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Coincidence and Circumstance in the Law of Evidence
Or
“The Soul’s Dusty Answer”

Frank Bates

**INTRODUCTORY**

“Perhaps”, writes Weinberg in a stimulating essay, “no branch of the common law has been more resistant to change than the law of evidence. Its ossification through the process of judicial development was virtually complete by the end of the nineteenth century.” It is, perhaps, for that reason that there are some issues which remain unresolved and, nonetheless, have attracted scant attention from writers on the area. Such a notion is the apparently mundane one of coincidence and its effect on, and relationship with, other, more apparently established, evidentiary notions and concepts.

Indeed, in relatively recent times, only two text writers have dealt with the issue of coincidence as such. First, Wells, in a very basic text, has justified the reception of similar fact evidence, in some circumstances at least, with the comment that, “... experience suggests that people repeat actions from choice, not idly or by accident. Repetition of acts and transactions, therefore, is always significant, because if it is assumed that there was no reason for the repetition, the only other explanation is coincidence and this is generally unlikely.” This is, of course, a fair comment, although “unlikely” may be a word of wide import. Nonetheless, it is highly relevant and will be later considered, especially as it arises in the context of relatively recent Australian legislation.

More recently, Roberts has written that, “A lawyer who finds that coincidence is an element in the case he or she is making has an uphill battle, for by definition a coincidence does violence to the normal expectations which would be raised in the circumstances. In such a case the lawyer should do all in her or his power to reduce the force of the coincidence by adducing evidence which would tend to explain it and by explaining it show it to be within reasonable contemplation after all.” By his very use of the phrase *by definition*, Roberts has added another complicating factor to any initial discussion. Apart from the Australian legislation mentioned earlier, which will be later considered in more detail, common law courts have, not unsurprisingly, given the paucity of consideration of the phenomenon, not sought to explore the nature of what must generally be a well known circumstance. Hence, extra-legal sources must necessarily be tapped.

As might be expected, some writers have emphasised the peculiarity of coincidence. Thus,

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1 Professor Emeritus of Law, University of Newcastle (NSW)
4 Below text at n 73.
6 Above text at n 3, below text at n 73.
Lord Byron, in *Don Juan*, borrowing, indeed, from a legal context, wrote of, “A ‘strange coincidence’ to use a phrase By which such things are settled nowadays.”

Likewise, the Nineteenth Century dramatist Haddon Chambers had a character speak of having been caught by the “long arm of coincidence.”

At the same time, instances of, to utilise the *Oxford English Dictionary*’s definition, “A notable occurrence of events or circumstances without apparent causal connection” have been known, and remarked, since classical times, when Plutarch seemed to regard coincidence as less strange and unpredictable than other commentators. He observed that, “It is no wonder if, in long processes of time, while fortune takes her course hither and thither, numerous coincidences should spontaneously occur. If the number and variation of subjects be infinite, it is all the more easy for fortune with such abundance of material to affect the similarity of results.”

The law’s view of coincidence, as was suggested by Wells and Roberts, seems to approximate more to that of Lord Byron and Chambers rather than to that of Plutarch, even though, in the intervening period, the number of circumstances or subjects can only have increased which, in turn, can only increase the possibility of coincidence, which Plutarch regarded as contemporaneously numerous.

**COINCIDENCE OR PART OF THE STORY**

To begin with a hypothetical instance: *The ubiquitous X has occasion to visit a health care practitioner Alpha. He is not by any means satisfied with the treatment he receives and noisily articulates his view. Some months later, X becomes very seriously ill and finds himself, once again, under the care of Alpha, rather to his initial alarm. He recovers, owing, he believes, largely to Alpha’s efforts. Alpha falls out with her employers who dismiss her. One of the grounds is an alleged and disputed, inappropriate relationship with X. In subsequent industrial proceedings, their earlier contact is disclosed.*

How much utility to any party is it likely to be? Or, for the purposes of this discussion, is it coincidence or part of the story or what? Colloquially, and leaving the law of evidence temporarily to one side, opinion as to that is divided.

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7 *Don Juan* Canto at, st 78.
8 The advocate for Queen Caroline had spoken, regarding her alleged association with the Bergami, of, “. . . odd instances of strange coincidences.” See, *The Queen’s Case* (182) 2 Brod & Bing 286.
9 *Captain Swift* (1882) Act 2.
10 *Lives; Sertorius* sec 1.
11 A third school of thought, emanating apparently from readers of horoscopes in womens’ magazines, seemed to suggest that X and Alpha were somehow fated to find one another.
However, from an evidentiary viewpoint, as will later generally be seen, coincidence is to be avoided and also put to one side. Events, though, which can be found to be a part of the story – or, technically *res gestae* – are a part of evidence to be taken into account. The notion of *res gestae* differs from many other rules of evidence at common law in that it is inclusionary – that is, it operates to include evidence which would not otherwise be available to a trier of fact. This is important because, as Glanville Williams described the matter,\(^\text{12}\) “The common law of evidence is distinctive chiefly in the determined way in which it excludes certain evidence which, although logically relevant, is regarded as unfair or dangerously misleading.” As Williams went on to point out, the major exclusionary rules were those which prohibited the reception of so-called hearsay evidence and those prohibiting what might generally be referred to as similar fact evidence.

A major exception to these exclusionary rules – although it is often, and wrongly\(^\text{13}\) - confined to the former is the doctrine of *res gestae* itself. Its advantage as an inclusionary doctrine is that it is, as Nokes some time ago noted,\(^\text{14}\) loose in its operation. He considered, too that attempts by some academic writers to categorise its utility\(^\text{15}\) have been in advance of anything attempted by the courts. Still more graphically, Lord Tomlin, in *Homes v. Newman*,\(^\text{16}\) commented that, “What is meant by saying that a document or act is admissible because it is part of the *res gestae* has never so far as I am aware been explained in a satisfactory manner. I suspect it of being a phrase adopted to provide a respectable legal cloak for a variety of cases to which no formula of precision can be applied.” Yet, in whatever form it is couched, there can be no doubt that *res gestae* is well established and it means, as Sir Frederick Pollock put it in a note to the report of *Homes v. Newman*, “. . . in English neither more nor less than part of the story.”

All of that notwithstanding, there have been numerous attempts to reduce parts of the story to the standing of what comes unhappily close to coincidence. One such attempt has been excessive reliance on the notion of contemporaneity, especially in criminal cases through, specially, the risible decision in *R v. Bedingfield*.\(^\text{17}\) There, the deceased had run out of a room with her throat cut and had said to a bystander, “Oh aunt! See what Bedingfield has done to me!” (or words to that effect). Lord Coleridge CJ refused to admit the statement on the grounds that the act had been completed before the statement was made. It took over one hundred years for the mischief therein presented to be modified. In *R v. Andrews*,\(^\text{18}\) the relevant statement had been made by the deceased to police some


\(^{13}\) In the words of C Tapper, *Cross on Evidence* (7\(^{th}\) Ed 1990) at 657, “Under it evidence may be received although it infringes the rule against hearsay, the opinion rule or the rule which generally prohibits evidence of bad disposition on the part of one of the parties, and there may be other exclusionary rules which are mitigated by the operation of the doctrine.”


\(^{16}\) [1931] 2 Ch 112 at 120. That view seems to be shared by one earlier academic writer, see S Phipson, “The Doctrine of Res Gestae . . .” (1903) 19 *LQR* 435.

\(^{17}\) (1879) 14 Cox C C 341. For an article both hostile to the decision and describing its aftermath, see F Bates, “Distilling the *Res Gestae*” (1988) 30 *Crim L Q* 276.

minutes after being attacked. This time, the statement was admitted and, in so doing, the House of Lords overruled Bedingfield. Lord Ackner noting19 that, “. . . the involvement of pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of appropriate but not exact contemporaneity.”20

Yet these, and the cases which followed them, were criminal cases, and, hence, the more obviously absurdly repellent features of Bedingfield have been modified in such cases21 or, possibly, in parts of Australia, by statute.22 However, the hypothetical situation earlier advanced is not a criminal case, nor did it possess any of the features which might characterise criminal cases. In Australia, the position seems governed by the decision of the High Court in Vocisano v. Vocisano23 where that Court refused to admit certain statements made after an accident on the grounds that they were insufficiently contemporaneous with the events described to be part of the res gestae. In Vocisano, Barwick CJ emphasised24 that it was, “. . . the contemporaneous involvement of the speaker at the time the statement is made with the occurrence which is identified as the res which founds admissibility.” As regards the factual situation in the case, the Chief Justice had commented that, “The occurrence was the accident, and although the statements by the respondent were made proximately to the occurrence of the accident, they were in the nature of an historical account rather than in the nature of a statement made as part and parcel of the occurrence.” Given the traumatic nature of the events in Vocisano, it is not easy to say that, on the facts, it was incorrectly decided. Thus, in circumstances which involve immediate trauma, such as Bedingfield, Andrews and Vocisano, the requirement of contemporaneity may go some way towards explaining away possible coincidence or, perhaps still more relevantly, casting light on situations which occur within a specific time-frame.

But, obviously, Vocisano was not concerned with, say, a breach of contract or, for that matter, an industrial dispute. Different considerations ought, perhaps, to be applicable in less dramatic situations: thus, for instance, in Sudgen v. Lord St Leonards,25 it was held, both at first instance and in the court of Appeal, that evidence regarding a testator’s intention to benefit his daughter was admissible as evidence that a lost will contained a bequest to the daughter. There was an interval of some six years between the creation of the will and the resultant dispute over its contents. (Strangely, perhaps, the leading judgement in the Court of Appeal was delivered by Lord Cockburn CJ who was later to perpetrate Bedingfield). Again, in Peipman v. Turner,26 the New South Wales Court of Appeal admitted, against objection, a statement by the deceased, supported by corroborative evidence that he intended to enter private medical practice from government employment in a case

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19 Ibid at 301.
20 Author’s italics.
24 Ibid at 273.
25 (1876) 1 P D 154.
involving Fatal Accidents’ legislation. That statement had been made at least twelve months prior to the deceased’s death in a motor accident. In such circumstances, the greater amount which he could have expected to have earned in private practice was taken into account in the assessment of the widow’s payment there under.  

Yet, despite both of these cases which seem to suggest that a statement of intention to do a particular act might be admissible as part of the res gestae, it is not generally so admissible, at least where, the maker of the statement is still alive and the issue involved can be regarded as being serious, or criminal at any rate.  

Despite Sugden v. Lord St Leonards and Peipman v. Turner, contemporaneity may still not be irrelevant. Thus, in Homes v. Newman itself, Lord Tomlin, in holding that a memorandum written by a deceased woman was admissible to explain the transfer of a land charge, stated that it was so because it was, “. . . executed contemporaneously to record the principal fact and the statements or declarations contained in it were made as part of and throw light upon and explain the principal fact . . .”

So it is safe to say that the law is far from certain and its application to the hypothetical situation still less so – but it does seem fair to say that, in colloquial terms at least, the first encounter would be regarded as being, to use Sir Frederick Pollock’s phrase again, neither more nor less than part of the story. At the same time, its clear utility as part of the story is nullified by its lack of contemporaneity, the more so as all parties were still living.

Yet, that cannot be the end to any distillation of res gestae, as its very nature and existence (and it quite clearly does exist as the numerous reference to it in case and text instantly demonstrate) are in, at times, raucous dispute. Thus, for example, North American commentators have waged something of a campaign (rather than had a mere field day) about it. In one case, a distinguished judge, had said that, “It is a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms.” But it is the text writers and commentators who are the most pungent: Morgan, thus, has written that, “The marvellous capacity of a Latin phrase to serve as substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as ‘res gestae’. It is probably that this troublesome expression owes its existence and persistence in our law of evidence to an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking.”

27 Compensation to Relatives’ Act 1897.
28 For example, R v Petcherini (1855) 7 Cox C C 79; R v Thompson [1912] 3 KB 19.
29 Above text at n 15.
30 [1931] 2 Ch 112 at 121.
31 Above text at n 15.
32 US v Matot 146 F 2d 1979 (2nd Cir, 1944) at 198.
33 E M Morgan, “A Suggested Classification of Utterances Admissible as Res Gestae” (1922) 31 Yale LJ 229 at 229.
That theme was taken up yet more stridently in *Wigmore on Evidence*, assuredly one of the common law’s very greatest texts, when it proclaimed\(^{34}\) that, “There has been such a confounding of ideas, and such a profuse and indiscriminate use of the shibboleth ‘res gestae’, that it is difficult to disentangle the real basis of principle involved. On the one hand, to repeat without comment the often meaningless and unhelpful language of the courts is to shirk the duty of the expositor of the law as it is. On the other hand, to discriminate between the principles genuinely involved is to risk the reproach of representing as law that which the courts do not concede . . .” Still more strongly, it is continued,\(^{35}\) the phrase, “ought, . . . wholly to be repudiated, as a vicious element in our legal phraseology . . . any name would be preferable to an empty phrase so encouraging to looseness of thinking and uncertainty of decision.”

To some degree, even allowing for the emmience of the utterers, these statements may themselves be categorised as polemic though others, to like effect, can readily be found.\(^{36}\) Similarly, Sir Frederick Pollock, of whom note has already been made,\(^{37}\) wrote to Oliver Wendell Holmes in 1931\(^{38}\) that, “I am reporting, with some reluctance, a case on the damnable pretended doctrine of res gestae; and wishing some high legal authority would prick that bubble of verbiage: the unmeaning term merely fudges the truth that there is not universal formula for all the kinds of relevancy.”

That is a very useful *introit* to the wholly different view of *res gestae* which might help place the story of X and Alpha into some degree of totality, in theoretical, if not in practical terms. Stone,\(^{39}\) whose original manuscript had been revised by Wells in 1990, had already sought to reduce *res gestae* to five distinct heads. Arguing that it would be a work of supererogation to reproduce that article, Wells sought to offer\(^ {40}\) some observations which sought to bring the topic into the mainstream of evidence law at large, especially with the principle of relevance, rather than an, “. . . evidentiary excrescence whose competence seeks to be specially justified.”

First, exception is taken to the use of the description *inclusionary doctrine* which the authors claim\(^ {41}\) suggests that courts are led to accept and, moreover, to use, evidence that, but for the doctrine, would have been rejected because there was, otherwise, no proper use to which it could have been put. Then, after having stated that no judge or commentator would argue the doctrine could only be used as evidence going to the personal credit of a party, its reception must be for some useful purpose. At that point, the writers seek to tie the application of the doctrine to relevance, as Pollock

\(^{34}\) *Wigmore on Evidence* (Chadbourn Rev 1976) vol 6 59 para 1745.

\(^{35}\) Ibid at para 1767.


\(^{37}\) Above text at n 15.

\(^{38}\) *Pollock-Holmes Letters*, 23 April 1931 (1942, vol 2 at p 284).

\(^{39}\) Stone had, of course, published an earlier article, above n 14.


\(^{41}\) Wells, at least; though he comments, ibid at 152, that the views expressed by Stone in the earlier article bear out his conclusion.
had earlier hinted. By *relevance*, Stone and Wells meant assisting or disproving a fact in issue.

“If the complaint is thereupon made”, they continue, “that no place for such evidence can be found amongst generally recognised forms or kinds of relevance. I reply: so much the worse for the practice of looking only to recognised forms of relevance.” In addition, the implications of the word *proof* must, in that context, be taken into appropriate account.

In Stone’s history of evidence law, he seeks to trace its development in historical terms from reliance on revealed truth, notably represented by early forms of trial such as by ordeal or by battle, to reliance upon discovered truth. By that is meant *proof* through the medium developed through evidentiary principle in the modern forms of inquiry. As regards the issue of proof *per se*, the writers comment that, today, it “. . . means to persuade a tribunal that the fact asserted by one party, and denied or not admitted by the opposing party, is to the mind and heart of the tribunal, so probable that it should be accepted as true – true to life – for the purpose of the case being heard.” Yet there was more to the process than that of persuasion – there was the nature of the tribunal itself.

“The predominant aim,” the writers continue, “is to persuade, not a disembodied arbiter actuated by the rules of abstract computation and logic, but a human being, or human beings, who is, or are, to be moved to the point where he or they believe in a specified segment of life itself. In other words, the tribunal must consider and appraise the evidence, not in order to determine whether or not it meets certain formal criteria disengaged from reality, . . .” Essentially, there are two conflicting processes involved, that dealing with the formal processes and the other which, “. . . leads to an investigation of life itself as it is known to mankind, in general and to the community from which the case emerged, in particular.” After that discussion, the conclusion is reached that “Evidence of all complex factors that are in issue or are relevant (in its correct sense) thereto is necessarily competent, and fit to be used to persuade the tribunal of fact of the reality of the acts (including all oral and written statements and declarations) events, states and things alleged.”

Where then does that leave X and Alpha in our hypothetical instance? What is the evidence of their original encounter in that context? And in the context of an evidentiary doctrine which has had scorn from some of the very highest sources heaped upon it?

**The Dissimilar Similar Fact**

Following on from the discussion of *res gestae*, one Australian commentator, Forbes, has written that the *res gestae* concept borders on similar facts but is, strictly speaking outside it. Yet it is clear, at least to this writer, that similar fact evidence has been a source of fascination since, at

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42 Above text at n 37.
43 Above text n 39 Ch 1.
44 Ibid at 151.
45 Ibid at 152.
least, *Makin v. Attorney-General (NSW)*[^47] and *R v. Smith*[^48] and also of continuing difficulty[^49]. It is certainly true that the “seductive attraction”, referred to by another commentator[^50] remains. In recent times, that is readily borne out from the prurient public attention which has attached to the decision of the New South Wales Court of Criminal Appeal in *R v. Fletcher*[^51].

Traditionally, it was criminal cases which attracted the prosecution to seek the admission of similar fact evidence and that was not, generally, easy to do. This does not mean that it was wholly irrelevant in civil cases; thus, in *Mood Music Publishing Co v. De Wolfe Ltd*[^52], Lord Denning MR stated that, “In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter in issue: provided that it is not oppressive or unfair to the other side: and also that the other side has fair notice of it and is able to deal with it”. Also in *Mood Music*, the Master of the Rolls noted that the factual issue in that case was whether similarity in products was the result of copying or “mere coincidence”. Lord Denning MR commented that, “whereas it might be due to more coincidence in one case, it is very unlikely that they would be coincidences in four cases.”

In Australia, Gummow J, in *Lyons (DF) Pty Ltd v. Commonwealth Bank of Australia*[^53], relying on the comments of Dixon and Evatt JJ in *Martin v. Osborne*[^54] that similar fact evidence bore its probative value or cogency, not as a matter of deductive logic, but because it allowed for the admeasuring of the probability or improbability of the fact or event in issue. On the facts of *Lyons*, the application of that test would be sufficient to raise, “as a matter of common sense and experience,” the inherent improbability of certain meetings which were crucial to the outcome of the case having taken place[^55].

*Martin v. Osborne*, the High Court decision upon which Gummow J placed much reliance, in turn placed reliance on another article by Stone[^56]. In that article, attention was drawn to two meanings which might be attached to the word *similarity*. On the one hand, in the popular sense, a fact will be regarded as being similar to another whenever the two possess a common characteristic; however, the writer suggests that that may not be sufficient to render the first fact relevant in the legal sense so as to act as proof of the other. On the other hand, in the narrower (more formal . . .?)[^57].

[^47]: (1894) AC 57.
[^48]: (1915) 11 Cr App Rep 229. The “brides in the bath” case.
[^50]: Carter, above n 48 at 42.
[^52]: [1976] Ch 119 at 127.
[^54]: (1936) 55 CLR 375 at 385.
[^55]: (1991) 100 ALR 498 at 476.
[^57]: Above text at n 44.
sense, a fact is similar to another only where the common characteristic is the significant one for the purpose of the inquiry at hand.

The usual purpose of the admission of similar fact evidence is to enable the person seeking to make the case (usually a prosecutor in a criminal proceeding) to reduce possibility of confusion of the issue through coincidence\(^{58}\) and, more usually, concoction\(^{59}\) of evidence. However, at common law, similar fact evidence may, in admittedly, some limited circumstances be utilised by the defence. One instance which might be of relevance to the hypothetical is the decision of the Court of Appeal in \textit{R v. Sagar}\(^{60}\) where, in effect, similar fact evidence was admitted to negative \textit{mens rea}. Thus, the accused had been charged with having obtained goods by false pretences, the false pretence which was alleged was that he had claimed to be carrying on a genuine and \textit{bona fide} business as a manufacturers’ agent and merchant. A strong Court of Criminal Appeal\(^{61}\) held that receipts sworn to by the accused as having been given to him as acknowledgements of payments for goods purchased by him, other than those which were the subject of the present charge, together with entries in his bank pass-books which showed payments made by him for goods supplied to him, were evidence that he was in fact carrying on a genuine and \textit{bona fide} business. Put another way, although the issue was never directly raised, the accused’s earlier behaviour was regarded as a part of the story.

Statute law, in 1995, finally took specific account of the possibility of the occurrence of coincidence and the reception of evidence to overcome its possibility. Thus, s 98(1) of the \textit{Evidence Act} 1995, which present governs proceedings in the courts of the Australian Commonwealth, the Australia Capital Territory and the States of New South Wales and Tasmania and Victoria, provides that “Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if . . . (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.” This seems to be limited in its general applicability and must be read in connection with s 97(1) of the Act, which is concerned with what it describes as “The tendency rule” and which states, \textit{inter alia}, that, “Evidence of the character, reputation or conduct of a person, or a tendency that a person has or has had, is not admissible to prove that a person has or had a tendency (whether because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind, if . . . (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.”

It is quite clear why these provisions were enacted: there was dissatisfaction with the fairly strict test for admissibility of similar fact evidence which had been enunciated by the House of Lords

\(^{58}\) Above text at n 2.
\(^{59}\) Below text at n 61 \textit{ff}.
\(^{60}\) [1914] 3 KB 1112.
\(^{61}\) Lord Reading CJ, Lord Coleridge and Avory JJ.
in *Boardman v. DPP*, where Lord Morris, for instance, had spoken of, “... such a close or striking similarity or such an underlying unity that probative force could fairly be yielded.” That formula had *mutatis mutandis*, been applied in various decisions of the High Court of Australia. At the same time, the *Boardman* principle had not fared too well in its country of origin: thus, in *DPP v. P*, Lord Mackay LC, purporting to apply the *Boardman* formula, stated that it was not “... appropriate to single out ‘striking similarity’ as an essential element in every case ...” The Lord Chancellor sought to justify that apparently paradoxical remark by saying that the essence of *Boardman* was that the probative force was *sufficiently great* to make it just to admit the evidence notwithstanding that it was prejudicial to the accused. That force might be derived from striking similarities, but to limit it to them, gave too much effect to a formula and was not justified in principle. By way of conclusion, Lord Mackay LC stated that the evidence would be admitted if the similarity was, “... sufficiently strong or there is other sufficient relationship between the events described in the evidence ... that the evidence, if accepted, would so strongly support the truth of the charge that it is fair to admit it, notwithstanding its prejudicial effect.” Of course, Lord Mackay’s comments have been laudatorily received, but that, in turn, seems to have led to the test’s becoming more flexible, even though it might be regarded as vague. Indeed, flexibility notwithstanding, later developments suggest that the test is not so much vague as chronically uncertain.

From the point of view of this paper, to this commentator at least, the *Boardman* test has much to commend it. The more striking the similarity, then the less the likelihood of a difficult coincidence arising. Conversely, the more striking the dissimilarity – or, the less of a perceptible underlying unity – the less likelihood of such a coincidence. Since the hypothetical situation was not, of course, concerned with a criminal matter, the issue arises whether the same issues necessarily arise. In *Mood Music Publishing Co v. De Wolfe*, Lord Denning MR after having referred to the traditional strictness of the criminal law in respect of the issue, noted that, “In civil cases the courts have followed a similar line, but have not been so chary of admitting it. In civil cases, the courts will admit evidence of similar facts if it is logically relevant in determining the matter which is in issue. ...” That is the view taken in Australia and would mean that the evidence of striking dissimilarity would be less stringent in order to show the existence of an unlikely coincidence. Indeed, in

63 Ibid at 441.
66 Author’s emphasis.
68 Notably, the comment of Lord Lloyd in *DPP v H* [1995] 2 AC 596 at 626, where he stated that Lord Mackay had released the law from the bondage of striking similarity.
69 For example, *R v Ananthorayan* [1994] 2 All ER 847; *R v Ryder* [1994] 2 All ER 859; *R v W* [1994] 2 All ER 872.
70 [1976] Ch 119 at 127.
Boardman, Lord Salmon had said\textsuperscript{72} that the orthodox use of similar facts could be said to be nothing more than an application of probability reasoning to events which are, “. . . inexplicable on the basis of [innocent] coincidence.” It is not a difficult step to apply the obverse variety of probability reasoning. That application of Boardman is surely more in appropriate accord with an application of probability reasoning than the \textit{sufficient relationship} test, which was nowhere explicated, enunciated by Lord Mackay in \textit{P}.\textsuperscript{73}

Though these attempts at simplification through the cases, then, do not appear to have been successful, what of the statutory provisions earlier noted which apply in some Australian jurisdictions?\textsuperscript{74} In the New South Wales Court of Criminal Appeal’s decision in \textit{R v. Ellis},\textsuperscript{75} Spiegelman CJ commented that, in his view, Parliament had sought to achieve the same general objective as the Australian common law, but had done so by the use of different and more precise terminology. In the same case, other judges in the Court remarked\textsuperscript{76} that the admission of similar fact evidence was, “. . . exceptional for reasons of policy not for logic.”

But, in truth, neither policy nor logic appears from the decision of a differently constituted New South Wales Court of Criminal Appeal in \textit{R v. Fletcher},\textsuperscript{77} where the issue was confused by the emotive, and much publicised, nature of the case’s subject matter.\textsuperscript{78} The prosecution had sought to adduce tendency and coincidence evidence\textsuperscript{79} (as similar fact evidence is known) as going to the grooming of, and inappropriate sexual contact with, young boys. The appellant argued that the evidence had been improperly admitted because it did not have probative value which could have outweighed its obviously prejudicial effect. By a majority, the Court of Criminal Appeal dismissed the appeal.

Much of the judicial discussion in \textit{Fletcher}, it is true, concerned the operation of s 97(1),\textsuperscript{80} but that, in turn, was certain to impact on the operation of s 98(1). Thus, Simpson J, who delivered the majority judgment, stated\textsuperscript{81} that the s 97(1) exercise was, “. . . predictive and evaluative and is not a scientific exercise with a clear or rigid answer, or with only one correct answer. . .” Further, she admitted that the decision as to whether or not to admit evidence under the provision involved, “. . . a degree of value judgment.” All of this now seems to be making Lord Morris’s dictum in \textit{Boardman}\textsuperscript{82} seem pellucid!

\textsuperscript{72} [1975] AC 421 at 462.
\textsuperscript{73} Above text at n 66.
\textsuperscript{74} Above text at n 61.
\textsuperscript{75} [2003] 144 A Crim R 1 at 18.
\textsuperscript{76} Ibid at 20 \textit{per} Hidden and Buddin JJ.
\textsuperscript{77} (2005) 156 A Crim R 308.
\textsuperscript{78} The accused was a Roman Catholic priest who had been charged with nine counts of sexual acts on boys occurring between 1990 and 1991.
\textsuperscript{79} Above text at n 66.
\textsuperscript{80} Above text at n 60.
\textsuperscript{81} (2005) 156 A Crim R 308 at 317.
\textsuperscript{82} Above text at n 61.
Given all of the obvious confusion, it is not surprising that there was a strong dissenting judgment by Rothman J, who did directly address the coincidence provision. In that context, he noted that it was not merely the propensity of the appellant to indulge in the acts with which he was charged, it was the improbability of different complaints, which were, untrue, being made coincidentally. This is the obverse, of course, in the situation with which the hypothetical is concerned. Rothman J was of the view that the evidence ought not to be admitted because the various events were not related. It is far from clear, in that context, what “unrelated” means. Thus, in the hypothetical situation described earlier, it might very well be argued that the events therein were quite “unrelated” in the sense that they happened in different places and for different reasons, though, coincidentally, involving the same people. In *Fletcher*, Rothman J did not seem to think that that would justify the reception of the tendency and coincidence evidence, whereas Simpson J would have admitted it, but on what basis it is not wholly clear.

Hence, attempts both to loosen the conditions for the reception of similar fact evidence and to reduce it to statutory order do not, despite Spiegelman CJ’s comments, seem to have been notably successful. Nor do they appear directly to have addressed the matter of coincidence.

**COINCIDENCE AND CIRCUMSTANCE**

However, the issue of coincidence, at least for the purposes of this paper, cannot stand independent of that *circumstance*. In *Pfenning v. The Queen* Mason CJ and Dean and Dawson JJ had said that courts, “... must recognise that propensity evidence is circumstantial evidence and that, as such, it should not be used to draw an inference adverse to the accused unless it is the only reasonable inference in the circumstances.” Though that very well might be an apposite comment as it relates to the type of evidence, whatever label one attaches to it, which has just been discussed, the law bristles with comments relating to the utility and weight of circumstantial evidence. Extra legally, Thoreau noted that, “Circumstantial evidence can be very strong; such as when you find a trout in the milk.” Since that may seem unnecessarily restrictive, other remarks should be taken into account. In such graphic circumstances, it is safe to say with Lord Hewart CJ that, “... it is no derogation of evidence to say that it is circumstantial.”

An altogether more directly apposite description of the notion of circumstantial evidence as it affects the present discussion, though, may be found in the judgment of Pollock CB in *R v. Exall* that, “It has been said that circumstantial evidence is to be considered as a chian and each piece of evidence as a link in the chain, but that is not so, for then, if any one link break the chain would
fall. It is more like a rope comprised of several cords. One strand of the cord may be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with much certainty as human affairs can require or admit of.” The idea of connecting tissue may be of genuine importance for the purposes of this paper, but, since the courts have not examined as to what the tissue should be likened, dispute remains as to what comprises it. Thus, it will be remembered that in Pfenning,91 the High Court had said that similar fact evidence was a species of circumstantial evidence. But that has not always been universally accepted.

Thus, in the much noted earlier decision of the same court in Martin v. Osborne,92 Sir Owen Dixon had said that, in cases where an issue was to be proved by circumstantial evidence, the circumstances which might be taken into account “. . . include all facts and matters which form consistent parts of ingredients of the transaction itself or explain or make intelligible the course of conduct pursued. The moral tendencies of persons, their proneness to acts or omissions of a particular description, their reputations and their associations are in general not matters which it is lawful to take into account, and evidence disclosing them, if not otherwise relevant, is rigidly excluded. But the class of acts and occurrences that may be considered includes circumstances whose relation to the fact in issue consists in the probability or increased probability, judged rationally upon common experience that they would not be found unless the fact to prove also existed.”

A key phrase in that passage, as Eggleston has properly pointed out,93 is judged rationally upon common experience.94 Eggleston goes on to state that in judging what amounts to common experience, “. . . the tribunal of fact will normally rely on its own knowledge of the world – of human affairs and of the ordinary course of nature.” Eggleston also continues by saying that it was not necessary that the facts sought to be proved should on their face, have any connection with the facts in issue.

As regards the hypothetical, then, it would instantly appear that the original association which has no connection with the facts in issue should be able to be used by Alpha. But there are two obstacles: the first is that the trier of fact’s knowledge of the world too readily equates with the notion of common sense. This is inherently unfortunate and is generally eschewed by both judges and commentators. Where it is not, difficulties do arise and, although a detailed analysis of the application of the notion generally in a legal context is beyond the scope of this discussion,95 some instances may be illustrative.

90 Below text at n 120.
91 Above text at n 85.
92 (1936) 55 CLR 367 at 375.
93 R Eggleston, Evidence, Proof and Probability (2nd Ed, 1983) at 89.
94 The like phrase, the common course of human affairs also occurs earlier in the same passage.
95 For such a discussion, see F K H Maher, “Common Sense and the Law” (1972) 8 Melb ULR 587.
Hence, in respect of the criminal trial, in *R v. Turner* Lawton LJ commented that, “. . . psychiatry has not yet become a satisfactory substitute for the commonsense of juries or magistrates or matters within their experience of life.” As I have elsewhere written, appeals to commonsense in matters as important as the criminal trial seem more than a little misplaced as the notion is so patently subjective, if for no other reason. Having said that: it may very well be that, in that vein, the elusive notion of commonsense may be manifested in more than one form. Indeed, more recently de Sousa Santos has postulated that there are, in fact, six major common senses circulating in society (by that he means, in his own words, “. . . six modes of production of knowledge – as – regulation, through which individuals and groups know what they are doing and saying according to what is supposed to be done or said in the specific structural place where the course of action or of communication takes place. Each forms knowledge and establishes boundaries of reasonableness, symbolic demarcations for ordered action communication.”). This is all very well, but that writer fails, directly at any rate, to tell us which variety is sought to be applicable to what area of legal activity and, for the purposes of this discussion, the law of evidence receives no mention as a part of de Sousa Santos’s wider thesis. Nevertheless, the view of de Sousa Santos does seem to suggest that different experiences applied to different situations may very well not produce a solution which can be subsumed under one heading, whatever its title. Although it is clear that such a view accords with reality, it does not make the issue of the initial encounter any easier to resolve.

It does not, second, make the issue any easier to resolve because of the coincidence, with which the discussion began, and with which no judge or writer has really sought immediately to grapple. It is not easy to escape the conclusion that the possibility of coincidence may be avoided depending on what is required to be proved and against whom. Thus, in the early case of *R v. Gray*, it was alleged that the accused had deliberately set fire to his restaurant so as to collect insurance money. In defence, he claimed, inevitably that the fire was accidental, though, in fact, it had been extinguished at an early stage. An inspection of the premises showed some evidence that it was lit deliberately. Having adduced that evidence, the prosecution sought to show that the accused had occupied two houses, each of which had burned down and each of which had been the subject of an insurance claim. As regards those fires, Willes J noted, that there was no evidence

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96 [1975] 1 All ER 70 at 75.


98 The instance I used, ibid, was that when the abominable Alf Garnett in the television series *Till Death Us Do Part* says, “It stands to reason”, by no means every one would agree with him. For better or worse, Alf is not seen so much on our screens today.


100 De Sousa Santos (ibid at xv), states the subject of his book is, “. . . the paradigmatic transition, the idea that our time is a time of transition between the paradigm of modernity, which seems to have exhausted its regenerating capacities, and another, emergent time, of which so far we have only signs. The signs are unmistakable and, and yet so ambiguous that we don’t know if the paradigm of modernity will give rise to one, or, rather, to more paradigms, or indeed if, in lieu of new paradigms, we are approaching an age, whose novelty consists of not being paradigmatic at all.”

101 (1866) 4 F & F 1102.

102 Ibid at 1105.
of the nature of the fires, or of their cause, or of the number of persons present in the house at the
time the fires occurred, nor was there any proof that the prisoner was near any of the houses, or
indeed that he was in England at all when the fires broke out.” After having consulted with Martin
B, Willes J admitted the evidence nonetheless, and rejected a submission made on the accused’s
behalf as having no bearing on the issue and having a tendency to embarrass the accused in his
defence. Not surprisingly, the accused was convicted. As Forbes has put the matter, the events
which were not individually proved to be unlawful acquired that quality via the improbability of
coincidence. Indeed, the situation could well be put in another manner: that courts might go to
quite extraordinary lengths to avoid having to admit the possibility of coincidence as such.

Yet one judge in Australia has been prepared to admit the possibility of coincidence, both
in court and extra-judicially. In Perry v. R, Murphy J commented trenchantly and directly that,
“Common assumptions about improbability of sequences are often wrong. A suggested sequence,
series or pattern of events is often incorrectly regarded as so extremely improbably as to be improbable
sequences and combinations are constantly occurring. Although Murphy illustrated his thesis by
reference to statistical probability, which he was to reiterate extra-judicially, he also stated there that, “Many examples can be given which would lead to the realisation that many commonly perceived “improbabilities” are not so improbable.” Or, to take up the theme of this paper: many
commonly regarded regularities may well be, in reality, nothing other than coincidences, however so
much we may care to avoid the notion by attaching evidentiary labels to them. This is nothing new
and, after all, Murphy J’s comments in Perry are not a little redolent of those written by Plutarch
in classical times. Murphy J was also surely correct when he suggested the dangers of admitting
evidence which does not tend to prove the charge.

In our hypothetical, seeking to obviate coincidence before it is even raised is surely dangerous
and it was a danger to which Murphy J made allusion in Perry when he said that normally strict
standards, “... tend to be indirectly and subtly undermined from the outset by reference to a sequence

103 Ibid at 1103.
105 In Gray, Willes J relied on two yet earlier cases R v Richardson (1860) 2 F & F 343 and R v Geening (1849) 18
L J M C 215.
107 Ibid at 594.
108 “In random tossing”, he stated, ibid, “the occurrence of a run of ten consecutive heads or tails is generally regarded
as highly improbable. But this will occur on the average once in every 512 tosses and the lesser sequences more
frequently (2 runs of 9; 4 runs of 8; 8 runs of 7). If one randomly tosses a coin 257 times, more likely than not there
will be a sequence of ten heads or tails.” Forbes, above n 103 at 61, comments that statistical theory has so far had
little effect in this area of evidence.
110 Above text at n 106.
111 Above text at n 9.
112 Above text at n 108 at 135.
of events which according to common human experience would not occur unless the accused were guilty.” In turn, to refer to another issue which has come to be considered in the context of the hypothetical situation, Murphy J, at that point, referred to the earlier decision of the High Court in *R v. Thomas*. In that case, the trial judge had included in his summing up to the jury the following regarding the burden and standard of proof in criminal cases: “[Y]ou consider it in an ordinary common sense manner and in the way you would consider the more serious matters for consideration and decision in your lives.” Not wholly surprisingly, in view of what has earlier been said, the High Court stridently rejected that obtuse formulation and, in *Perry*, Murphy J suggested that the standard of proof could all too readily be undermined by a rejection of the possibility of coincidence and replaced, indirectly, by something approximating to the standard rejected in *Thomas*. Hence, one should not too readily reject the possibility of unlikely sequences or combinations of events.

By this stage, it might be thought that, given the level of attention which has been paid to matters of evidence generated by the earlier hypothetical situation, that evidence law does not, at large, present too well. Nonetheless, some judges, especially, seek to stand by its integrity and coherence. Thus, for instance, Hamilton LJ, in *A-G v. Horner (No 2)*, stated that, “... I yield to authority on the law of evidence, without reluctance, because I am satisfied that in the main the English rules of evidence are just, and I am satisfied also that there is not portion of the English law which ought more rigidly to be upheld. My experience is that the public have in the result derived great benefit from their strict application.” One might care to compare that *dictum* with the comment of Weinberg with which this paper began.

However, that would leave a quite erroneous impression. Murphy J apart, there have been many other judges throughout the common law world who are aware of its limitations and of the factors which are contributory. Although too, and this may be borne out by the topics hitherto discussed, the remark of Jackson J in the United States Supreme court in *Michelson v. US* that, “It illustrates Judge Hand’s suggestion that the system may work best when it is explained least.” Much of the reasoning behind broad criticisms as well, paradoxically, as the reasons for may of the rules’ existence, may be found in a passage from the judgment of Russell J of the Nova Scotia Supreme Court.

114 (1960) 102 CLR 580 at 584.
115 Above text at n 95ff.
116 Or, “By a backdoor” in his own words.
117 Above text at n 106.
118 [1913] 2 Ch 140 at 156, comment made when deciding that a map was inadmissible evidence of the extent of Spitalfields Market in the 18th Century.
119 Above text at n 1. Paradoxically perhaps, that commentator is now a judge of the Federal Court of Australia.
120 C P Harvey, *The Advocates’ Devil* (1958 Ed) at 79.
121 335 US 469 at 481 (1948).
Court in *Lancaster v. Halifax Electric Tram Co.*122 “The evidence”, the judge said, “is extremely conflicting as to the manner in which this accident occurred. There is evidence that the carriage was going eastwardly, and also that it was going westwardly; that the car was an open car; also that it was a closed car; that the left hind wheel of the carriage was struck by the car; also, that the fore-wheel, and not either of the hind wheels was struck; that there was only one vehicle in the vicinity on the occasion, and that there were two. Probably I have not exhausted the list of contradictions, but the statement of one of the witnesses, that the horse was heading east and west, seems to cap the climax, and, possibly, resolves some of the other contradictions in the case by the hypothesis of a two-headed horse.” Those, doubtless apposite comments, reveal why, to a degree at least, many evidentiary principles exist in their current form, and this helps to explicate some of the issues which have been earlier discussed and emphasise Harvey’s rather virulent comment.123

In *A-G v. Hitchcock*,124 Rolfe B remarked that, “. . . if we lived for a thousand years instead of about sixty or seventy, and every case was of sufficient importance, it might be possible, and perhaps proper. . . to raise every possible enquiry as to the truth of statements made . . . In fact mankind finds it impossible.” Hence, there is a continuing fear of first, fabricated evidence and, second, of erroneous or inaccurately recalled evidence. The two, inevitably overlap and interact: so, as Megarry V-C commented in one well-known Equity decision,125 “Honesty and sincerity are not the same as prudence and reasonableness. Some of the most sincere people are the most unreasonable; and [the defendant] told me that he had met quite a few of them.” Parenthetically, it should be said that Megarry V-C was not an especially great admirer of evidence law; commenting extra-judicially, he wrote126 that, “The logic of the rules of evidence is noteworthy neither for cogency nor for coherence.”

The mendacious witness has been effectively noted by Hilbery J who mused127 that he had, “. . . often reflected that we lawyers would be out of work if everyone told the truth. I sometimes think, after sitting on the bench for 23 years, that nothing is improbable with human beings.” The confusion which surrounds and, thus perhaps, justifies these remarks is graphically illustrated by a recent decision of Carmody J of the Family Court of Australia. In *Lockhart and Lockhart*,128 where an evidentiary presumption thought to have been moribund,129 was revitalised, Carmody J was forced to say that, “It just goes to show that the problem with proven or admitted liars is that you

122 (1917) 50 NSR 386 at 387.
123 Above text at n 119.
124 (1847) 1 Exch 91 at 105.
125 *Cowan v Scargill* [1985] Ch 270 at 289. The defendant was, of course, Arthur Scargill the renowned, or notorious, leader of the National Union of Mineworkers in an especially torrid period of British industrial relations.
129 The evidentiary presumption of marriage. See *In the Marriage of Kirby and Watson* (1977) FLC 90 – 261 at 76, 403 per Watson J. Carmody J was, rightly or wrongly, reversed by the Full Court of the Family Court in *Lockhart and Lockhart* (2007) FLC 93 – 308.
never know when whether they are lying when they swear that they are telling the truth, or telling the
truth when they swear they are lying.”

Tricks of observation have already been noted, especially in relation to accidents, but tricks of memory were graphically depicted by Lumpkin J in the American State of Georgia when he expostulated, “How frail and fallible is memory! History records a few examples, of men of whom it may be said, that whatever knowledge they acquired, either sensible or intellectual, remained as indelibly fixed upon their mind, as if it were engraved on a rock. But these are rare instances. Usually the impressions made on the memory resemble much more the traceless track of the arrow through the air, than the enduring hieroglyphics upon the pyramids and obelisks of ancient Egypt. Many memories are mere sieves.” More particularly, given the nature of the area, in Pierce v. Brady, Romilly MR commented that “Witnesses not infrequently turn inference into recollection, and a person by long dwelling on a subject thinks a thing may have happened, and at last comes to a belief that it actually did happen.”

**Conclusions**

To those two considerations which are hallowed by experience and time may, it seems, pace Murphy J, be added fear and concern over the possibility of coincidence. In that context, circumstance may have an interactive relationship with coincidence, but the precise nature of that relationship may not be easy specifically to ascertain. One immediate cause, as will have been remembered, is the very nature of the evidence of circumstance. As Lord Coleridge J described the situation, “Circumstantial evidence varies infinitely in its strength in proportion to the character and variety, the cogency, the independence, one of another, of the circumstances; I think we may describe it as a network of facts. That network may be a mere gossamer thread, as light and substantial as the very air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and ruts. It may come to nothing. On the other hand, it may be absolutely convincing. The law does not demand that you should act upon certainties and certainties alone. In the passage of our lives, in our acts, in our thoughts, we do not deal with certainties. We ought to act – we do, in fact act – on just and reasonable convictions found on just and reasonable grounds.” Lord Coleridge J’s sentiments seem echoed by the poet George Meredith who wrote that,

> “Ah, what a dusty answer gets the soul
>
> When hot for certainties in this our life.”

At this stage, the present area of investigation does not seem remotely able to provide the certainties of which Lord Coleridge J and Meredith seemed so cautious, though perhaps we might all

130 Above text at nn 23ff, 121.
131 Miller v Cotton 5 Ga 341 at 348 (1848).
132 (1856) 23 Beav 64 at 70.
133 In R v Dickman (1910), reported in The Trial of JA Dickman (Notable British Trials) (2nd Ed 1926) at 186.
134 George Meredith, Modern Love (1862) st 50.
care to ask ourselves when, and will, coincidence come to be recognised as circumstance!  

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135 A law student seeking for realism in these gossamer threads of evidentiary persiflage might enquire as to what happened to the protagonists in the hypothetical.

X, doubtless, has returned to his ubiquitous role in legal hypothetical situations. He would look forward to being blown up by terrorists in a friendly and peaceful jurisdiction or meeting the same fate in our own at the hands of negligently supervised delinquent children. He might continue to make commercial contracts with dubious companies in countries which have neither legal profession nor system of commercial law. Doubtless, his matrimonial affairs would make the week of a Family Court judge seem positively balmy and, consequentially, his Will will be witnessed by incompetents and will not provide for any of his immediate and unfortunate family. Such is the lot of the central character in law essay and examination paper. This hypothetical is a mere blip in a calamitous career.

Alpha, conversely, will, no doubt wonder at the conceptual confusion she (I have assumed it is “she”) has unwittingly caused and will return, like a character in Dr Who, to a more benign dimension where she will continue to save lives unhindered and untrammelled by the misfortune blighted X and his doctrinal portmanteau. If she thinks of it at all, she will probably realise that she would have been better served by The Repairer of Reputations in the American Surrealist writer R W Chambers’s story (see R W Chambers, The King in Yellow, 1895), than by the common law rules of evidence in their unaesthetic edifice (above text at n 119)

Nunc dimittis . . .
The International Criminal Court, Constitutional Issues
The case of Chile

Paschos S. Vasileios

“When we are dealing with words that also are a constituent act we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters”

Missouri v. Holland (Oliver Wendell Holmes Jr., J.)

1. PROLOGUE

In July 1998, after years of preparatory work and five weeks of negotiations in Rome, 120 states voted to approve a “statute,” or treaty, establishing an International Criminal Court, with jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression. The immediate emerging question is whether this interaction of international and national legal orders is able to achieve enough of the benefits the world community seeks from a permanent international court at an acceptable cost. The horizontal, almost primitive, architecture of the international legal system is based on each country’s tacit and perenially renewed consensus. Some argue that, on balance, such a court disserves certain national interests. Others contend that the costs of not joining far outweigh the costs of joining.

1 LL.M Lawyer, Phd Candidate., National and Capodistrian University of Athens
3 from now on ICC.
5 Solemn and manifestly at the beginning signing a treaty, tacit and perenially renewed in the sequence. That means that each time needed the state consents or not.
6 The conflict in Yugoslavia sharpens this debate and hastens the need for a decision. Although the actions of Yugoslav President Slobodan Milosevic and his subordinates fall under the jurisdiction of the ad hoc (ex post) tribunal established by the United Nations to prosecute war crimes in the former Yugoslavia, the expulsion of hundreds of thousands of ethnic Albanians from Kosovo -and the massacre of many- is a chilling example of the kinds of crimes
A historic trend in international law since 1945, accelerated since the end of the Cold War, has been to hold governments accountable for the treatment of their own citizens and to hold individual officials accountable for government actions. Thus, a critical challenge for the 21st century will be to develop institutions designed to regulate individuals as well as states within a global rule of law.

The ICC established by the Rome Statute advances the interests of the world community and affirms humanistic ideals. It constitutes the missing link of the international law system. Tyrants guilty of mass atrocities against their own people and their neighbors threaten regional stability and ultimately global order, forcing the world community to impose sanctions and often to send soldiers. The ICC serves notice on leaders who undermine world legal order that they will be held responsible for their actions, thereby creating a meaningful deterrent. The main (not the only one) target of the ICC is the criminal state and the consequent actes iurae imperii and the “privileges” accorded to states that fall upon the ICC’s jurisdiction.

The broad goals of the ICC align with every civilized country’s interests in the promotion of international law and justice. The Rome Conference made much progress toward achieving a specific treaty text compatible with national constitutions. The ICC project therefore deserves continuing support and engagement. A stance of continued engagement, however, offers the best prospects for clarification of the court’s mandate and confirms dedication to human rights and justice.

The ICC stands at the crossroads of civilized countries’ strategy, the search for global justice and the changing architecture of the international system. Moreover, the decision concerning the ICC arises at the end of a decade of post Cold War disorder resulting from ethnic and religious conflicts, failed states, civil wars and local and regional power struggles. The thesis that follows does not only address these larger concerns. It focuses also in constitutional issues, concerning the acceptance of the jurisdiction of the court and the idea of national and global scope of justice and how it affects human rights. Of course the political factor plays a significant, if not crucial, role in the whole discussion, political factor deriving both from pure political sources and judge-made policy. But, in general, arguments for options whether denying or accepting the jurisdiction of the ICC is intended to punish. Supporters of the court in its present form insist that only an effective permanent court can make the prospect of punishment for such atrocities sufficiently certain to deter their commission.

8 Duffy Helen, Towards Eradicating Immunity: The establishment of an International Criminal Court, Social Justice, winter 1999, 26, 4 (ProQuest Social Science Journals), pages 115 and following.
10 Article 5, Crimes within the Jurisdiction of the Court:
   1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
      a. The crime of genocide,
      b. Crimes against humanity,
      c. War crimes,
      d. The crime of aggression.
ICC mix moral, political, and pragmatic concerns in ways that frequently lead proponents of different positions to speak past each other.

2. **Historical Background**

   After World War II, the international community, outraged at the atrocities committed by the Nazi regime, took action at Nuremberg against many of the leaders responsible. The Nuremberg trials, in turn, helped establish a basic framework and precedent for the prosecution of war crimes and crimes against humanity. The Geneva Conventions of 1949 codified and expanded the rules of war.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

   **Article 11, Jurisdiction ratione temporis:**
   1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
   2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

   **Article 12, Preconditions to the Exercise of Jurisdiction:**
   1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
   2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
      a. The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
      b. The State of which the person accused of the crime is a national.
   3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception.

   **Article 13, Exercise of Jurisdiction:**

13 The chronology of crimes since Nuremberg is long. In Cambodia, the Khmer Rouge was responsible for approximately two million deaths and disappearances during its bloody rule in the 1970s. In El Salvador, government troops bent on subduing an insurgency attacked and killed civilians, including children, as they hunted their enemy. At least half a million people were killed and others maimed in the Rwandan genocide in 1994. From 1992 to 1995, Bosnian Serb forces engaged in a massive ethnic cleansing campaign affecting several hundred thousand people and culminating in the massacre of more than seven thousand men at Srebrenica. And 1999 saw the displacement of a million or more Kosovars, along with numerous murders, rapes, and other acts of ethnic brutality.
and included basic protections for civilians and combatants involved in civil war. The International Law Commission formulated the Nuremberg Principles in 1950 and concluded a draft Code of Offenses against the Peace and Security of Mankind in 1954. But the development of a regime holding individuals accountable for crimes under international law slowed considerably during the Cold War.

In the face of these tragedies, the international community has made efforts to achieve some measure of justice. The milestone of this effort is the creation of the International Criminal Court.

The ICC itself has been a long time in the making\textsuperscript{15}. The United Nations envisioned such a court soon after Nuremberg\textsuperscript{16} and Tokyo\textsuperscript{17}, but the project foundered during the Cold War. The tribunals for the former Yugoslavia\textsuperscript{18} and for Rwanda\textsuperscript{19} (ex post facto tribunals) breathed new life into the project and taught the international community valuable lessons about international criminal prosecution\textsuperscript{20}. Importantly, the tribunals helped further develop the international law that could be applied by the ICC. But the process of creating and operating the individual tribunals has been both expensive and redundant\textsuperscript{21}, raising questions about selective justice, providing an additional reason for the creation of a standing ICC\textsuperscript{22}.

The International Criminal Court was born of a determination to move beyond the inadequacies of the country-by-country approach. In 1998 the nations of the world gathered in Rome to create a tribunal with global scope, one that would be available to prosecute and punish the world’s worst offenders wherever they committed their crimes\textsuperscript{23}. The goal was to signal to tomorrow’s would-be tyrants that there will be no more escaping justice, no more safe havens, that the international community will pursue these killers and prosecute them wherever they hide.


\textsuperscript{17} B.V.A. Röling, The Tokyo Judgement, University Press, Amsterdam, 1977, C.F. Rüter editions.

\textsuperscript{18} M.N. Marouda, Το Διεθνές Ποινικό Δικαστήριο για την πρώην Γιουγκοσλαβία, Αντ. Ν. Σάκκουλας, Αθήνα-Κομοτηνή 2002, σελ. 39-57.


\textsuperscript{20} The Rwanda Tribunal is an ex post tribunal. The Former Yugoslav Tribunal is also essentially ex post, in that by the time of its operation, there was already a general outline of a political settlement, supported by a United Nations political and a NATO military presence in the arena.

\textsuperscript{21} Jeannette Irigoin, La Corte Penal International. Diferencias y similitudes con los Tribunales para la ex-Jugoslavia y Ruanda, , Ius et Praxis, año 5, No 2.


\textsuperscript{23} Henry Kissinger, ΗΠΑ, Αυτοκρατορία ή Ηγετική Δύναμη; Α.Α. Λιβάνη, Αθήνα 2001, σελ. 430 επ.
The Rome negotiators limited their focus to the gravest crimes -genocide, war crimes, crimes against humanity and aggression. These crimes embrace such atrocities as systematic ethnic and political slaughter, widespread torture and rape and the indiscriminate use of military force against civilians. In the name of the international community, the negotiators resolved that those who commit these unspeakable crimes must be brought to justice, that they must be prevented from using violence and intimidation to secure their impunity.

The Rome negotiations were difficult and complex. Negotiators had to merge different legal systems and different visions of the role of international justice. The final vote on the statute was 120 in favour of and rejecting it.

3. **Why Should States Implement the Rome Statute**

To begin with, at a philosophical level, the acceptance of the ICC jurisdiction focuses on the moral obligations of the civilized countries. The moral imperative animating the court is balanced against and ultimately outweighed by the imperative of protecting sovereignty and constitutional processes from any encroachment. But the protection of national sovereignty and constitutional processes is a totally different issue from the ICC’s active existence. Some argue that it can be an obstacle to the above mentioned processes and contradict the idea of national sovereignty, but, as it will thoroughly be analysed further, this thesis is totally erroneous and false, deriving also from other motivations, sometimes less gentle and civilized.

The position of each country towards the ICC, also reflect very different attitudes toward the development and expansion of international law. The question that unavoidably arises is how much sovereignty each “nation state” is willing to “sacrifice” to aid in the fortification of a global rule of law. Unfortunately the idea of “nation state” is still in many senses dominant and this can be also traced in decisions of national courts.

In general, the ICC court is an institution whose goal is to promote further peace and security, while eventually limiting the need for dangerous foreign deployments (or even wars). This fact rests on two assumptions. The first is that holding particular individuals (ratione personae) responsible to

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24 Before and during the Rome negotiations the members of the United Nations Security Council were initially skeptical about the viability of an international criminal court who would investigate whether the crime of aggression is committed or not. This led to the opposition of certain states to the Statute of Rome, as it will be thoroughly in furtherance explained.

25 The human rights provisions apply mainly in state crimes, but not only.


27 Chile played an active role during the negotiations in shaping the court and defining its reach, focus, and powers.

28 Germany for example proposed that the ICC have “universal” jurisdiction, that is, be able to prosecute crimes wherever they are committed. This made legal sense. For centuries individual states have had the right to prosecute piracy, regardless of where it takes place. Treaties now allow states to prosecute genocide, torture and serious war crimes -all within ICC jurisdiction -wherever they are committed. If individual states have universal jurisdiction over such heinous international crimes, why can they not agree to delegate it to an international court?

29 Article 25 of the Rome Statute. Legal entities, such as states and organizations, are excluded from the ICC’s
the international community for their crimes will break self-perpetuating cycles of violence, immunity and impunity. The second is that prosecutions will have a deterrent effect on would-be perpetrators. At a pragmatic level, the acceptance of the ICC jurisdiction is about simple institutional efficiency. The ICC is a better long-term solution than continued ad hoc tribunals, each of which must begin largely from scratch. Moreover, as a single, ongoing structure the ICC would avoid problems of inconsistent judgements and will promote the idea of international justice standards, which none will be able to escape from.

The ICC established by the Rome Statute is an effective institution for addressing the most serious violations of humanitarian law, human rights law and the law of war. It avoids the recurring need to expend energy and political capital to establish ad hoc tribunals to investigate crimes committed in particular countries or conflicts. Equally important, as a permanent mechanism its deterrent effect is likely to be far greater. To the extent it succeeds as a deterrent, the court reduces the necessity of costly in lives and dangerous deployments, supported by the world community. Even absent any deterrent effect, however, it advances core humanitarian values, including respect for the rule of law, due process and individual accountability. It also strengthens relations among civilized countries and makes it easier to exercise partnership through existing multilateral institutions.

These benefits far outweigh any potential costs imposed on national jurisdiction and sovereignty. The Rome Statute provides more than adequate safeguards from frivolous prosecutions, as it will be furthermore explained. Moreover, the active involvement of each country in the selection of judges and prosecutors will render dangerous scenarios almost impossible.

Putting arguments on the table, the ratification and implementation of the Rome Statute in domestic legal orders,


30 The pedagogical and practical import of such moral messages is illustrated by the current case of General Pinochet. In strictly legal terms, he has suffered no more than deprivation of liberty and freedom of movement only for some months. He may never actually be prosecuted. But his hopes of becoming a respected senior statesman and to go down in history as his country’s savior have been dashed. He will now be remembered, above all, as a torturer who got nabbed. Not only has he suffered loss of honor and reputation, but Chile will now understand its history differently. In Chile and elsewhere, a generation of youth has been taught that his alleged crimes, most of which took place before they were born, are so unconscionable that he is pursued for them even today.


34 Furthermore article 25 of the statute of Rome, the milestone of ICC negociations.

35 using the example of Chile and the relevant decision of its Constitutional court.
1. ensures that the member states will enjoy full voting rights in the appointment of prosecutors and judges and in establishing working procedures for the ICC,
2. enhances the likelihood that the ICC will become an effective and relevant institution,
3. strengthens diplomatic relations with allies and offers countries a chance to gain more respect at an international level,
4. affirms fundamental values as a force for human rights and the rule of law,
5. among allies, a decision to sign and even to seek ratification has strong support.
6. Such a decision may also strengthen support for the ratifying countries in the international community.

There is a good cause to believe that the jurisprudence of the ICC will have a clarifying and unifying effect on the international and the domestic level of criminal law. This expectation concerns not only the definitions of crimes, but also general principles of the international law, which are enforced as more states join the ICC treaty.

4. CONSTITUTIONAL ISSUES

4.1. The worldwide status

It’s, in some certain extent, logical that the implementation of the Rome Statute raises constitutional concerns. As an international treaty regulating the behaviour and social duties of individuals, human rights, the competence of states and the international community, the functions and privileges of governments and the need to balance competing demands of justice, the ICC intersects with domains that are traditional prerogatives of states and their constitutional order.

The growing number of signatures and ratifications appeared even more remarkable as the domestic hurdles to ratification became clearer. In many states the ratification process generated debate about the compatibility of the ICC Statute with certain constitutional norms. Poland, Estonia, Brazil, Portugal, the Czech Republic and Costa Rica, to name only a few, debated these constitutional questions. The stakes were particularly high for states with relatively new constitutions that had not previously amended their fundamental law. The debate centered on three constitutional norms: prohibitions on the extradition of nationals, provisions on immunities and prohibitions on life imprisonment. A small number of states, including Germany and France, chose to amend their constitutions before ratifying. Others, such as Belgium, chose to amend the Constitution after ratification so that the amendment procedure would not delay ratification. In other states, including Norway, Venezuela and Argentina, interpretation of the relevant constitutional provisions led to the conclusion that initial concerns about compatibility were unfounded and that the Constitution did not require amendment. Also, Canada, United Kingdom, New Zealand and Greece, to name a few, had


enacted their implementing legislation.

While the worldwide process of amending national criminal laws to conform with the requirements of the Rome Treaty was only in its early phase, initial experience highlights the extraordinary potential the implementing process offers to reform domestic criminal law more generally. For example, taking the opportunity afforded by the adoption of implementing legislation, Canada and New Zealand introduced laws to give their national courts the authority to investigate and prosecute the ICC crimes on the basis of universal jurisdiction.

The locus of ICC activity had shifted decisively to the national arena. As the possibility of transforming domestic criminal law and enhancing respect for human rights domestically became evident, the potential extended benefits of the ICC process became worldwide clearer.

4.2. The case of Chile

4.2.1. The decision of the Constitutional court

Chile signed the treaty for the Rome Statute on September 1998 and eventually ratified it on the 29th of June 2009. Some nationalists argued that the Rome Statute is seriously flawed and would establish a court that would be contrary to the national interests and the constitutional experience of Chile. As a matter of Chilean law, the ratification of the Rome Statute was brought before the Chilean Constitutional Court (Tribunal Constitucional) in a case judged in 08.04.2002, which had a negative outcome. The reasons given for the disapproval of the treaty and claiming the

38 Chile has not signed the Agreement on Privileges and Immunities.
39 Chile is the last south American country, which has ratified the treaty.
40 which is not true, because Chile has ratified in the past numerous other similar treaties, see appendix. For the debate and discussion in general among Chilean legal science, see Revista Actualidad Juridica, n2, Julio 2000, Universidad de Desarollo, pages 5-80. See, also, Ius et Praxis, año 5, No 2, pages 353-387 and Revista Actualidad Juridica, n6, Julio 2002, Universidad de Desarollo, pages 75 and following, especially the article from Carlos Cruz-Coke Ossa, Inconstitucionalidad del Tribunal Penal Internacional, pp 137-145.
41 The background of the decision to bring the case to the Constitutional court in short is the following: on 22 January 2002, the Chilean Chamber of Deputies (Camara de Diputados) approved the bill of ratification by a vote of 67 in favor and 37 against, meeting the necessary quorum for its approval. The bill was then sent to the Senate. In March 2002, a group of 34 deputies asked the Constitutional Court to declare the unconstitutionality of the Statute. According to the deputies who opposed the ratification, constitutional reforms and special laws should be enacted in order to ratify. Advocates of the Court within the Government urged and still urge the Senate to resume discussions after the Constitutional Court has concluded its review.

The constitutionality of the Rome Statute was not unanimously agreed in an early consultation by the Presidency of the Republic with the Supreme Court. A majority opinion resulted in favor of its constitutionality, with a dissenting minority arguing that it is unconstitutional and some judges abstaining. If rejected in the Senate, the Treaty could be re-submitted after a year.

In July 2001, the ratification bill was approved by the Constitutional, Legislative, and Justice Commission of the Chamber of Deputies. In the same year, the President of the Supreme Court of Justice, Minister Hernan Alvarez, expressed his support for the ICC during his official visit to Spain. Also, the Chilean Congress hosted a Parlatino Meeting in June 2000, at which participants expressed their support for the prompt establishment of the ICC. Early in 2000, ex President Ricardo Lagos Escobar and the Foreign Affairs Minister reaffirmed their support for the ICC, and declared that one of Chile’s main objectives in foreign policy is to have a leading role in the protection of
court unconstitutional vary and are in some sense “innovative” or not valid, in the sense that they are not thoroughly justified creating a problematic legal case. Almost the rest of the world, which has ratified the treaty, has similar constitutional provisions or, occasionally, the same.

The Constitutional Court’s decision argues that the exegesis for the ICC’s declaration of unconstitutionality lies basically on the following assumptions: the Chilean sovereignty is violated (article 5,6,7) because only the Chilean Constitution empowers authorities; the creation of the court is based on an international treaty and not on a chilean law (art.73); it harms the principle of separation of powers, because it violates the independency of the judicial corpus (art.73); it violates the principle of legality, because it creates criminal law (it is actually argued that the Statute of Rome is a criminal code), which can only be created through constitutional provisions as material law is usually created; the crime of aggression is not specified; the right of the ICC prosecutor to perform investigations on Chilean ground violates also Chilean sovereignty. In general the ICC treaty violates the articles 5, 6, 7, 19 paragraphs 3 and 7, 58, 60 number 3 and 16, 73, 74, 75, 76, 77, 78, 79, 80ª, 81 and 90, almost half of the Chilean Constitution! It is incredible how legal norms and criteria are manipulated creating a circular paradox.

The dilemmas presented are in fact pseudodilemmas. To begin with a school paradigm, the Chilean sovereignty cannot be violated, because the parliamentary act with which the ICC jurisdiction and Statute are ratified, transforms the international treaty into domestic Chilean law. Chile has ratified so far numerous international treaties.

Besides this, the independency of the judicial corpus is not harmed, since Chile coelects with the other member states the judicial body that forms the ICC. Therefore, the principle of separation of powers is not harmed in any way.

To continue, the principle of legality is not violated, simply because the parliament ratifying the Rome Statute actually acts like voting a typical criminal law. The Statute of Rome firmly strengthens national criminal codes and sanctions in general, since it recognizes their priority in prosecution of serious international crimes. Besides the principle of complementarity, the Statute provides also special safeguards for military personnel.

As for the crime of aggression, at a pragmatic level, its inclusion in the ICC jurisdiction has more a symbolic value. Agreement upon this matter, could not be reached until the end of the Rome negotiations. In any case the Court will exercise its jurisdiction in the future, when a more specific

43 The U.S. used the same argument for obvious reasons.
44 upon this appendix. See, also, Alcalá Humberto Nogueira, Las Constituciones Latinoamericanas, Anuario de Derecho Constitucional, 2000, mainly pages 172 and following.
provision will be adopted, which will define the crime and the conditions and circumstances under which it will be prosecuted. Consequently, there is no reason to reject the Rome Statute and claim it unconstitutional for a provision which has not actually yet come into force. No one can argue that the recognition at an international level, for the first time in the human history, of personal criminal responsibility for individuals who due to a certain authority or official capacity order, solicit or induce the commission of such a crime is an interesting evolution.

Further, the Rome Treaty provides for high standards for the selection of the prosecutor and deputy prosecutor, who can be removed by a vote of the majority of states parties. It seems that even if positive law placed the prosecutor in the position of a referee of revolutions, the states agreeing to the statute would refuse to carry out the obligations that a diligent and objective prosecutor would need carried out in order to perform his or her statutory functions. Indeed, in Article 54 of the ICC

Atricle 121. Also, new crimes can be added according to the article 123. Criminal sanctions applied to states have not yet been recognized in the international law. See R.E. Fife, Criminalizing Individuals for Acts of Agression Committed by States, in the general work, M. Bersghmo editions, Human Rights and Criminal Justice for the Downtrodden-Essays in Honour of Asbjorn Eiden, Martinus Nijhoff Publishers, Leiden/Boston, 2003, pages 53-73.

This specific matter is far more complicated and joined with the discussion of the role of the U.N. Security Counsel in the Court. The five permanent members of the Security Counsel demanded that the court should only intervene to prosecute this specific crime after former recognition of the Counsel that the crime of aggression was committed and that this would be binding for the court. The majority of the states participating in the negotiating process supported the opinion that this crime should also be part of the process or at least a simple procedural prerequisite. This is more a matter of international politics and distribution of power, but, in any case, it would put in risk the independency of the court, because the U.N. Security Counsel is an organ of a political nature.

Article 25, Individual criminal responsibility:
1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
      (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
      (ii) Be made in the knowledge of the intention of the group to commit the crime;
   (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
   (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.
Statute, the authority of the prosecutor seems to be restricted. He or she is authorized to “request the presence” of witnesses but not to compel it, to “seek the cooperation of any state” but not to demand it or to act within its territory without its permission. It’s doubtful that these provisions can be strengthened to give the prosecutor the necessary authority at the expense of states that are parties to the statute. It is even more doubtful whether he or she could assert the necessary authority over revolutionary groups that are not even parties to the statute and thus not subject to its positive obligations. The ability of the ICC to function is contingent upon the obligations of States Parties towards the Court.

The Court provides for several checks against spurious complaints, investigations, and prosecutions. Before an investigation can occur, the prosecution must get approval from a three-judge pre-trial chamber, which is then subject to appeal. Moreover, the U.N. Security Council can vote to suspend an investigation or prosecution for up to one year, on a renewable basis, giving the Security Council a collective veto over the Court.

Finally, the surrender process takes place between different countries. The court cannot be considered as a third party, since the country is its member and participates in many different ways throughout the whole judicial process. Some opponents of the ICC acknowledge the fact that Chilean citizens might fall subject to the court’s jurisdiction even if the treaty is not ratified. To do otherwise would be to allow renegade governments to immunize their citizens from prosecution by simply refusing to ratify these anticrime treaties. Chile thus must accept that other governments can extend the reach of their anticrime treaties to Chilean citizens. But even then, Chileans would still be unlikely ever to appear before the International Criminal Court, because Chile does not commit genocide, war crimes or crimes against humanity. The same argument can be used for the vast majority of the countries that have ratified the Treaty.

### 4.2.2. Political and Diplomatic Aspect of the Case

The argument given that Chile would be in the position to face the prospect of politically motivated prosecutions before a judicial organ beyond the reach of the Chilean Constitution is not valid, because that could happen only if the national authorities would be unable to act against, let’s make an hypothesis, a genocide. The principle of complementarity came into life in order to

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49 Article 86 of the Statute of Rome, which requires States Parties to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

50 The Rome Statute makes in the article 103 a clear distinction between surrender an individual to the court upon request and extradition that takes place between states.

51 The crime of genocide is carefully defined by a treaty that countries have ratified. It addresses murder and other serious acts of violence committed with the intent to destroy all or part of a national, ethnic, racial, or religious group. Most of the war crimes under the court’s jurisdiction are defined in extensive detail by the Geneva Conventions, which Chile and 187 other countries have ratified. They include many specific provisions designed to spare civilians the hazards of war.

52 Article 1 and 17-19 of the Rome Statute for the criteria that have been set. See also, Brown, Bartram S., “Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals”, 23 Yale Journal of International Law, 383 (Summer 1998) and Repetto Claudio Troncoso, La Corte Penal Internacional y
prevent such a remote occasion. The ICC is an ultimate resort court, consequently it can be said that the fundamental principle of ultimum refugium that governs the modern doctrine of criminal law is satisfied. The principle of priority of the ICC is being activated only when a state cannot or is genuinely unwilling to act and provide a fair trial. The national courts have the a priori jurisdiction for the ICC’s crimes. As a consequence, in case of simultaneous energisation of both ICC and national jurisdiction, the ICC has not priority, even if the U.N. Security Council has initiated the procedure. The ICC will function more as a “watchdog”, as an observer in motion. This emphasis is put on prevention rather than control through suppression.

In any case it is more than obvious that a similar case does not violate the jurisdiction of the Chilean Courts, because that would mean that they are not sufficient enough (inability) to take action against genocide. Imagine also the remote possibility that a Chilean did commit a war crime. Would that citizen face trial before the International Criminal Court? No. That is because, under the principle of “complementarity” codified in the Rome treaty, the court will assume jurisdiction only when national courts are unwilling or unable to investigate and, if appropriate, prosecute the matter themselves. The International Criminal Court will not routinely substitute itself for national courts, where justice is most meaningful, but will encourage national courts to do the job themselves. The ICC is neither designed nor intended to supplant independent and effective judicial systems. Only when national court systems have broken down or abusive governments insist on shielding criminal suspects from legitimate investigation and prosecution, will the International Criminal Court step in. Indeed, the court must defer to good faith investigation by national law enforcement personnel whether or not they conclude that the evidence warrants prosecution.

el Principio de la Complementaridad, Ius et Praxis, año 5, No 2.

53 this reminds the principle of subsidiarity of the European Union Law.


55 Every state has a duty to exercise its national jurisdiction against the blamed ones for ICC’s crimes, see forefront of the Rome Statute, point 6.


57 A finding of inability of a state to prosecute depends upon any of three disabling circumstances: (1) a total collapse of the national judicial system, (2) a substantial collapse of the national judicial system or (3) the unavailability of the national judicial system. Note that all the elements for a determination are linked to the “national judicial system.” One or more of these itemized circumstances must produce the following condition: the judicial system of the state in question is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings. Note, also, that only objective conditions are to be considered. The provision does not include possible defects in the quality of justice of the national legal or, more specifically, judicial systems as a ground that might authorize the ICC to conclude that it could take jurisdiction. Such a formula would have required the ICC to make qualitative judgments about the judicial systems of states parties.
The decision of the Chilean Constitutional Court contends that the International Criminal Court would infringe Chilean sovereignty. But there is no sovereign right to commit atrocities, particularly the vicious crimes on which the court would focus. Just as the Chilean Constitution creates a government of limited powers that cannot intrude on basic rights, so international law sets limits to how sovereign governments can treat their own people. It is fully consistent with the Chilean Constitution that genocide and other such crimes be subject to prosecution.

Critics also argue that it would be unconstitutional for Chile to cooperate with the International Criminal Court in the unlikely event that the court sought the surrender of a Chilean. Again, that view is mistaken. To begin with, no treaty, including this one, can compel Chile to violate its Constitution. Moreover, this treaty is fully compatible with the Constitution. The Chilean government routinely enters into extradition treaties with other democracies. The Chilean government agrees to extraditions only when confident that the requesting country can assure a fair trial. Because the International Criminal Court will be governed by the strictest due process standards, there is no constitutional reason why Chile should not cooperate with it in the same way that it cooperates with the courts of its democratic partners. Some have suggested constitutional problems if the International Criminal Court were to seek to prosecute a Chilean for a crime committed on Chilean soil. But the likelihood of Chileans committing genocide, war crimes, or crimes against humanity on national soil is too remote for this concern to deter the country from the full enforcement of the treaty. Unless of course hideous and malevolent political forces will urge Chile to such a decision, which is highly unlikely, if not impossible, to happen. So long as a fair trial is guaranteed, as it would be with the International Criminal Court, there is no constitutional impediment to Chilean cooperation.

Despite these safeguards, can anyone guarantee that the International Criminal Court will never initiate a case against a Chilean? Of course not. No government can or should be able to provide such absolute assurance, for that would be inconsistent with the first principle of justice, that it applies equally to all. But the court’s focus on the most heinous crimes, which Chile does not commit, its application of legal standards that are already gradually incorporated into modern criminal doctrine, its deference to good faith investigations and prosecutions by national authorities and its respect for due process provide every reasonable guarantee against the unjustified prosecution of a Chilean.

Moreover, the remote possibility of a frivolous or politically motivated prosecution is

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58 see furthermore appendix.
59 For instance the first case of the ICC, where Uganda, a state party to the Rome Statute, made by its own the first voluntary referral of a situation to the ICC in December 2003. The situation in question involves crimes committed in the course of the internal armed conflict in northern Uganda, which has continued for the last eighteen years with a frightful toll of massacres, rapes, child abuse, and other grievous human rights violations. One of the results of the conflict is approximately 1.5 million internally displaced persons. On July 29, 2004, the prosecutor announced that he had determined that there was a reasonable basis to commence an investigation into crimes allegedly committed in northern Uganda. [ICC Press Release, Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda (July 29, 2004)].
60 See for the guarantees provided also articles 14 (Referral of a Situation by a State Party), 15 (Prosecutor), 16
vastly outweighed by the court’s prospect of promoting justice, deterring tomorrow’s tyrants and saving the lives of their countless victims. The International Criminal Court is the best tool for that purpose.

Some contend that the court might prolong suffering by discouraging tyrants from stepping down from power lest they face prosecution. In fact, dictators rarely have the luxury of planning a quiet retirement. They are usually forced to step down because their support wanes. When their support fades, their regimes quickly crumble.

Of course, some tyrants plan for their eventual demise by adopting amnesties for their crimes while their grasp on power is still strong. Chile’s ex dictator Pinochet provides a good example. But when the Chilean people rejected his rule in a plebiscite and major branches of the armed forces stopped supporting his reign, he, too, was forced to resign. Since then, his allies in the armed forces have used the threat of violence to prevent any reexamination of this amnesty. Why should the international community respect such coerced impunity? Indeed, to do so would only encourage further atrocities by suggesting to tomorrow’s tyrants that they can use violence and extortion to escape punishment for their crimes.

There are those who say that societies should be free to forget past atrocities and move on without the burden of prosecutions. But because of the coercive powers of dictators, we should be wary of how we characterize the choice of impunity. A choice made with a gun pointed at one’s head is not a free choice. To defer to the supposed “national choice” in such circumstances is really to defer to the dictates of the tyrant.

But what if victims freely decide to grant an amnesty, as might be said of South Africa for those abusers who confess fully before its Truth and Reconciliation Commission? In such cases, the International Criminal Court prosecutor might well exercise discretion to defer to this national decision. However, any attempt to move beyond prosecutorial discretion and entrust this matter to a political body will only encourage tyrants to use blackmail to secure their impunity.

Chile should revise its opinion and recognize that this judge made policy is in fact erroneous, because it,

1. Reverses a policy that has lent active support to the idea of a permanent international criminal court.
2. Isolates Chile from allies and diminishes Chilean credibility on human rights and humanitarian issues in the broader international community.

(Deferral of Investigation or Prosecution), 17 (Issues of Admissibility), 53 (Initiation of an Investigation), 54 (Duties and Powers of the Prosecutor with Respect to Investigations).

As we saw when Duvalier fled Haiti, when Marcos left the Philippines, when Mengistu fled Ethiopia, when Amin left Uganda, and, most recently, when Suharto resigned as president of Indonesia, failing dictators rarely have the chance to hold out for amnesty from prosecution.

Chile should be proud to join not only with its closest allies, including Britain, France, Canada, Germany, Italy, Greece, Spain, but also with newly democratic governments around the world, such as South Africa, Argentina and South Korea. These new democracies, having recently escaped from authoritarian rule, understand perhaps even better than others the importance of international justice to guard against renewed tyranny.
3. Overlooks Chilean participation in numerous treaties that permit chilean citizens to be held accountable for criminal and even economic actions in foreign jurisdictions.

Apart from that,

1. In the broader public, an active opposition to the court could strengthen forces opposed to the United Nations and other international human rights organizations (although absent a ratification debate the public salience of the issue will remain low).  
2. Among national human rights organizations and other groups, this option will spark anger and mobilization against the international rumor of the country.  
3. Among allies, a decision definitively to reject the statute will harden the perception of Chilean hostility to the development of universally applicable international law. Moreover, rejecting the ICC will put chilean policy in direct conflict with close allies whose cooperation is necessary for a host of policy goals.

On the contrary, when the Chilean ratification of the treaty eventually (at 2009) took place, it manifested its profound commitment to subjecting the world’s most heinous despots to the rule of law. Chile owes this commitment as a matter of justice to those who have suffered the depredations of the recent past. And owes it to its future generations, because only by punishing today’s mass murderers there is a hope to deter the would-be killers of tomorrow.

In sum, by bringing the most egregious criminals to justice and deterring others from repeating their crimes, the court will help promote a lawful and stable international order, answer the pleas of victims and reinforce the humanitarian ideals. While no new venture is ever risk free, the court’s treaty contains ample safeguards against misuse.

4.2.3. The Constitutionual reform

Nevertheless, the Chilean Administration remained supportive of the ICC and Chile’s eventual ratification. Consequently, after a long period of national and international political pressure, Chile finally took the decision to amend its Constitution in order to harmonize it with the standards posed by the needed ratification of the ICC and the general principles of the international

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63 Public opinion is one of the most powerful weapons of the expansion of the international law.

64 Ex Chilean President Ricardo Lagos has recommended ratification of the Rome Statute, as part of his recent human rights proposal presented in August 2003. However, the composition of the Senate is such that ratification seems unlikely. Nonetheless, some efforts are underway by the Ministry of Foreign Affairs to implement other humanitarian and human rights treaties. On 15 June 2005, the Minister of Foreign Affairs Ignacio Walker met with the ICC President Philippe Kirsch in The Hague, to discuss the current status of the Rome Statute ratification. Chancellor Walker announced that he will soon meet with the Commission of Foreign Affairs from the Senate to request the discussion and approval of that treaty. Chancellor Walker remarked: “It is not ‘nice’ that our country has not yet ratified the Rome Statute that creates the International Criminal Court, that sanctions extreme crimes, such as genocide and crimes against humanity, considering that human rights are a priority for Chilean foreign policy and for our government. We should have been in the top ten and now we can be in the top one hundred, so I hope the Parliament ratifies this year the treaty that has been signed by the Chilean government.”

65 The proposed amendment suggested by the Executive is very similar to the French one. The amendment has to be
law in accordance with the article 17 (2) of the Statute of Rome. This became reality under the law 20050 of 26.08.2005 which modified certain provisions of the Chilean Constitution, more specific the articles 50 (now 54) and 82 (now 93). So, since then, the Chilean Constitution provides that Chile should at a minimum remove the barriers to prosecution of the Rome Statute’s crimes and therefore implement it and ratify it. The incorporation of ICC’s crimes into domestic law will benefit the state by strengthening its national criminal justice system, bring national criminal law under conformity with international obligations and up to date with important developments in international law. Since Chile has already accepted the Geneva Conventions, the implementation of the Rome Statute provides an excellent opportunity to Chile to establish detailed national law on these crimes. Although this was not necessary, as it has thoroughly been explained, the articles concerning the right of the Congress to submit such a treaty to the control of the Constitutional court has been shrinked, so now, with the existing legislation, the government can actually ratify the treaty.

In any case, under the principle of universal jurisdiction every state has the right to exercise jurisdiction to these crimes, so shouldn’t it be better for Chile to sort this matters out by itself, since the ICC has no police and law enforcement powers? It is totally reasonable that the each state prefers to prosecute the perpetrators by itself and, by effectively applying its police powers, demonstrating to their constituents (and their opponents) their ability to defend their citizens. In this way, credibility and political legitimacy is gained. In democratic societies, governments that fail to show this ability are unlikely to remain in power long. In undemocratic societies, such failures are likely to embolden other aspirants to power.

approved by a qualified majority. Nevertheless, opposition to the final ratification still exists, see for instance, Bruna Guillermo, Algunas Consideraciones sobre la constitucionalidad de la Corte Penal International, Ius et Praxis, año 5, No 2.

66 Article 50 of the Chilean Consitution.
67 France and Luxemburg chose the same solution.
68 Articles 50 and 82 of the Chilean Constitution.
69 This principle can be considered as the “new born baby” of the international law, though it is not fully recognized by the international community. The criminal punishment of crimes against the humanity, because of its impact and gravity, should not be let in the discretion of national courts. It’s part of each state’s jurisdiction and, as a consequence, each national court has jurisdiction upon these crimes, no matter what the circumstances are. The ooeconomicality of such equitable goods demands global obligation of respect towards them. See for the philosophical foundation of this principle H. Laswell, M. McDougal, M. Reisman, Theories about International Law-Prologue to a figurative Jurisprudence, in the work: M. McDougal, M. Reisman, International Law and Essays-A Supplement to International Law in Contemporary Perspective, Mineola, New York Foundation Press, 1981, pages 43 and following. See, also, Decision of the Belgium First Instance Court of 8.11.1998 and Luc Reydams, In Re Pinochet, American Journal of International Law, 93, 3, pages 690-711.

70 Canada and New Zealand have already incorporated this principle into their domestic legislation. Historically, Greek courts were among the first to embrace what came to be known as the restrictive theory of sovereign immunity. See the decision of the Hellenic (Greek) Supreme Court (Areios Pagos) prefecture of Voiotia v. Federal Republic of Germany, Case No. 11/2000, May 4, 2000, and comments from Maria Gavouneli and Ilias Bantekas in The American Journal of International Law, Washington: January 2001, Vol. 95, Iss. 1; pages 198 and following.

5. CRITICIZING THE ICC

Of course, no court can be a perfect deterrent, a panacea. No court or law enforcement official can dissuade every would-be criminal from a life outside the law. But the International Criminal Court offers great promise as a deterrent because it targets not an entire people, the way broad trade sanctions do, nor frontline conscripts, the way military intervention often does, but the tyrant who is ordering and directing the killing. Some tyrants might still not be deterred. But even if the court prevents only an occasional genocide, it is worth it.

To be sure, the International Criminal Court, like any court, depends on national governments. It would be independent, but not uncontrolable, in order to avoid questions like who guards the guards.

As it has already been explained, the ICC is not the solution to all world’s human rights problems. It’s will not create a paradise in the world legal order, but, for sure, it’s an important step, a step closer to civilized solution of disputes. There’s a long way ahead and a lots of improvements should be made. Law is a living process and criticism should always be welcome. The doctrinal problems of the statute exceed the goals of this paper, so, it will only take place a brief presentation from an international politics scope.

To have rule of law in a free society, there must be a framework -a constitution- that defines government authority and thus limits it, preventing arbitrary power. There must also be political accountability through reasonably democratic popular controls over the creation, interpretation and enforcement of the laws. These prerequisites must be present to have agreement on three key structures: authoritative and identifiable sources of the law for resolving conflicts and disputes, methods and procedures for declaring and changing the law and the mechanisms of law interpretation, enforcement, execution, and compliance. However, in international law, for the time being, there’s an unavoidable democratic deficit, though necessary for the very existence of international law.

The belief that the ICC will have a substantial, indeed decisive, deterrent effect against the perpetration of grievous crimes against humanity has so little empirical evidence to support it. Behind the above mentioned optimistic rhetoric, there’s a complex set of questions put on the table considering the appropriate roles of political and economic power, diplomatic efforts, military force and legal procedures. No one disputes that barbarous measures of genocide and crimes against humanity are unacceptable. But, transforming international matters of power and force into matters of law is a very demanding procedure. Misunderstanding the appropriate roles of force, diplomacy and power in the world is not just bad analysis but could also lead to bad policy and become potentially dangerous.

The main topic of the discussion focuses on whether the Rome Statute can sustain with the

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72 (a school paradigm) the control of the assembly of the democratically elected governments, which form the vast majority of the assembly of the states that have ratified the treaty.
73 As the great scholar C. H. McIlwain wrote, “All constitutional government is by definition limited government.”
74 Courting Danger: What’s Wrong with the International Court”, The National Interest, no. 54 (Winter 1998), pages 60-71.
abstract concept of “complementarity,” the idea that the primary responsibility for enforcing the law remains within each nation-state. A case can be brought by the International Criminal Court only when a national justice system is unwilling or unable to proceed with a good faith disposition of the matter. The prosecutor is obliged to notify the national authorities if he or she proposes to open a case and the national justice system is allowed to take priority over the case unless it is acting in bad faith. The prosecutor’s decision to go forward is subject to challenge in a pretrial chamber of the tribunal and to an assembly of states parties. The big question that arises is if this safety check is enough or lacks the actual control by the democratic base of the judicial and legislative power. The answer to this question lies more in the field of politics rather, than law doctrine. In general, each legal subject should be set under discussion in order to be ascertained if it serves the fundamental values of each state.

6. **Epilogue - Synopsis**

On this increasingly interdependent globe, the aggression and turmoil that usually accompany severe abuses threaten also commerce, welfare, and even the security of borders. Enhancing the rule of law to address these threats serves all. The court will uphold the belief that criminals should be held responsible for their actions and that victims should see their attackers brought to account.

When the history books are written on the twentieth century, there will be much misery and cruelty to record. We will never be able to erase the barbarity that has marred so much of people’s lifetime. Let’s at least ensure that the final chapter is dedicated to the eradication of those sad phenomena. Rather than submit to this cruelty, let’s begin the century by pledging to overcome it, by reaffirming our commitment to justice and the rule of law. Let us move forward together to help building an even stronger International Criminal Court. Small steps towards the full establishment of an international legal order that reflects the ethical and moral evolution of mankind based on the conviction that impunity should not exist are still on the go.

1. **The Statutes of the Nuremberg Tribunal, in art. 6.c) define as crime against humanity:**

“...Murder, extermination, submission to slavery, deportation, and any other inhumane action committed against any civilian population, before or during a war, any politically motivated persecution, or racial and religious persecution, even when such actions or persecutions are not a violation of internal law of the country where they have been committed, constitute a crime under the competency of the Tribunal…” Allied courts applied this article after 1945, and, subsequently, the following courts did also:


In 1981, the Netherlands Supreme Court in the Menten case (N.Y.I.L., 1982, p. 401 and s.),

since the ICC is in its very beginning, so, there is an empirical lack of defining abstract notions.
In 1983, by the High Court of France in the Barbie case, drew from art. 6.c) with the following criteria (subject to application in Spain and Chile):

   a) The concept of incrimination derives from international repressive policy that transcends national borders. b) It also stems from the adhesion of France to this policy of repression, c) the enshrining through UN General Assembly resolution 13.II.1946 of the definition of crimes against Humanity as set forth in the Nuremberg Court Statutes, and, d) the recommendation in this UN resolution to member States to prosecute or extradite authors of such crimes. The legal basis rests in article 15.2 of the International Pact on Civil and Political Rights of 19.12.1966 (and art. 7.2 of the European Convention on Rights of Man), that states that the principle of non-retroactivity of criminal laws is not contrary to the prosecution and conviction of persons for actions qualified as “criminal according to general principles of law recognized by the community of nations.” This exception —were it so — to the non-retroactivity of criminal law has been applied in the penal prosecution against an individual accused of hijacking an airplane when this action is not punishable for the ius fori at the time it was committed (Sri Lanka, Cr. of App., 28.5.1986, Ekanayake case, I.I.R., 87, p. 298).

In 1989, by the Ontario Superior Court of Justice (Canada) in the Finta case (10.5.1989, I.L.R., 82, 438 s.).


“This class of crimes (...) is broader than war crimes (...) and is susceptible to be committed by States against their own citizens (...).”

For D. Thiam, UN International Law Commission Special Observer,

“An inhuman act committed against a single person may constitute a crime against Humanity if considered in the context of a systematic pattern or if the execution forms part of a plan, or if repetitive in nature and leaves no doubt about the intentions of the author. (...) An individual act may constitute a crime against Humanity if it ascribes to a context of a coherent and repeated set of acts committed under the same motive: political, religious, racial or cultural” (Rapport C.D.I., 1989, p. 147, parag. 147). Likewise, “the characteristics of a crime against humanity” may be ascribed not to one single case of forced disappearance but rather to the “systematic practice” of forced disappearances. (A/Res. 47/133, Dec. 18, 1992, preamble, clause 4). The Nuremberg Court Statute states in its,

   Art. 6, leaders who have participated in a plan designed to commit crimes against humanity are responsible for the acts others commit in execution of that plan,

   Art. 7,established that the position of Head of State or any other high-ranking official does not grant immunity from prosecution nor does any government office serve as extenuating circumstances
Art. 10 states

“In all cases in which the Tribunal has proclaimed the criminal nature of a group or an organization, authorities shall have the right to compel any individual to appear before the courts (...), on the basis of membership in this group or organization. This principle holds that the criminal nature of the group or organization shall be considered as proven and no further discussion on this point shall be entertained “.

The “National Intelligence Directorate” (DINA) was termed a “criminal organization “ by the Sentence handed down by the Supreme Court of Chile on May 30, 1995 (Letelier case).

2. Statutes of the ICC in former Yugoslavia

Created in 1993, its article 10 provides that the non bis in idem rule does not prevent the court from trying a person who already stood trial in another State, if in that State, that event is not deemed to be a violation of common law, or if the proceeding appears to deny justice. The unequivocal nature of this exception makes it possible to prevent the accused from shielding himself behind pro forma proceedings. In sum, whenever there is agreement on criteria on the serious and massive nature, and political, racial, religious, social or cultural motivated acts, crimes against humanity consist of:

Murder (Nuremberg, art. 6; Statutes of the Court on the former Yugoslavia, art. 5.a), homicide (Tokyo, art. 5.c),

Extermination (Nuremberg, art. 6.c; Statutes of the Court on the former Yugoslavia, art. 5.b),

Slavery (Nuremberg, art. 6.c; Statutes of the Court on the former Yugoslavia, art. 5.c),

Deportation (Nuremberg, art. 6.c),

Expulsion (Statutes of the Court on the former Yugoslavia, art. 5.d),

Any other inhuman act committed against any civilian population (Nuremberg, art. 6.c; Statutes of the Court on the former Yugoslavia, art. 5.i),

Persecution for political, racial, or cultural motives (Nuremberg, art. 6.c; Statutes of the Court on the former Yugoslavia, art. 5.h) and social or cultural motives (proposal for penal code on crimes against the security of humanity, art. 21),

Genocide (1948 Convention, art.4),

Apartheid (1973, Convention art. II),

Imprisonment (Law n 10 enacted by the Allied Control Council in Germany, 1945, art. II, 1.c; Statutes of the Court on the former Yugoslavia, art.5.e),

Torture (Law n 10 enacted by the Allied Control Council in Germany, 1945, art. II, 1.c, Statutes of the Court on the former Yugoslavia, art. 5.e),

Rape (Law n 10 enacted by the Allied Control Council in Germany 1945, art. II, 1.c, Statutes of the Court on the former Yugoslavia, art. 5.g),
The systematic practice of forced disappearances (Resolution 47/133 of the UN Gen. Assembly, 18.XII.1992),

The use of atomic weapons in determined circumstances (Sentence of the International Court of Justice, 1996).

However, motive is not a determining factor in all crimes that affect peace and security of humanity. The International Law Council of the UN considers in this class of crime the “systematic or massive violation of the rights of man,” persecution for political, racial or religious reasons, but also persecution for “social or cultural reasons” (proposal for Criminal Code on crimes against the security of humanity, art. 21); as well as crimes that are “systematic or massive violations of the rights of man” — premeditated murder, torture, imprisonment, rape, forced disappearances, slavery - according to art. 5 of Statutes of the Court on the former Yugoslavia.

3. Retrospective Application of Criminal Law in Crimes Against Humanity

The International Pact on Civil and Political Rights, 19.XII.1966, ratified by Chile (BOE 30.IV.1977), in art. 15 incorporates the principle of “national or international” nullum crimen sine lege, but adds in its paragraph 2:

“Nothing set forth in this article shall preclude trial or conviction of a person for acts or omissions that, when committed, were criminal actions according to general principles of law recognized by the international community.”

Such is also the case in art. 7 of the Convention for the protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950 (BOE 10.X.1979 and 30.IX.1986).

4. Extradition

The UN General Assembly Declaration on extradition of individuals guilty of crimes of war and crimes against humanity, adopted 3.XII.1973 (resolution 3074, XXVIII), establishes in its Art. 9:

“When States cooperate in the discovery, arrest, and extradition of individuals against whom there is evidence of having committed crimes against humanity, and when States collaborate in the punishment of these individual if found to be guilty, the States are acting in conformance with the provisions of the UN Charter and the Declaration on the principles of international law related to friendly relations and cooperation between States.”

And its article 5 states:

“When evidence exists that individuals have committed war crimes and crimes against humanity, they must be brought before the Courts and if found guilty, they must be punished, as a general rule, in the countries where these crimes were committed. States shall cooperate in the extradition of these individuals for this purpose.”
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Social Morality - Legislative and Judicial Overtones - The Indian Experience

Prof. S. Sumitra, 1

The separation of law from morality by the British positivist jurists Bentham and Austin was a great advance in legal history. The oft quoted story in this connection is of the famous Lord Chancellor of England Sir Thomas More (1478-1535) who once went for a walk on a street in London with his daughter Margaret and her husband Roper. On seeing a man running on the street, Margaret told Sir Thomas “Father, get that man arrested”. When Sir Thomas Asked why, she replied “Because he is a bad man.” Sir Thomas then asked “But which law has he broken?” to which she replied “He has broken the law of God”. Sir Thomas then said “Then let God arrest him. I arrest a man only if he has broken a law of Parliament.” Often an act may be regarded as immoral by society, but it may not be illegal. To be illegal the act must clearly attract some specific provision of the Penal Code or some other statute. 1

When Lord Mansfield said, ‘The law of England prohibits everything which is contra bonos mores’, 2 he was confirming the unison of law and morals. The identity of law, morality and religion perhaps is a matter of bygone days, as we now draw a clear distinction between the two.

Law is intended to a fundamental level, reflect and enforce the moral and ethical standards of a civilized society. Morality deals with that which is regarded as right or wrong. Morality stems from an individual’s conscience and from the values of a given society, which might be based on religious tradition or on political principles such as democracy or socialism. Moral conduct would be that which is considered ‘right’ based on people’s consciences and society’s shared values. 3 Morality and social morality are concepts very closely interwoven. Moral values are the basis on which one makes decisions and judgments.

This ideological and psychological orientation based on value judgment makes it difficult to agree upon universal standards of morality and distinguishes it from law. Law differs from morality also on another count, though related, that is, the certainty. Law is intended to, at a fundamental level, reflect and enforce the moral and ethical standards of a civilized society.

Morality differs from law in the sense that it deals with that which is regarded as right or wrong. Morality stems from an individual’s conscience and from the values of a given society, which might be based on religious tradition or on political principles such as democracy or socialism. Moral conduct would be that which is considered ‘right’ based on people’s consciences and

1  Department of Law, Andhra University
2  Lord Mansfield in Jones v Randall (1774) 1 Cowp 17 at 39 quoted by R.W.M.Dias, in Dias Jurisprudence, fifth edition, at 216
society’s shared values. Morality is one way for a community to define appropriate activity.\(^4\) Often a distinction is maintained between individual morality and social morality. Individual morality is the basis for making decisions and judgments for individuals like honesty, loyalty, good faith and being responsible. Social morality is concerned with the implications of an act to the well being of the society. Social morality is concerned more with balancing individual moral choices and preferences inter se and the interests of the society, and is based on considerations of fairness which in turn could be rooted in culture and religion. This constitutes the value system of a society.\(^5\)

Upholding social morality as a function of law or courts has always been controversial at least for one reason. Law has a large moral component and this is true in almost all legal systems. When we agree that law has a moral component, the true meaning is that law is intrinsically connected to sociology and social morality. However, there is what is called moral relativism in the sense that morality of a society may change with changing times. Change in the social morality may lead to changes in law. Law can be amended through a legislative process but morality is not susceptible to change through a formal mechanism. When society by and large approves of the new moral order, there may not be any friction in the society or the disturbance could be only minimal. However, problem is when only a section of the society adopts a different value system and morality, there is a sizeable majority not only opposing the change but also trying to impose its own traditional moral standards. It is this kind of friction between the divergent view points the Indian society is at present experiencing. After 1991, when India embarked upon a path of globalization, the impact has been not merely on the economic system, but also on the social rubric. It had brought about sudden and unprecedented changes in the family and social systems and values and also in the individual perceptions of right and wrong. Even before the onslaught of economic liberalism, there has been a transition in the Indian society from a traditional agricultural economy to an urban industrial economy which led to the disintegration of the joint family system and growth of nuclear families, whereby culture and religion are relegated to a strictly personal domain. Morality became more individualized. This is where things like social morality are undergoing an identity crisis. The process of globalization has further accelerated the transformation of the society with a strong newly emergent middle class, the growing materialistic culture and the ever increasing wealth. An attempt is here made to understand how the legal system responds to this social crisis or challenge with reference to a few of such challenges like premarital sex, homosexuality, live in relationships, alcoholism, pub culture and dress code.

**Pre-Marital And Extra Marital Sex, Live-In Relationships**

Indian society is by and large, conservative. Indian culture is unique in terms of the importance attached to the family system. Divorce was something the country did not know about long time ago. Now, though divorce is permitted by law, most Indians consider marriage as an exclusive and indestructible union. Society also regulates sexual behavior of individuals and confines it within the institution or the framework of marriage. Sex before marriage or outside marriage is strictly prohibited. Strict segregation of boys and girls or men and women is observed. Any open talk about sexuality

\(^4\) Ibid

or sexual orientation is considered as uncultured or even abominable. Religious fundamentalism in some corners of the country has also opposed any change in the existing system. Hence, open and public discussion on concepts like premarital sex, live in relationships or homosexuality has come as a culture shock to the Indian society which is difficult to digest.

Ms. Khushboo, a well known actress, in a survey conducted by the Times of India, a fortnightly news magazine, expressed her opinions about sexual habits of people in residing in the bigger cities of India, wherein she noted the increasing incidence of premarital sex, especially in the context of live-in relationships and called for the societal acceptance of the same. However, she also observed that girls should take adequate precautions to prevent unwanted pregnancies and the transmission of venereal diseases. Her statement published in the media evoked a lot of resentment and sharp reactions from several people that as many as 23 criminal cases were filed against her in the courts under sections 499,500 and 505 of Indian Penal Code and sections 4 and 6 of the Indecent Representation of Women (Prohibition) Act 1986. In a criminal appeal in this case the Supreme Court while giving the appellant relief from the criminal cases, observed, “Even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as “decency and morality’ among others, we must lay stress on the need to tolerate unpopular views in the sociocultural space.” Admittedly, the appellant’s remarks did provide a controversy since the acceptance of premarital sex and live-in relationships is viewed by some as an attack on the centrality of marriage. While there can be no doubt that in India, marriage is an important social institution, we must also keep our minds open to the fact that there are certain individuals or groups who do not hold the same view. To be sure, there are some indigenous groups within our country wherein sexual relations outside the marital setting are accepted as a normal occurrence. Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in premarital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not coextensive”.

In the instant case, the Supreme Court while saying that the appellant was exercising her freedom of speech and expression, clearly held that issues of social morality cannot be judged on the basis of the existing criminal law. At the same time, the Court avoided judging on the wrongfulness or otherwise of premarital sex or live-in relationships. This is because the existing law is silent on the matter and rather chose to leave the matter within the domain of personal liberty. This is exactly a matter of social morality and law and courts cannot interfere or decide what is right on behalf of the civil society. As the Court has opined, the remedy for the aggrieved persons in such cases can be only through a public platform and not through courts. However, the aspect of extramarital sex has been taken cognizance of by the Indian law. Section 497 of the Indian Penal Code makes adultery an offence though it is a consensual act as the same is considered offensive to social morality.

As far as live-in relationships are considered, an indirect reference may be found in the

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7 Ibid,para 45
8 Ibid para 46
Protection of Women from Domestic Violence Act 2005 wherein it affords protection to women from domestic violence from a male adult person if they are living in a marriage like relationship. It by no means amounts to an acceptance of the right or wrong of the relationship, but only amounts to taking cognizance of the inevitable reality. However, mere live-in relationships have been distinguished from marriage like relationships. In a recent case, the Supreme Court was seized with a case in which a woman claiming to be the second ‘wife’ of a man made a claim for maintenance.\textsuperscript{10} The Family Court and the High Court have decided the matter on the basis of proof of marriage of the man with another woman even before he got married to the respondent in the case. The Supreme Court opined that the matter could not have been decided in the absence of impleading the first wife. Incidentally, the Court said “In our opinion a ‘relationship in the nature of marriage’ under the 2005 Act must also fulfill the above requirements, and in addition the parties must have lived together in a ‘shared household’ as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a ‘domestic relationship’. In our opinion not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a ‘keep’ whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage’.\textsuperscript{11} No doubt the view we are taking would exclude many women who have had a live in relationship from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law. Parliament has used the expression ‘relationship in the nature of marriage’ and not ‘live in relationship’. The Court in the garb of interpretation cannot change the language of the statute. In feudal society sexual relationship between man and woman outside marriage was totally taboo and regarded with disgust and horror.... However, Indian society is changing, and this change has been reflected and recognized by Parliament by enacting The Protection of Women from Domestic Violence Act, 2005.”\textsuperscript{12}

**Homosexuality**

Homosexuality presents a more subtle problem as law itself prohibited it. There is a reference to homosexuality in Indian law in S. 377 of the Indian Penal Code.\textsuperscript{13} Though pronounced illegal, there have been not many criminal prosecutions unnatural sexual behavior. However, the constitutional validity of this provision has been challenged by an NGO Naz Foundation which based its arguments on the ground that this is being used as an instrument for harassing people with different sexual orientation.\textsuperscript{14} In other words, s. 377 which is resorted to protect children from sexual}

\begin{footnotesize}
\begin{enumerate}
\item Ibid para 34
\item Ibid, paras 35 & 36
\item “377. Unnatural Offences - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”
\item Naz Foundation versus Union of India, WP( C ) No. 7455/2001 date of decision 2\textsuperscript{nd} July, 2009
\end{enumerate}
\end{footnotesize}
abuse as the respondents claim, has become a weapon against lesbians, gays, bisexuals and trans-genders (in short, the LGBT). The NGO works in the field of AIDS/HIV prevention. They argued that, homosexuality could lead to AIDS and when they want to create awareness among the LGBT groups, they never disclose their sexual orientation for fear of prosecution under s. 377 and hence decriminalizing the act would solve many of the problems. They have also based their arguments on the grounds of privacy, equality and discrimination on the basis of sexual orientation. According to the petitioner, Section 377 IPC is based upon traditional Judeo-Christian moral and ethical standards, which conceive of sex in purely functional terms, i.e., for the purpose of procreation only. Any non-procreative sexual activity is thus viewed as being “against the order of nature”. The submission is that the legislation criminalizing consensual oral and anal sex is outdated and has no place in MODERN SOCIETY.

The petitioners very forcefully argued that while right to privacy is implicit in the right to life and liberty and guaranteed to the citizens, in order to be meaningful, the pursuit of happiness encompassed within the concepts of privacy, human dignity, individual autonomy and the human need for an intimate personal sphere require that privacy – dignity claim concerning private, consensual, sexual relations are also afforded protection within the ambit of the said fundamental right to life and liberty given under Article 21. It is averred that no aspect of one’s life may be said to be more private or intimate than that of sexual relations, and since private, consensual, sexual relations or sexual preferences figure prominently within an individual’s personality and lie easily at the core of the “private space”, they are an inalienable component of the right of life. Based on this line of reasoning, a case has been made to the effect that the prohibition of certain private, consensual sexual relations (homosexual) provided by Section 377 IPC unreasonably abridges the right of privacy and dignity within the ambit of right to life and liberty under Article 21. The petitioner argues that fundamental right to privacy under Article 21 can be abridged only for a compelling state interest which, in its submission, is amiss here.

On the other hand, the Ministry of Home Affairs, Union of India, in its affidavit, submitted that the impugned provision is necessary since the deletion thereof would well open flood gates of delinquent behavior and can possibly be misconstrued as providing unfettered licence for homosexuality. Proceeding on the assumption that homosexuality is unlawful, it has been submitted in the affidavit that such acts cannot be rendered legitimate only because the person to whose detriment they are committed has given consent to it. Conceding ground in favour of right to respect for private and family life, in the submission of Union of India, interference by public authorities in the interest of public safety and protection of health as well as morals is equally permissible.

Terming the issues raised in the petition at hand as a subject relating to policy of law rather than that of its legality, Union of India relies upon the reports of Law Commission of India particularly on the issue whether to retain or not to retain Section 377 IPC. Reference has been made to 42nd report of the Commission wherein it was observed that Indian society by and large disapproved of homosexuality, which disapproval was strong enough to justify it being treated as a criminal offence even where the adults indulge in it in private. Union of India submits that law
cannot run separately from the society since it only reflects the perception of the society. It claims that at the time of initial enactment, Section 377 IPC was responding to the values and morals of the time in the Indian society. It has been submitted that in fact in any parliamentary secular democracy, the legal conception of crime depends upon political as well as moral considerations notwithstanding considerable overlap existing between legal and safety conception of crime i.e. moral factors.\(^\text{16}\)

Acknowledging that there have been legal reforms in a large number of countries so as to decriminalize homosexual conduct, Union of India seeks to attribute this trend of change to increased tolerance shown by such societies to new sexual behavior or sexual preference. Arguing that public tolerance of different activities undergoes change with the times in turn influencing changes in laws, it is sought to be pointed out that even the reforms in the nature of Sexual Offences Act, 1967 (whereby buggery between two consenting adults in private ceased to be an offence in the United Kingdom) had its own share of criticism on the ground that the legislation had negatived the right of the state to suppress ‘social vices’. Union of India argues that Indian society is yet to demonstrate readiness or willingness to show greater tolerance to practices of homosexuality. Making out a case in favor of retention of Section 377 IPC in the shape it stands at present, Union of India relies on the arguments of public morality, public health and healthy environment claiming that Section 377 IPC serves the purpose.\(^\text{17}\)

The Delhi High Court agreed with the arguments of the petitioners and declared the provision unconstitutional. This judgment has attracted scathing criticism. The All-India Muslim Personal Law Board (AIMPLB) and the Apostolic Churches Alliance have strongly opposed the Delhi High Court’s judgment decriminalizing homosexuality between two consenting adults.\(^\text{18}\) Even if it was conceded that consensual sex between two adults in private came under the right to privacy and dignity, it could be restricted on the principles of morality, decency and health. In determining morality and decency, regard must be had for the existing social realities based, among other things, on beliefs of all major religious practices. The fact that 76 countries still treated homosexuality as a crime should also be taken into account. Mr. Ahmadi pointed out that religious texts such as the Koran and the Bible, *Arthasastra* and *Manusmriti* condemned homosexuality. Social morality was a relevant factor to adjudge the validity of a law.\(^\text{19}\)

The Judgment is criticized for totally ignoring issues of social morality.”The High Court has relied on foreign judgments for the proposition that “if, in expressing one’s sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy”. It, therefore, held that the “sphere of privacy allows persons to develop human relations without interference from the outside community or from the State” and thus the criminalization of “the person’s core identity solely on account of his or her sexuality” violates the right to privacy guaranteed by Article 21. If such a sweeping proposition is to be accepted, one would have to decriminalize the offence of adultery penalized under section 497 IPC. After all, in an adulterous relationship between

\(^{16}\) Ibid para 12
\(^{17}\) Ibid para 13
\(^{18}\) The Hindu online, New Delhi, March 1st 2012
\(^{19}\) Ibid
two adults in private, both are acting consensually and without harming the other. And how about incest? Should now consensual but incestuous acts between adults in private be treated as legitimate? The very criteria adopted by the High Court for holding that criminalization of homosexuality results in an infringement of Article 21 are, therefore, unsustainable.”

**Alcoholism**

Alcoholism is an age old problem in India. Though prevalent in certain communities, it was looked down as an immoral practice in a majority of the communities. For certain castes, alcohol was totally prohibited especially for women. Even when culture tolerated it, there was always a sense of immorality attached to it. This is discernible from a few cultural factors. No person would visit any place of worship in a drunken condition and morality required men not to drink in the presence of women and intoxicated men to keep away from women. India’s Freedom Struggle which combined in itself a social reform movement, women’s rights movement, a farmer’s movement, also included and spread sentiments against alcoholism. A Directive Principle of State Policy in Part IV of the Constitution ordains the State to endeavor to bring about prohibition of the consumption of alcoholic and intoxicating beverages except for medicinal purposes.

Sporadic anti arrack movements are common in the country and some States have also experimented with total prohibition. However, there is no total prohibition of alcoholic beverages in India. On the other hand, liquor fetches government substantial revenue. Rather than total prohibition, the Governments and the civil society now focus more on drunken driving, preventing spurious liquor, regulating sales of liquor etc. With the free availability and absence of any prohibition or even control, alcoholism has increased steeply.

The Government is even criticized for encouraging alcoholism. The unfortunate situation is that the government is neither capable of nor willing to control or prohibit consumption of alcohol. The Government itself opening outlets for selling liquor is not uncommon. Alcohol is opposed by women’s rights activists and women’s organizations not merely on the ground of inherent immorality, but also because when a man turns alcoholic, the woman in the house is faced with increased levels of domestic violence, the financial position of the family worsens and the family burden falls on shoulders of women. It also leads to increasing rates of crime especially against women. Except for these things, Indian society has become lot more permissive. Consumption of liquor has become a status symbol and is now so extensive that the sense of immorality or stigma attached with it is fast waning out. The immorality of the process is not even perceived except in the private circles of a few traditional people.

What is peculiar here is that on the one hand, it is the women’s NGOs that lead the anti

20 N.H.Hingorani, Of Social and Moral Behaviour Delhi HC has overstepped its limits on Section 377 available at http://lawyersupdate.co.in/LU/1/792.asp visited 19-07-2012

21 Art.47 of the Constitution of India

22 Alcohol consumption has been steadily increasing in developing countries like India since the 1980s. The pattern of drinking to intoxication is more prevalent in these countries. Per capita consumption of alcohol has been increasing at an alarming rate and also people now drink at an early age than previously. Alcohol Related Harm in India, A Fact Sheet http://www.addictionindia.org/images-ntkh/alcohol-related-harm-in-india-a-fact-sheet.pdf visited 21-07-2012
arrack movements, and on the other hand, alcoholism is spreading to women. This is more shocking in terms of social morality. Men have not reduced consumption of liquor and more women are reported to have picked up this habit. Of late, women are also competing with men for running liquor shops. In June 2012 when liquor shops were allotted in Andhra Pradesh, there were several women applicants. One reason could be that women were pushed forward by the men in the family but for many women who have been fighting against ills of liquor sales, this did come as a surprise.  

Indian Excise Law is value neutral. It does not prohibit drinking, rather only tries to regulate it. The legal drinking age in India and the laws which regulate the sale and consumption of alcohol vary significantly from state to state as this is a state subject under the Constitution. Consumption of alcohol is prohibited in a few states in India and all other states, permit alcohol consumption, but fix a legal drinking age of between 18-25 years. Indian alcohol law retains only a few relics of any aspect of social morality. Firstly, liquor shops cannot be situated within a radius of 100 meters of any place of worship. Secondly, certain dry days are observed in the country. Dry days are those on which sale of liquor is prohibited. Dry days are observed on major festive days and days of national importance. A third aspect of it is a strict prohibition of advertising alcoholic drinks. It is a different matter that spurious advertising is undertaken by private news channels. The New Excise Policy 2012 adopted by the Government of Andhra Pradesh seeks to create awareness among people on the ill effects of alcohol consumption. Drunken driving is made an offence under the Motor Vehicles Act recently but this has nothing to do with social morality. This is in the interest of road safety that the Government has decided in favor of imposing stringent penalties. Smoking is not totally prohibited but only smoking in public places is prohibited. Similarly, prohibition of smoking in public places is in public interest while prohibition of advertising tobacco products could be related to social morality as behind this, a conviction is discernible that a habit which is considered immoral or harmful to public health shall not at least be positively encouraged.  

It is also possible to determine what social morality is in the light of the newly emerging doctrines of human rights and gender equality. In a recent judgment, the Supreme Court of India declared unconstitutional s. 30 of the Punjab Excise Act 1914 which prohibited the employment of men below the age of 25 and any woman in any premises where alcoholic and intoxicating drinks are consumed.

25 Ibid
26 Government of Andhra Pradesh, Excise Policy 2012-13,G.O. MS No. 390, Revenue (Excise II ) Department, dated 18-06-2012
27 (On 1 March 2012, the Union Cabinet approved proposed changes to the Motor Vehicle Act. As per the new provisions, drunk driving would be dealt with higher penalty and jail terms - fines ranging from ₹2,000 to ₹10,000 and imprisonment from 6 months to 4 years. Drink driving will be graded according to alcohol levels in the blood From Wikipedia, the free encyclopedia http://en.wikipedia.org/wiki/Alcohol_laws_of_India visited 21-07-2012)
28 Prohibition of Smoking in Public Places Rules 2008
29 Anuj Garg & Ors v Hotel Association of India, 6th December, 2007 Appeal (civil) 5657 of 2007.
Avoidance of women from such places was based on the moral standards of the pre-Independence Indian society. This is challenged on the basis of denial of equality to women in matters of employment. The Court observed, “Changed social psyche and expectations are important factors to be considered in the upkeep of law. Decision on relevance will be more often a function of time we are operating in. Primacy to such transformation in constitutional rights analysis would not be out of place”.  

“The present law ends up victimizing its subject in the name of protection.”

“Instead of putting curbs on women’s freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the state as well as law modeling done in this behalf”.  

The Court made a reference to the description of the notion of “romantic paternalism” by the US Supreme Court in *Frontiero v. Richardson* wherein the US Supreme Court said in the context of bar on women in military service, “There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage. As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes”.  

The Apex Court favorably recalled the dissenting opinion of Marshall J in a case, wherein there was an effective bar on females for the position of guards or correctional counsellors in the Alabama state penitentiary system. The prison facility housed sexual offenders and the majority opinion on this basis inter alia upheld the bar, where he said “In short, the fundamental justification for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women that women, wittingly or not, are seductive sexual objects”. The Court concluded that the impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.  

This is an example of the Apex court redefining social morality so as to be in consonance with the notions of gender equality.

**PuB culture, Dress Code For Women And ‘Moral Policing’**

“Moral policing” is the slogan that is raised every time a discussion about women’s freedom of dressing is called for. Women and girls find the Western dresses very fascinating which sometimes may end up showing a lot of skin. While a section of the women deem it as a matter of personal choice, this is perceived by another section as offensive to public morals and even obscene. However, certain institutions in India still have a dress code which is not challenged. What is more offensive is the excessive skin showing and exhibition of female body in the media especially the movies. India has an obscenity law which however, is not effectively enforced. It is difficult to lay down clear

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30 Ibid para 8  
31 para 35.  
32 para 36  
33 411 U.S. 677, 93 S.Ct. 1764  
34 Dothard v. Rawlinson 433 U.S. 321, 97 S.Ct. 2720  
35 supra n. para 45  
36 INDECENT REPRESENTATION OF WOMEN ACT 1986 Section 3 of the Act in nutshell prohibits for publication or causing for publication or arranging or taking part in publication or exhibition of any advertisement which
and universal standards of what is obscene, but it is equally difficult to draw a line between what is obscene and what is an artistic expression.

M.F. Hussain, a famous artist, has been criticized for his so called ‘obscene’ paintings. It was also reported that an art student from a University in Baroda was held in police custody for six days for painting allegedly obscene works as part of an examination. Similarly, an incident of Richard Gere kissing Shilpa Shetty in public in April 2007 during an AIDS awareness campaign, evoked strong reactions from certain corners of the society. The reactions are described as “intolerance as a society towards the expression and display of emotion by different people”.

However, acts of physical intimacy in public, between people of different sexes is opposed to social morality in India. Pubs were unknown to India sometime ago but are fast catching up with the youth. Pub culture is generally disapproved by a majority and is vehemently opposed by conservative organizations which are sometimes called ‘Fundamentalist’. In January 2009, activists of Sri Ram Sena, a Hindu Fundamentalist Organization, attacked women sitting in pubs. Criminal cases have been filed against the miscreants. Besides the few situations discussed above, there are many more occasions of social morality being called in for a reassessment. For example, tradition did not allow women to go out either for education or for employment. However, these matters have been accepted by the society without much friction perhaps because these are matters of Fundamental Rights and gender equality and law is intentionally used as an instrument for social change, or perhaps more because, the society has perceived the advantage in changing. Again, there are matters like ‘honor killings’, or ‘sati’ which were practiced ostensibly in the name of culture. However, law had little difficulty in prohibiting them because they involve acts like murder or abetment to commit suicide, which per se are illegal and also criminal acts.

To sum up, it is not for the legislature or for the judiciary to make a value judgment on issues of social morality. Law leaves certain matters to the wisdom of the civil society to regulate individual’s conduct through culture or religion. In the alternative, such matters are left within the domain of personal liberty. Questions of social morality have been agitated before the courts several times. Normally, the Courts are not supposed to pronounce on such matters. However, if issues of social morality can be argued on a solid and clear foundation of Fundamental Rights or Human Rights, the later have prevailed over matters of social morality. Gender equality, privacy, personal liberty are the titles in the light of which social morality may be decided and clearly, the former have prevailed over the latter.

There is a valid point when it is said True, notions of morality are subjective and do change contains “indecent representation of women” in any form. The expression “indecent representation of women” has been defined in Section 2(c) of the Act as depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals. S. 292 Indian Penal Code and Film Censor Laws also are intended to prohibit obscenity.


38 Girls Assaulted at Mangalore Pub 26 Jan, 2009, Times of India, Mangalore
over time. Equally true is the fact that morality by itself is not a ground of restriction of fundamental rights. But is morality altogether irrelevant? After all, it is morality which makes incest or adultery abhorrent. Humans do not exist in vacuum. Law is meant to reflect standards of social behavior. Societal morality is inherent in the very conceptualization of a legal norm.\textsuperscript{39}
Police: A Journey of an Organization

Dr. N.K. Gupta*1
Anupam Manhas**

Introduction

The police are not merely a segment in the civil administration. This is particularly so in a country like India where they perform a wide range of functions.2 The maintenance of law and order in the country such as India, where the population is so scattered, must necessarily be both important and expensive, and the condition of efficiency and economy is a task of the greatest difficulty.3 The police are in a strategic position with reference to crime causation. They come next to family and other personal groups in importance. Among both criminals and non-criminals they frequently are personified as “the law” and respect for law depends upon the behaviour of the police more than on any other agents of the state.4 They are in news almost on a daily basis and the manner in which they exercise the powers given to them is the subject of serious debate.

Police: Meaning

The term ‘police’, derived from the Greek “Politeia”, originally applied to the general instrument of government.5 In Ancient Greece it included entire public activity of the city state with the development of individual community guaranteed by the laws. The sphere of police activity was gradually narrowed. Until today in Germany it is used to include only internal governmental administration, exclusive of military, financial and judicial functions.6 The Latin equivalent of ‘Politeia’ is ‘Politia’. The term ‘Politia’ stands for the state or administration.7

New Encyclopedia Britannica defines police as “a body of civil officers charged with maintaining public order and safety and enforcing the law, including preventing and detecting crimes. In addition, it is usually entrusted with various inspectional, licensing and regulatory activities.”8 Venkatramaiya Law Lexicon explains the term police as “the department of government which is concerned with maintenance of public order and safety and the enforcement of law.”9 According to the Oxford Dictionary police means “an official group of people employed by state to prevent and solve crime and keep public order.”10

1 *Professor, Department of Law, H.P.University, Shimla-1710005
   ** Lecturer, DDM Sai Law College, Kallar, Hamirpur-177042
In a broad sense, the term police connotes the maintenance of public order and the protection of persons and property from the hazards of public accidents and the commission of unlawful acts; specifically, it applies to the body of civil officers charged with maintaining public order and the safety and enforcing the law, including preventing and detecting crime. In its wider aspects, the term at one time also included such public health activities as street paving and lighting, or scavenging and sanitations, as well as applications broad enough to comprehend the entire range of government domestic policies. In modern usage, it includes various inspectional, licensing and other regulatory activities. In the modern world, police generally refers to persons employed by government who are authorized to use physical force in order to maintain public order and safety. Police usually wear distinctive clothing and often carry arms.

The Police are the official organization that is responsible for protecting people and property, making people obey the law, finding out about and solving crime and catching people who have committed crime. It signifies a kind of planning for improving or ordering communal existence. Police in the contemporary world is generally used to indicate the executive civil force of a state to which is entrusted the duty of maintaining public order and of enforcing regulations for the prevention and detection of crime.

It is body of civil servants whose duties are preservation of order, prevention and detection of crime and enforcement of laws. They are the agents of the state whose function is the maintenance of law and order and especially the enforcement of the regular criminal code.

Section 1(1) of the Police Act 1861 defines police as “the word police shall include all persons who shall be enrolled under this Act.” Section 2(b) of the Police Forces (Restriction of Rights) Act, 1966 defines it is “any force charged with the maintenance of public order.”

Most of the ‘police’ definitions differ in part from each other, but incorporate three elements: function, structure and legitimacy. The main function of policing is the maintenance of order and regulation of norms but it is not the only function. The structure of police is such that the specific individuals are organized to fulfill police functions. The police organization is not autonomous underpinning this structure or organization is the overseeing of the police by some political authority.

12 Ibid.
17 A.K. Jain, Criminology, p. 156.
18 Supra Note 4 at p. 330.
19 Supra Note 5 at p. xxi.
20 Ibid.
POLICE: FUNCTIONS

The police perform a wide range of functions. They are:

(a) Detection of Crime: The most important function of police is to deal with the anti-social elements in the society. This function brings with it detection and investigation of crime, arrest of the offenders and the collection of evidence against those who are prosecuted in court of law.

(b) Crime Prevention: The preventive tasks of police covers actions like preventive arrests, arrangement of beats and patrols, collection of intelligence and maintenance of crime records to plan and execute appropriate preventive action, handling of unlawful assemblies and their dispersal.21

(c) Enforcement of Regulations: The third function of the police is owing to the growth of certain problems of the contemporary period involving the enforcement of a wide variety of regulations which are not concerned directly with the criminal.22 This includes enforcement of social legislations.

(d) Patrolling and Surveillance: Patrolling is the visible police function for the purpose of general watch and ward. The patrolling in rural police station is different from patrolling in urban police stations.

(e) Service Oriented Functions: These functions include rendering service of a general nature during fairs and festivals, rescuing children lost in crowds, providing relief in distress situations arising due to natural calamities.23

Apart from these principles, the Indian Police performs many other roles such as manning the international border as a second line of defense. The police are expected to deal with outlaws of varying degrees ranging from terrorists to local miscreants. It assists the state and central administration to conduct elections.24

Policing: Principles

John Anderson, a former top ranking British officer formulated principles to guide police conduct and behavior to manage the drastic changes taking place in the societies throughout the world. These principles may be summarized as:25

a) to contribute towards liberty, equality and fraternity in human affairs.

b) to help reconcile freedom with security and uphold rule of law.

c) to facilitate human dignity through upholding and protecting human rights and pursuit of happiness.

d) to provide leadership and participation in dispelling cryogenic social conditions through cooperative social action.

24 Supra Note 21 at p. 22.
25 Id. at p. 21.
e) to contribute towards the creation and reinforcement of trust in communities.

f) to strengthen the feeling of security of persons and their property.

g) to investigate, detect and activate the prosecution of offences within the role of law.

h) to facilitate freedom of passage and movement of highways, roads and streets and on avenues open to public passage.

i) to deal with major and minor crimes and help and advice those in distress and, where necessary, activating other agencies.

**HISTORY OF POLICE ADMINISTRATION**

The legacy of police dates back to the prehistoric period. The primitive man dealt with the subject with utmost ease. In case of violation of right, the man was quick to retaliate. Man is a social animal. He has the inborn instinct to live in groups since times immemorial. Later these groups gave way to the organized society. A need was felt in the society to have some means to maintain order and peace. These means differed from society to society and from time to time. To ensure that its members conformed to accept norms and codes, it became necessary for an organized society to have a system to oversee the conduct of its members.26 Under the simplest forms of state organization the ruler had his employed agents to enforce his decisions.27

The basic function of a well administered state is to maintain law and order and to preserve peace among its citizens. For this it is essential that the state is equipped with a well-organized police.28 It is not possible to connect the history of any branch of present administration with that of the modern time. This is due to the reason that the basic conceptions of administration in the past were different from that of the present day. There can be little comparison between the administration of criminal justice and the police systems of the past and the present.29

The history of police administration in India can be studied under the following heads:

a) Police in Ancient India

b) Police in Medieval India

c) Police in British India

d) Police in Independent India

I) **Police in Ancient India**

(a) **Police Administration in Pre Mauryan Period**

Police has been in existence in India in one form or another from the very ancient times.
though we have little knowledge of police organization in ancient India. However, from the beginning of Indian history certain state officials or private persons were vested with police functions.\textsuperscript{30} Unfortunately the records do not clearly distinguish between the police and military officers.\textsuperscript{31} At times the police functions were discharged by the military officers and vice versa. The earliest mention of a functionary doing policing like watch and ward against thieves is available during Vedic era.

In the Ramayana of Valmiki, it is found that there were squads of police to captivate Hanuman in Lanka. Even when Lord Rama returned from exile, arrangements by police were made to control the crowd to avoid stampede.\textsuperscript{32} In old Sanskrit classics like Sakuntalam, a reference is made of the people patrolling the lanes armed with lathis, investigating the case, in involving the loss of a diamond ring and the spies collecting information.

The Laws of Manu carry some vague references to the police. He emphasized that the police functions should be entrusted to only those who were well acquainted with the local people and were dedicated to the case of protection of society against law violation. The King was to dispatch patrols, maintain police posts as also send out spies who were called upon to help him in criminal administration.\textsuperscript{33}

The ancient police system in India was based on the principle of local responsibility and mutual cooperation. There was a different set of organization for rural areas and different for urban areas.

The indigenous system of police in India was organized on the basis of collective responsibility of the village community.\textsuperscript{34} Responsibility for policing rested with the headman who was usually assisted by a watchman and sometimes by a special police helper.\textsuperscript{35} The security of the village and prevention and detection of crime was in the hands of the headman. The autonomy of headman depended upon the structure of land holding. If there was a dominant land owner, as was often the case, the responsibility of policing rested with the land owner. The headman acted as his agent for police as well as revenue purposes. But where the land holding was more evenly distributed or where a dominant land owner was remote, the headman represented the pinnacle of the police authority.

The watchman had to report to the headman every arrival and departure of strangers and suspected persons. In case a theft was committed in the village, the headman had to detect the thieves and recover the stolen property. In case he failed to recollect the stolen properly, he had to make up the loss as far as his means permitted. The balance was recovered from villagers. At times, the payments were made to the leaders of plundering tribes to prevent attacks by them.

\textsuperscript{30} Id. at p. 3.
\textsuperscript{34} Supra Note 7 at p. 301.
A tax was levied upon villagers to meet the expenses connected with the visits of soldiers and officers with their persons and attendants. A tax was levied upon the villagers for meeting the expenses of soldiers quartered on the village and a fine imposed upon it for giving shelter to cheats and bad characterized.

(b) **Police Administration under Mauryas**

Kauṭilya’s *Arthasastra* was written between 321-200 B.C., during the Mauryan period. It provides a basic structural organization and administrative setup in logistic and philosophical pursuit on the knowledge of police investigation processes, punishment, detection and prevention. It was stipulated that the King should learn everyday at night from his secret spies the intention and actions of his subjects and officers and the opinions of ministers, enemies, soldiers, the members of the assembly, relations and women in harem. With a view to checking corruption and misuse of power the police officers were paid handsome salaries. The compensation as well as subsistence was also granted to the families of those police officials who died on duty. The grants were given to policemen on the occasions of funerals, sickness and child birth. These welfare measures ensured that police officers were honest and sincere in their duty.

Kauṭilya’s work gives description of two main type of police i.e. regular police and secret police.

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36 *Supra Note* 31.
37 *Ibid*
38 *Supra Note* 32.
39 *Supra Note* 28 at p. 3.
40 *Id.* at p. 4.
(i) **Regular Police**

a) **Organisation**

The regular police was further divided into two branches namely the rural and urban. The PRADESHTA (for the rural area) and the NAGARIKA (for the urban area) were at the top, the rural and urban STHANIKAS were in the middle, and lastly, the rural and the urban gopas were at the bottom. The Pradeshta with his retinues of Gopas and Stanikas was responsible for locating external thieves and officers’ in charge of the city, namely, the Nagarakas, were responsible for detching internal thieves.\(^{43}\) Kautilya mentions 18 great officers of state and calls them ASHTADASATIRTHAS.\(^{44}\) Out of these 18 officers seven discharged police and military functions. They were: DAUVARIKA, ANTARVANSIKA, PRASASTA, DANDAPALA, DURGAPALA, ANTAPALA and ATAVIKA.\(^{45}\)

b) **Functions**

The DAUVARIKA was the warden of the police. He kept strict vigilance in the management of the royal palace. He was considered as a very important officer.\(^{46}\) ANTARVANSIKA was the overseer of the harem. This officer was quite like a lady. Her function was to guard against the intriguing women who were in close connection with the King.\(^{47}\) Thus, while DAUVARIKA was responsible for the maintenance of law and order of the outer life of palace,\(^{48}\) the ANTARVANSIKA was incharge of the peace and security of its inner life.\(^{49}\)

The PRASASTA was a military cum police officer and he was in charge of the ammunitions.\(^{50}\) The DANDAPALA, the DURGAPALA and the ANTAPALA were the military officers but were discharging a good deal of police functions as they were in charge of peace and order of the country at large.\(^{51}\) The DANDAPALA in latter times was known as DANDAPARIKA or PURAPALA when he became out and out a police officer.\(^{52}\) DURGAPALA was latter known as KOTAPALA and subsequently as KATUALA or KOTWAL. He was the head of the city administration with the duties of collection of revenues and maintenance of law and order by means of police, secret agents and watchmen.\(^{53}\) ANTAPALA was vested with the duty to guard the roads. He was responsible to make roads safe of robbers and as such collected road tax from merchant travellers.\(^{54}\) The road tolls were a sort of insurance. If the Merchants suffered any loss from the robbers the ANTAPALA was to

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\(^{43}\) *Supra Note* 31 at p. 25.

\(^{44}\) *Id.* at p. 20.

\(^{45}\) *Ibid.*

\(^{46}\) *Ibid.*

\(^{47}\) *Ibid.*

\(^{48}\) *Ibid.*

\(^{49}\) *Ibid.*

\(^{50}\) *Ibid.*

\(^{51}\) *Id.* at p. 21.

\(^{52}\) *Ibid.*


\(^{54}\) *Ibid.*
compensate the loss.\textsuperscript{55}

ATAVIKA were the forest tribes who were a great danger to public safety when recruited into army they made fearless soldier, and while employed in police, they put up efficient nocturnal operations, as well as, daylight service. By mentioning ATAVIKA as a high official Kautilya probably means the ATAVIPALA, who was incharge of controlling the ATAVIKAS.\textsuperscript{56} He i.e. Kautilya was of the view that criminal laws and police regulations were the means of KONTAKA SODHANA, the cleaning of thorns i.e. eradication of the dangerous elements by criminal law.\textsuperscript{57} The following were branded as KANTAKS by Kautilya.

a) the merchants and artisans who cheat their customers.
b) physicians who neglect the patients.
c) dishonest musicians and dancers.
d) thieves in guise of gentlemen
e) persons committing crimes like forcible entry, poisoning, frauding.\textsuperscript{58}

The wine sellers, restaurant keepers and prostitutes were required to send regular reports about suspected persons. No citizens were allowed to move outside in the night after the announcement of the trumpet by the curfew police except doctors, persons carrying dead bodies, persons going to attend call of government, persons going to meet emergencies like outbreak of fire etc., persons going to attend theatrical performance, a personal travelling with a lamp in his hand etc.\textsuperscript{59}

The security force operated in the following way. Huntsmen and outcastes roamed about the forest. At the approach of thieves and hostile they conveyed the news by the blowing of conches or by the beating of drums from safe distances, or else by using swift conveyances.\textsuperscript{60} The carrier pigeons or relay of smoke and fire signals were used to report the movements of hostiles. In the next place, measures were taken on the widest scale for the protection of life and property of the public.\textsuperscript{61}

He favours the use of torture for extorting confessions from suspects whose guilt is established prima facie. Kautilya gives us infact a gruesome list of eighteen kinds of torture out of which some are declared to be in common use, and the rest are reserved for the punishment of heinous crimes. However, some category of people were exempted from torture like pregnant women, women confined a month before, Brahmans and ascetics until they are accused.\textsuperscript{62}

Kautilya mentions the obligation of public of watch and ward in the rural as well as urban

\textsuperscript{55} Ibid.
\textsuperscript{56} Id. at p. 22.
\textsuperscript{57} Ibid.
\textsuperscript{58} Ibid.
\textsuperscript{59} Ibid.
\textsuperscript{60} Supra Note 42 at p. 133.
\textsuperscript{61} Ibid.
\textsuperscript{62} Supra Note 42 at p. 134.
areas. In the rural areas the secret information was gathered through the agency of beautiful women about the behaviour of respectable and local customers as well as of new comers fallen asleep through intoxication in the rooms of liquor house.\textsuperscript{63} Customers who were suspected of acquiring property in various improper ways or making payments in stolen cash or kind, as well as those behaving like spend thriftrs were to be lured outside by the dealers and handed over the police.\textsuperscript{64}

In the urban area the residents of the city were required to act in a specific manner on the new arrivals in their midst. Owners of charitable rest houses had to seek permission for lodging heretical visitors. Physicians were to report to GOPAS and STHANIKAS about patients desiring secret treatment of their wounds, as well as persons dealing with dangerous drugs.\textsuperscript{65} The stringent regulations were enforced by penalties.\textsuperscript{66}

(ii) \textbf{Secret Police}

\textbf{Organisation}

Megasthenes says that ephors (inspectors) or episkopai (overlookers) formed the sixth Indian caste. Everybody was not eligible for this service. Only the most qualified men were recruited for this service. The Mauryas followed the Arthashastra tradition in four respects. These were careful recruiting of spies, countrywide espionage, precautions against false reports by the spies and the spies’ enlistment of the services of loose women.\textsuperscript{67} The spies were to be secretly punished or dismissed in the event of frequent mutual disagreements of their reports.

The secret service was divided into two classes, namely, the itinerant (SANCHARA) and the stationary (SAMSTHA). The SANCHARA group consisted of types distinguished for their miscellaneous learning, bravery, cruelty or facility of access to the inner apartments of men of high rank.\textsuperscript{68} The SAMSTHA group consisted of those supposedly belonging to one or other of well-known Brahmanical order or stages of life as well as heterodox order of monks.\textsuperscript{69} The members of the two groups were to operate without being known to each other. Both the groups belonged to the kings’ official establishment on regular pay scale.

The SANCHARA group included four type of spies – the SATRIS, the TIKSHNAS, the RASADAS and the BHIKSHUKIS or PARIVRAJIKAS. The Satris were the spies who were orphans. They were to be maintained by state. They had knowledge of palmistry and tricks of legerdemain.\textsuperscript{70} The Tikshnas were desperadoes who may fight with elephants for money in disregard of their lives. The Rasadas were those who did not have affection even for their relatives. They were insolent and

\begin{thebibliography}{9}
\bibitem{63} \textit{Id.} at p. 135.
\bibitem{64} \textit{Id.} at p. 134.
\bibitem{65} \textit{Supra Note} 42.
\bibitem{66} \textit{Ibid.}
\bibitem{67} \textit{Id.} at p. 264
\bibitem{68} \textit{Id.} at p. 136.
\bibitem{69} \textit{Ibid.}
\bibitem{70} U.N. Ghoshal,\textit{A History of Indian Public Life}, (1966), p. 137.
\end{thebibliography}
cruel.\textsuperscript{71} The Bhikshuki was a poor Brahman widow. Being clever and desirous of earning her living, she was honoured in King’s inner apartments. She visited the families of high officials.\textsuperscript{72}

The Samastha group comprises five type of spies namely the KAPATIKA, the UDASTHITA, the GRIHAPATIKA, the UAIDEHAKA and the TAPASA.\textsuperscript{73} The Kapatika or a false vedic student, is a bold pupil capable of knowing the minds of others.\textsuperscript{74} The Udasthita means the false monk. He is the one who has fallen from vows but is clever and otherwise pure.\textsuperscript{75} The Grihapatika or the false householder is the cultivator who has suffered loss in his profession but is clever and pure. The Uaidehaka is the false merchant, who has fallen from his vows but is clever and otherwise pure.\textsuperscript{76}

Besides the types and sub types mentioned above, there were others outside the classified list\textsuperscript{77} like persons deputed for espionage on behaviour of the eighteen top ranking officials. There is mention of hunchbacks, pygmies, the deaf and dumb, idiots as well as doctors, dancers, singers and the women of various professions.\textsuperscript{78}

Working of the Secret Police

The secret services performed various functions. Their services were availed for general administration, maintenance of law and order and for miscellaneous purposes.\textsuperscript{79}

(i) Role of Spies in General Administration

The spies were employed to perform various functions like surveillance of the state officials, invigilation of the subjects, suppression of the enemies of the state and strengthening interstate relations. The spies were employed for fomenting quarrels within the families of enemies of the state. They were also used as instruments for their direct assassination by the use of poison and dagger.\textsuperscript{80} Even the emissaries (dutas) sent to foreign countries were expected to act as secret service men. They used pseudo ascetic and pseudo mendicant spices for gathering secret information about the sentiments of enemy’s subjects towards their ruler and knowing enemy’s plans. In the absence of such facilities the duta was to gather information by a number of technical devices\textsuperscript{81} like the supposedly wild talk of spies posing as beggars, drunkards and mad men and inspecting the paintings and the cipher codes (prepared by spices).

(ii) Maintenance of Law and Order

In order to maintain law and order, the spies were employed by the SAMHARTA in different

\begin{itemize}
\item \textsuperscript{71} \textit{Ibid.}
\item \textsuperscript{72} \textit{Ibid.}
\item \textsuperscript{73} \textit{Id. at p. 136.}
\item \textsuperscript{74} \textit{Ibid.}
\item \textsuperscript{75} \textit{Ibid.}
\item \textsuperscript{76} \textit{Ibid.}
\item \textsuperscript{77} \textit{Ibid.}
\item \textsuperscript{78} \textit{Ibid.}
\item \textsuperscript{79} \textit{Id. at p. 138.}
\item \textsuperscript{80} \textit{Ibid.}
\item \textsuperscript{81} \textit{Ibid.}
\end{itemize}
ways. Once the gopas completed the statistical return of village lands, the Samaharta was to arrange for a police inquest of selected villages. Spies posing as householders were to report on new arrivals and departures in the village as well as on the movements of the enemy agents. While spies posing as ascetics were to report on the good or bad behaviour of people, the attendants of these pseudo ascetics were spread all over the countryside to report on movement of thieves, desperadoes and enemy agents. These measures were intended to supplement the working of regular police.  

SAMAHARTA was required to spread a network of spies to suppress public enemies. The SATRI type of spies was to set upon persons suspected to be living by underhand means. Their modus operandi consisted in instigating the suspects with offers of money to commit the crime or to learn their secrets by infiltrating into their midst. A subtler method was adopted against thieves and adulterators. Spies disguised themselves as sages. They pretended to possess knowledge of miraculous power like producing invisibility among themselves and sleep among watchman and winning the hearts of women. These powers were demonstrated carefully so as to win the confidence of the criminal gangs. Spies also disguised themselves as old thieves and infiltrated into the midst of the robbers and facilitated their arrest. Some spies instigated them to commit robberies and afterwards caused their assassination or arrest.

(iii) Miscellaneous Purpose

Spies were to be engaged to prevent evasion of the custom duties by dishonest merchants. In times of emergency the spies contributed a lot to raise extraordinary finance. They boosted the public subscription arranged by the SAMAHARTA by first making a large contribution and then shaming those who gave little. Other spies disguised as merchants were to start mercantile operations with ample stock and staff. When considerable stock had been accumulated by sale of merchandise as well as by means of public deposits and loans, the spies were to cause themselves to be robbed at night in collusion with the Kings agent. A check was also placed on the returns of gopas in respect of village lands tenements and families by the agency of spies. These functions were discharged by SAMHARTA. He was to depute spies posing as householders to selected villages to report upon such items as area and output of the fields, the title and the remissions in respect of the tenements, the caste and the occupation as well as the income and the expenditure of the family and their members.

There were spies to report on the taxes paid and the expenses incurred by the merchants. 

(c) Police Administration in Post Mauryan Period

(i) Police Administration under Gupta

The Gupta dynasty in India was particularly known for its excellent law and order situation.
through a well-organized system of police.\textsuperscript{88} Fahien in particularly was struck at the complete safety of the travellers on the high roads as he himself was never molested by robbers or highway men during long travels.\textsuperscript{89} It speaks volumes of efficient working of police of the period. DANDIKA, CHAURODDHARANIKA, ANDAPARIKA, NAGARSRESTHI, SARTHAUANHA etc. were the police officers. A tax was levied on people which was known as CHORAUARJJAN. It was the chowkidari tax and revenue coming from it was spent through the policemen for eradication of thieves and burglars and as such, maintenance of peace and security.\textsuperscript{90}

(ii) Police Administration under Ashoka

The MAHAMATRAS were the highest executive officer in the province. They were responsible for the overall peace and order. Under the PRADESIKAS were employed for the work of collection of revenue, maintenance of peace and order and administration of justice.\textsuperscript{91} Next in line came the RAJJUKAS who were responsible for welfare and happiness of people of province. The AYUKTAS were a sort of village police and were probably working under RAJJUKAS and were to some extent responsible to PRADESIKAS.\textsuperscript{92} Ashoka did not all together suspend spy system.

II) Police Administration in Medieval Period

(a) Police Administration in Muslim Period

The records of eastern Ganga reveal a highly organized system of police administration during the early medieval period.\textsuperscript{93} The police department was run by the DANDAPASIKAS who in same records is also known as DANDODHARANIKA.\textsuperscript{94} They were responsible for the maintenance of peace and order in the country and to catch thieves and other criminals and also to punish them.\textsuperscript{95}

The CHATAS, the BHATAS, the VALLABHAS and VAIS VASIKAS were all entrusted with same police functions. CHATA according to lexicographers means a rogue, cheat, swindler etc. However, this meaning does not go well with military or police force. Thus, we may be justified in equating CHATA with CHHATRA. Word CHHATRA is derived from the root CHHAD meaning to conceal, hide. It would mean one who is concealed or disguised i.e. a member of the secret service. While CHATA was the head of a Pargana, BHATA was his subordinate. The VALLABHAS and the VAISVASIKAS discharged intelligence duties.\textsuperscript{96}

The medieval period in India was by and large ruled by the Muslim rulers.\textsuperscript{97} It is important to realize that the Muslim rulers tried to implant the police system, keeping in mind the concept

\textsuperscript{88} Supra Note 7 at p. 301.
\textsuperscript{89} Supra Note 31 at p. 31.
\textsuperscript{90} Id. at p. 32.
\textsuperscript{91} Supra Note 35 at p. 28.
\textsuperscript{92} Id. at p. 29.
\textsuperscript{93} Supra Note 31 at p. 33.
\textsuperscript{94} Id. at p. 34.
\textsuperscript{95} Ibid.
\textsuperscript{96} Ibid.
\textsuperscript{97} Supra Note 32 at p. 25.
prevailing in their homeland.\textsuperscript{98} This system was based on Quran. However, their administration of police was essentially of a military character. A wealth of literature is available on the nature of administration Mughals gave to India.\textsuperscript{99} However, the documents of this era do not give adequate description of the police.

The police administration under the Muslim rulers can be studied under the following subheads:

(i) Police administration at provincial level

(ii) Police administration at district level

(iii) Police administration at parganas

(iv) Police administration in towns

(v) Police administration in villages

(i) **Police administration at Provincial level**

The Mughal Empire was divided in provinces or subas. At the head of every province was a governor who was called Subahdar or Tarañdor. The term Subahdar comes from the Arabic word ‘Sub’ means direction or point of compass.\textsuperscript{100} The word ‘tarf’ means direction.\textsuperscript{101} The Subahdar was also called nazim or regulator of province. He was appointed by the emperor by a royal sign manual called the firmanisabati.\textsuperscript{102} His main duties were to maintain law and order, enforce imperial decrees and help the collection of revenue. He recruited an adequate police force for maintaining law and order in the province. He made appropriate arrangements for the defence of the province but he could not wage a war or enter into peace with enemies without the permission of emperor. The Subedar’s Court constituted the highest court of appeal in criminal cases within the province. The provincial governors were usually transferred from one province to another after every three or four years so that they might not develop vested interested in the areas under their charge.\textsuperscript{103}

(ii) **Police administration at district level**

The provinces were divided into districts or sarkars. At the head of each district was a faujdar. Faujdars were appointed by the Emperor.\textsuperscript{104} He worked directly under the Subedar. The duties of faujdar included destroying the forts of lawless men and rebel chiefs, guarding the roads, protecting the revenue payers, dispersing or arresting robber gangs, taking cognizance of all violent crimes, putting down smaller rebellions etc.\textsuperscript{105}

\textsuperscript{99} *Supra Note* 33 at p. 2.
\textsuperscript{101} *Id.* at p. 49.
\textsuperscript{103} *Id.* at p. 342.
\textsuperscript{105} *Supra Note* 100 at p. 56.
(iii)  Police administration at Parganas

Each sarkar consisted of a few parganas or tehsils. The SHIKDAR was the chief executive officer of the tehsil whose duties, within his own limited sphere, were exactly the same as those of faujdar.\(^{106}\) His functions included enforcing the imperial orders at the tehsil level, maintaining law and order and helping the revenue officials in the collection of taxes. Under the SHIKDAR were THANADARS appointed one for every thana (police station). These thanadars were paid by the Zamindars and not faujdars.\(^{107}\) The thanadars were assisted by a small number of Barkandazes or armed guards.

(iv)  Police administration in Towns

The chief administrator of the city was the Kotwal. He was the chief of the city police and was assisted by the Central Government.\(^{108}\) Originally, he was a military officer, the commandant of forty five towns, but with the expansion of civil administration he gradually became a police officer.\(^{109}\) The duties of Kotwal included checking the number of persons in the prison and ascertaining their answers to the charges against them. He was required to report to his superiors the cases of those prisoners whom he considered innocent and secure their liberation. In case of the guilty persons who could pay fine, he was required to give orders for getting them pay suitable fines and then releasing them. He was to summon the watchmen and sweepers called halalkhors and take bonds from them that they would daily report to him the occurrences of every mohalla i.e. ward of the city without suppression or exaggeration. He was required to enlist a footman or PADA from each ward and post him there as a spy to report all news, so that he may compare the reports from the two sources and know the truth. It was his duty to keep the watchmen at places of sale or purchase or at places of entertainment where spectators assembled. This was done to seize the pickpockets and the snatchers. He was entrusted with the responsibility of summoning professional women, dancing girls, liquor sellers and vendors of intoxicants and taking bonds from them that if they do any forbidden act they would pay so much as fine. He had to patrol the city and streets at midnight with his followers. When the Emperor and the Subedar was not in residence the capital was ruled by Kotwal.\(^{110}\)

Being the head of spy organization he was a royal favourite. The two chief weapons employed by the Kotwal for dealing with crime and breaches of the regulations were torture and espionage, he was authorised to punish the offenders with penalties which included emplacement, trampling by elephants, beheading, amputation of the hand and merciless flogging.\(^{111}\) He even had the power to inflict capital punishment on highway robbers or the members of criminal tribe. In the absence of a Kotwal his duties were carried out by the collector of revenue.\(^{112}\)

\(^{106}\) Supra Note 102 at p. 347.
\(^{107}\) Supra Note 98 at p. 12
\(^{109}\) Id. at p. 11.
\(^{112}\) Id. at p. 185.
(v) **Police administration in villages**

According to one view in the rural areas, MUQADDAM (the village headman) were often assigned certain police functions by Subahdars.\textsuperscript{113} They were held responsible for maintaining law and order, enforcing crime control in villages and also for suppressing the outbreak of rebellions and riots.

The other view states that in the rural areas the Mughals continued the same police system that was prevalent from time immemorial. The only difference made by them was that there were the separate categories of village watchman, civil and military. The civil category was concerned with both revenue and police functions.\textsuperscript{114} The military category consisted of PAIKS or CHAUKIDARS whose only duty was to apprehend offenders and to preserve peace. Both classes of watchmen were maintained by grants of rent free lands.\textsuperscript{115}

(vi) **Intelligence Organization**

Intelligence formed an important function of Mughal police organization as it enabled the imperial government to have a complete hold over the generals. The detective branch of police was called KHUPHIA.\textsuperscript{116} It consisted of different classes of news writers. These men were scattered throughout the empire.\textsuperscript{117} They sent reports about important happenings in their respective districts at regular intervals. An officer known as DAROGAH or DAK CHAUKI i.e. superintendent of Posts and Intelligence was attached to the Imperial Court.\textsuperscript{118} The news reporters were of the following types:

a) the Waqai-navis
b) the Samanih-nigar or Khufia-navis
c) the Harkarah

While the first two sent written reports, the third one generally brought oral news. Every province had a waqai-navis who posted news writers and spies all over the province. Generally he submitted his reports to the governors but matters of more serious nature were referred by him directly to the imperial government.\textsuperscript{119} At times BAKSHI or incharge of military establishment in the province also acted as waqi-navis.\textsuperscript{120}

The terms waqai-navis and Sawanih-nagar mean the same thing i.e. a writer or surveyor of occurrences. But there is a minute difference between the two. While the former was the more regular and public reporter the later was a secret reporter of important cases only. Initially only

\textsuperscript{113} Supra Note 98 at p. 9.
\textsuperscript{114} Supra Note 31.
\textsuperscript{116} Supra Note 7 at p. 308.
\textsuperscript{117} Supra Note 102 at p. 343.
\textsuperscript{118} Supra Note 104 at p. 9.
\textsuperscript{119} Supra Note 116.
\textsuperscript{120} Ibid.
waqai-navis were employed. But there was a suspicion of their entering into collusion with the local officers. Thus, samanih-nigar who was also called Khufianavis were appointed to reside secretly in the subahs and report the happenings. Besides there were Harkarahs, posted in every province for the purpose of reporting the news of all events to the provincial governors.\textsuperscript{121}

The one essential drawback of the Mughal Period in terms of police administration was the gross neglect of the subordinate hierarchy level below Kotwal.\textsuperscript{122} There was no single well organized central police authority to control, supervise and coordinate the functioning of the several branches of police administration.\textsuperscript{123}

**b) Police Administration under Marathas**

Each village maintained its own watchmen, who belonged to the degraded Mahor or Mang tribes, under the direct control of the patel, and remunerated them for their services with rent free lands.\textsuperscript{124} These watchmen were assisted in the detection of crime by groups of hereditary criminal tribesmen like the Ramosis and Bhils. Each group was under the control of its own naiks or headmen, who were answerable to the patel for any theft or robbery committed in the village.

While this system afforded a moderate safeguard, it failed to prevent crime by Ramosis or Bhils from other areas. Further, the chances of blackmail by the tribesman were manifold. In urban areas the police powers were vested with the Kotwal who also performed municipal duties. He performed most of the functions ascribed to the nagarka or police superintendent in Arthshastra. Opportunities for nocturnal delinquency on the part of inhabitants were greatly less and a strict curfew order which obliged everyone to remain within doors after 10 p.m.\textsuperscript{125}

**III) Police Administration in British India**

With the decline of Mughal Empire in India the police system suffered a severe blow.\textsuperscript{126} The police officials began to exploit the situation to their advantage and became corrupt. Sir Thomas Munroe said, “large proportion of the police officers are either themselves robbers or murderers.” The British reformed the police gradually in piecemeal. The British period can be intensively studied in two portions i.e. between 1757 to 1860 and between 1860 to 1947.\textsuperscript{127}

**a) Period between 1757 to 1860**

Warren Hastings was the first British statesman who made a serious attempt to institute a system of police in India.\textsuperscript{128} The Thanadars and Paiks were rewarded in proportion to their services. Those found guilty of neglecting their duties were dismissed or fined. He was a strong believer that the remedy lay in reforming the indigenous police system rather than destroying it. In 1774 he

\textsuperscript{121} Supra Note 31 at p. 9.
\textsuperscript{122} Supra Note 32 at p. 26.
\textsuperscript{123} Supra Note 100 at p. 10.
\textsuperscript{125} Id. at p. 392.
\textsuperscript{126} Supra Note 31 at p. 10.
\textsuperscript{127} Supra Note 32 at p. 13.
\textsuperscript{128} Supra Note 31 at p. 12.
restored the institution of Faujdars. Now the functional system of the police comprised both officials as well as non-officials. The officials were faujdars and his subordinates and they were essentially of military character. The non-officials were zamindars. As a matter of fact non-officials played more important and active role than the officials because the latter were mainly dependent on former for an effective performance of police functions. In 1775 the authority to supervise police administration was transferred to naibnazim. Muhammad Raza Khan was the naibnazim. A central police office was also established at Murshidabad under the Supreintendent of Mohd. Raza Khan.\textsuperscript{129}

In case of absence of faujdars, the ancient system of village police being responsible to zamindars was retained. The attempts of Hastings to reform the police proved to be futile as the faujdars lacked the adequate authority, establishment and means to endorse the decisions. The political balance was telling more and more infavour of the British. This resulted in shifting of loyalty of zamindars and their subordinates to the British. The result was that the Zamindars withheld their assistance to the faujdars in the policing of the country. On 6\textsuperscript{th} April, 1781 the office of faujdar was abolished and his duties were transferred to European Magistrate who was responsible for apprehending offenders with the help of Zamindars. The Zamindars were to erect and maintain additional thanas at their own cost.\textsuperscript{130} They were also responsible for the behaviour of thanadars and other police officers. The Magistrate was provided with separate establishment each comprising a nazir, a jail officer, a few clerks and a number of barkandazes and the watchmen to assist him in discharge of his duties. The basic military character of faujdari system was replaced by a civil administration. The zamindars were now directly responsible to European Magistrate for efficient functioning of police. Their authority i.e. authority of European Magistrate was extended to the appointment of Thanadars. These reforms also failed. This first British attempt to institute a police system without modifying the criminal law having thus failed, violent crimes and dacoity continued to grow.\textsuperscript{131}

Lord Corn Wallis united the police and judicial functions in the same office of the Magistrate. A need was felt for an effective police system throughout the country, based on a uniform pattern. He introduced the daroga system. Under this system the police administration was directly taken over by the East India Company, completely divesting the Zamindars of the police responsibility. The main reason for the change was that instead of cooperating with the government, the zamindars had starting extorting and amassing wealth through plundering gangs.\textsuperscript{132} The weapons meant for enemies were used against the state.\textsuperscript{133}

Under this system the districts were divided into thanas (police jurisdictions). Each thana was placed under the charge of a daroga who was appointed by the Magistrate and functioned under him. But they could be dismissed only by Governor General in Council. Under each daroga, were 20-50 armed barkandazes. All the watchmen of the villages establishment were subject to his orders and they had to keep him regularly informed. His duties included maintaining peace at markets, fairs

\begin{itemize}
\item \textsuperscript{129} Id. at p. 14.
\item \textsuperscript{130} Id. at p. 15.
\item \textsuperscript{131} Supra Note 100 at p. 16.
\item \textsuperscript{132} Supra Note 31 at p. 17.
\item \textsuperscript{133} Ibid.
\end{itemize}
and other public places and to submit monthly reports on the state of their jurisdiction to district magistrate. He was paid a monthly salary of Rs. 25. In addition to it, he was granted a cash reward of Rs. 10 for every dacoit apprehended and convicted. He was granted 10% of the value of stolen property recovered, provided the thief was convicted. In cities the Kotwal was still in charge of police administration and a daroga was appointed for each ward of the city. The Kotwal acted under the immediate authority of the Magistrate.\footnote{Id. at p. 18.}

The daroga system proved to be a failure as it hardly improved the crime scenario. The establishment of barkandez was totally inadequate.\footnote{Id. at p. 19.} It lacked any assistance from the village police who continued to owe alligience to the old zamindars. Darogas were generally found to be unfit and negligent in their duties. Being low paid, they indulged in malpractices and corruption.\footnote{Ibid.}

Lord Minto was of the view that there is absence of a proper division of labour in police organization. A need was being felt for a central police authority for supervision and control over the entire police force. The first attempt in this regard was made by the appointment of Superintendent of Police later known as Inspector General of Police in Bengal. He was required to submit reports to the government with suggestions for improvement.\footnote{Id. at p. 21.} It resulted in activity, vigilance and constant attention which brought considerable improvement in police matters. The greatest advantage of this office was that the management of the police was placed in the hands of an officer who could devote the whole of his attention to the police affairs. The constant review of the actual position and functioning of the police department was of immense help in improving the police.

In 1816 further changes were effected in the police administration. The Superintendent of Police was required to maintain a register and submit annual reports on all subsidiary police establishments. Magistrates were directed to exercise proper attention to the organization, maintenance and control of police establishments and the chowkidars. Thus, the power of magistrate increased as he had greater control over internal matters of police administration and on appointments, transfer and discipline. In 1829, the office of Superintendent of Police was replaced by that of Divisional Commissioner.\footnote{Id. at p. 23.} The powers of superintendence over the police of a number of districts were transferred to the new commissioner while the executive charge of the district police was left in the hands of the collectors.\footnote{The office of magistrate had now been transferred from the judge to the Collector and Collector Magistrate or Divisional Magistrate became the head of police.}

The Selected Committee was appointed in 1832 to report on the affairs of East India Company. The committee found that the changes introduced in the police administration in Madras in 1816 and in Bengal in 1829 had brought adverse consequences. It was further revealed that the police subordinates were corrupt, inefficient and oppressive, while the superior officers, owing to
the multiplicity of their duties were unable to exercise an adequate supervision.\textsuperscript{140} In 1831 the union of the office of Collector and Magistrate was adopted as regular policy under Lord William Bentick. A beginning in this direction was made as early as 1821. The officers of Magistrate and Collector were united in each district. The move generated a lot of heat. It was contented that the union of thief catcher and thief trier was basically against the principle of criminal justice. This union of two offices was, however, temporary, as they were separated in 1827 by Lord Auckland.\textsuperscript{141}

A police committee was appointed in 1838 by Sir Thomas Metcalfe to investigate police of Bengal and recommend measures for a more efficient organization. While portraying a dismal picture of police administration, the report concluded that the union of the office of magistrate and collector had injurious effects. The committee did not make any recommendations. But Frederick Halliday, in a Minute of dissent, proposed that the whole of police force should be placed under the control of Superintendent General with four covenanted officers as Deputies, Superintendent and Assistant Superintendent for each district, a scheme of organization which was introduced by Sir Charles Napier in Sindh in 1843.\textsuperscript{142} Sir George Clerk, the Governor of Bombay, who visited Sind in 1847 was so impressed by the efficiency of the Sind Police that he immediately decided to reorganize Bombay Police. In 1853, Bombay police was remodeled. The model specified the following:\textsuperscript{143}

1) Every district was to have a superintendent of police who while generally being subordinate to the district magistrate was to have exclusive control over the police establishment in his district.

2) Every Tehsil was to have a native police officer whose relations with the Tehsildar were to be on the lines as between district magistrate and superintendent of police.

Madras was the next Presidency which adopted the new system. The position of Police in India in 1850 was summed up by Sir Ferederick Shore as “the police established by the British India Government was precisely similarly to that of London; (the former is considered by people as intolerable act). The latter is universally accepted to be the most admirable establishment highly conducive to public health.\textsuperscript{144}

On 16 April, 1855 Torture Commission submitted its report suggesting wide ranging changes in police system because the commission found, “corruption and bribery reign paramount throughout the whole establishment, violence, torture and cruelty are their chief instruments for detecting crime, implicating innocent and extorting money.”

(b) Period between 1860 to 1947

In 1860 First All Indian Police Commission was setup. On 16 March, 1861, the Indian Police Act was passed. This Act forms the basis of the present day Police organization. Going deeply into the reason for this Act, it becomes clear that the reorganization of Police was primarily due to the mutiny of 1857. In 1902-03 Second All India Police Commission was setup. The British often

\textsuperscript{140} Supra Note 31.
\textsuperscript{141} Supra Note 31 at p. 27.
\textsuperscript{142} Id. at p. 35.
\textsuperscript{143} S.M. Begum, District Police Administration, (1996), p. 28.
\textsuperscript{144} Supra Note 26 p. 29.
repeated what they said in 1859; the police in India were “all but useless for the prevention and sadly inefficient for the detection of crime” and with rare exceptions, ‘unscrupulous in the exercise of their authority’ together with a ‘very general reputation for corruption and oppression.’

IV) Police Organization in Independent India

The Indian Police is classified vertically and stratified horizontally. It is classified into two different categories viz. armed and unarmed. Most of the routine works like patrolling, prevention and investigation of crime is done by unarmed police. The armed wing of the police is pressed into service in situations involving violence or physical force as guarding the banks or important public places or buildings.

(a) Organisational Levels of Police

The police administration in India is managed to three different levels:

(a) Central Level
(b) State Level
(c) District Level

(a) Central Level: The police organization under central government is divided into three parts i.e. central para military forces, unarmed police organization and union territory police force.

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147 Ibid.

The Central Government has an indirect but dominant role in the police administration of the country.

Table 1
Role of Central Government in Police Administration

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Parliament</th>
<th>S.No.</th>
<th>Ministry of Home Affairs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Law Making on subjects in Union and Concurrent Lists</td>
<td>1.</td>
<td>Administration of All India Statutes</td>
</tr>
<tr>
<td>2.</td>
<td>Amendment in Basic Police Acts</td>
<td>2.</td>
<td>Administration of Union Territories</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4.</td>
<td>Police Coordination</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5.</td>
<td>Supply and Control of Arms and Equipments</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6.</td>
<td>Operations of Home Guards and Civil Defence</td>
</tr>
<tr>
<td></td>
<td></td>
<td>7.</td>
<td>Operations through a network of State Agencies</td>
</tr>
</tbody>
</table>


(b) **State Level:** The police organization at the state level is divided into two parts: civilian and professional. The civilian wing of the state police consists of the Home Minister, the Home Commissioner and Home Department. The professional wing is further divided into armed wing and unarmed wing. In most of the states the top brass of the police is designated as Director General of Police, who is assisted by Inspector General and other officials. Inspector General is followed by Deputy Inspector General and officers down to the constable.¹⁴⁹

The Inspector General, Deputy Inspector General, Superintendent of Police and Additional Superintendent of Police belong to the prestigious IPS. The Deputy Superintendent of Police, Inspector, Sub Inspector, Assistant Sub Inspector, Head Constable and Constable are appointed by the state government. However, in metropolitan cities of Bombay, Calcutta etc. the powers of Superintendent of Police and those of District Magistrate are combined in one single official called police commissioner.¹⁵⁰

(c) **District Level:** The DIG is in charge of police range. Each police range comprises of four or more police districts, which coincide with the boundaries of the revenue districts. The district

¹⁴⁹ Supra Note 146 at p. 309.
¹⁵⁰ Supra Note 148 at p. 304.
is further sub divided into police sub division, police circle and police station. The ASP or DSP looks after police subdivision, the police circles are under the control of circle inspectors while police stations are administratively managed by inspector. Some police stations have been outposts or chowkis which are usually headed by Head Constable or Assistant Sub Inspector depending upon the importance of the place where an outpost is located.\textsuperscript{151} The Superintendent of Police is the Chief of district police organization. He works under the overall supervision of District Magistrate.

(b) Police Strength

As per the international standards laid down by the U.N. there should be 222 policemen per lakh citizen.\textsuperscript{152} However, in India the strength of policemen is far beyond the yardstick.

Table 2
Comparative Strength of Civil Police

<table>
<thead>
<tr>
<th>Year</th>
<th>Sanctioned Strength</th>
<th>Actual Strength</th>
<th>Percentage of Civil Police in Position</th>
<th>Vacant Posts</th>
<th>Percentage of Vacant Posts</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>1209904</td>
<td>1091899</td>
<td>90.25%</td>
<td>118005</td>
<td>9.75%</td>
</tr>
<tr>
<td>2007</td>
<td>1269187</td>
<td>1095818</td>
<td>86.3%</td>
<td>173369</td>
<td>13.7%</td>
</tr>
<tr>
<td>2008</td>
<td>1329186</td>
<td>1132202</td>
<td>85.18%</td>
<td>196984</td>
<td>14.82%</td>
</tr>
<tr>
<td>2009</td>
<td>1612735</td>
<td>1215050</td>
<td>75.34%</td>
<td>397685</td>
<td>24.66%</td>
</tr>
<tr>
<td>2010</td>
<td>1618198</td>
<td>1223319</td>
<td>75.60%</td>
<td>394879</td>
<td>24.40%</td>
</tr>
</tbody>
</table>

Source: www.ncrb.nic.in

Figure 1: Graphical Representation of Strength of Civil Police


\textsuperscript{152} www.findarticles.com/p/newsarticles/timesofindia_the/mi-8012/is-20100819/police-publicratio-statestandard/.a-n54858173 visited on 22 Sept. 2010.
The actual strength of civil police including district armed police during 2006 stood at 10,91,899 against the sanctioned strength of 12,09,904. Thus the Civil Police strength in position was 90.25 per cent of sanctioned strength and 9.75 per cent of the posts were vacant. In the year 2007, the actual strength of civil police including district armed police stand at 10,95,818 against the sanctioned strength of 12,69,187. The Civil Police strength in position was 86.3 per cent and 13.7 per cent posts were vacant. The actual strength of civil police including district armed police in 2008 was 11,32,202 while the sanctioned strength was 13,29,186. The civil police strength in position was 85.18 per cent and 14.82 per cent posts were vacant. The sanctioned strength increased by 4.9 per cent in 2007 as compared to the sanctioned strength in 2006 and it increased by 4.7 per cent in 2008 as compared to sanctioned strength in 2007. The percentage increase in vacancies was 46.91 per cent from 2006 to 2007. It declined to 13.62 per cent from 2007 to 2008. The actual strength of civil police including district armed police during 2009 stood at 12,15,050 against the sanctioned strength of 16,12,735. Thus the Civil Police strength in position was 75.34 per cent of sanctioned strength and 24.66 per cent of the posts were vacant. In the year 2010, the actual strength of civil police including district armed police was 12,23,319 as against the sanctioned strength of 16,18,198. The Civil Police strength in position was 75.60 per cent and 24.40 per cent posts were vacant.

Table 3
Comparative Strength of Armed Police

<table>
<thead>
<tr>
<th>Year</th>
<th>Sanctioned Strength</th>
<th>Actual Strength</th>
<th>Percentage of Armed Police in Position</th>
<th>Vacant Posts</th>
<th>Percentage of Vacant Posts</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>364298</td>
<td>314122</td>
<td>86.23%</td>
<td>50176</td>
<td>13.77%</td>
</tr>
<tr>
<td>2007</td>
<td>393827</td>
<td>329363</td>
<td>83.6%</td>
<td>64464</td>
<td>16.4%</td>
</tr>
<tr>
<td>2008</td>
<td>407779</td>
<td>341393</td>
<td>83.73%</td>
<td>66386</td>
<td>16.27%</td>
</tr>
<tr>
<td>2009</td>
<td>412332</td>
<td>342447</td>
<td>83.1%</td>
<td>69885</td>
<td>16.9%</td>
</tr>
<tr>
<td>2010</td>
<td>426879</td>
<td>356992</td>
<td>83.62%</td>
<td>69887</td>
<td>16.37%</td>
</tr>
</tbody>
</table>

Source: www.ncrb.nic.in

Figure 2: Graphical Representation of Strength of Armed Police
The sanctioned strength of armed police was 3, 64,298 while the actual strength stood at 3,14,122 for the year 2006. The armed police in position was 86.23 per cent. The actual strength of armed police in 2007 was 3, 29,363 as against the sanctioned strength of 3, 93,827. Thus the armed police in position was 83.6 per cent. The actual strength of armed police for the year 2008 was 3,41,393 with the sanctioned strength was 4,07,779, 85.18 per cent is the percentage of armed police in position. The sanctioned strength increased by 8.1 per cent from 2006 to 2007 and by 3.42 per cent from 2007 to 2008. The percentage increase in vacancies was 28.47 per cent from 2006 to 2007 and 2.98 per cent from 2007 to 2008. The sanctioned strength of armed police was 4,12,332 while the actual strength stood at 3,42,447 for the year 2009. The armed police in position was 83.1 per cent. The actual strength of armed police in 2010 was 3,56,992 as against the sanctioned strength of 4,26,879. Thus the armed police in position was 83.62 per cent

(c) **Police to Population Ratio**

There were 126 police persons per 1, 00,000 populations in 2006. In the state of Himachal Pradesh, there were 187 police persons for 1, 00,000 populations for the same year. In 2007, the police to population ratio was 125 for India and it was 182 for the state of Himachal Pradesh. In 2008, the said ratio was 128 for the entire country and 199 for Himachal Pradesh.

The highest police to population ration in 2008 was in Mizoram (1004), followed by Andaman and Nicobar (666) and Tripura (640). The lowest police to population ratio was in Bihar (64) followed by Uttar Pradesh (72) and Dadra and Nagar Haveli (80).

**Women Police**

The United States of America was perhaps the first country in the world to recognize the need for police women. The police matrons were appointed in New York City in 1845. Their main duties were to deal with women and girls in police custody of the law enforcement agency. It was in 1892 when a widow of a patrolman was given an appointment in the Detective Bureau of the police department in Chicago. The first recorded instance on which information is available is that of a woman who in 1905 received police powers.153

Germany was the first country to have a governmental employee called police woman.154 In England prior to World War I woman were appointed as Matrons as in U.S.A. In 1916, a few women were selected for employment as police woman. In 1920, a Member of Parliament in England called it “as an extravagant eccentricity upon whose entertainment public money should not be wasted.”155 Initially police women played only a peripheral role in law enforcement. Their role was largely limited to police protective and preventive functions as they pertain to women, teenaged females, youngsters and infants.156

In India services of women were used primarily for spying. However, there is no record to suggest that women were inducted on regular basis in uniform as policemen. Even prior to

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155 *Id.* at p. 37.
independence, a few states had employed women in the police force, but they were the exception rather than the rule. The state of Travancore appointed women as Special Police Constables in the year 1938. In 1939, police women were appointed in Kanpur. However, women were inducted in police force on regular basis only after independence. The following factors were responsible for it:

(i) Due to the partition of country there was a large scale influx of refugees. Therefore, purely for reasons of security a need was felt to have women in the police force.

(ii) In several states political agitations, bunds, strikes, linguistic and communal riots were becoming a regular feature. The participation of women in these agitations was increasing day by day. In view of the delicacy of the problem of handling women agitators, a need was felt to have police women.

(iii) The traditional law enforcement agency was confronted with the problems of bringing about drastic changes in the attitude of its personnel, in their behaviour pattern and methods of functioning. To meet the challenge of the new situation, particularly to deal with women and children, there was a growing realization among the police administrators of the necessity to have women in the force.

(iv) Economic conditions forced a large number of women to come out of the four walls of the home in search of gainful employment. These conditions paved the way for the entry of women in police force. Delhi and Punjab gave the lead by appointing police women on regular basis in 1948. By 1975, almost all states in India had women in police.

The credit of setting up the first women police station in the world goes to the state of Kerala. It was set up at Calicut on October 27, 1973. Thereafter, the Mahila Police Station was established in Madhya Pradesh in 1987 and states of Rajasthan and Jammu and Kanpur in 1990. With the opening of Mahila Police Stations, women feel that their complaint will be dealt with faster and that they will get prompt relief. However, non-functioning of these police stations during night hours is a cause of inconvenience for the genuine complaints as they have to take their complaints to man-manned police stations or have to wait till next day.

**Women Police Strength**

The strength of civil women police including district armed police for 2006, 2007 and 2008 was 41,107, 41,418 and 40,948 respectively. However, the actual strength for the respective years was 48,625, 52,377 and 48,273. The sanctioned strength for 2009 was 43,513 and for 2010 was 47,978 respectively. However, the actual strength for the respective years was 61,174 and 63,348.

Table 4

158 *Supra Note* 153 at p. 39.
160 *Id.* at p. 41.
161 *Supra Note* 148 at p. 308.
Sanctioned and Actual Strength of Civil Women Police including the District Armed Force

<table>
<thead>
<tr>
<th>Year</th>
<th>Sanctioned Strength</th>
<th>Actual Strength</th>
<th>Percentage of Actual Strength of Civil Women Police to Actual Strength of Total Civil Police</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>40948</td>
<td>48273</td>
<td>4.26%</td>
</tr>
<tr>
<td>2007</td>
<td>41418</td>
<td>52377</td>
<td>4.78%</td>
</tr>
<tr>
<td>2008</td>
<td>41107</td>
<td>48625</td>
<td>4.45%</td>
</tr>
<tr>
<td>2009</td>
<td>43513</td>
<td>61174</td>
<td>5.03%</td>
</tr>
<tr>
<td>2010</td>
<td>47978</td>
<td>63348</td>
<td>5.18%</td>
</tr>
</tbody>
</table>

Source: www.ncrb.nic.in

Figure 3: Graphical Representation of Civil Women Police including District Armed Police

Table 5

Sanctioned and Actual Strength Armed Police (Women)

<table>
<thead>
<tr>
<th>Year</th>
<th>Sanctioned Strength</th>
<th>Actual Strength</th>
<th>Percentage of Actual Strength of Armed Police Women to Actual Strength of Armed Police</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>4381</td>
<td>4049</td>
<td>1.19%</td>
</tr>
<tr>
<td>2007</td>
<td>4078</td>
<td>3909</td>
<td>1.19%</td>
</tr>
<tr>
<td>2008</td>
<td>3340</td>
<td>2839</td>
<td>0.90%</td>
</tr>
<tr>
<td>2009</td>
<td>5251</td>
<td>4282</td>
<td>1.19%</td>
</tr>
<tr>
<td>2010</td>
<td>8203</td>
<td>9304</td>
<td>2.72%</td>
</tr>
</tbody>
</table>

Source: www.ncrb.nic.in
In the light of the above discussion, it is evident that the police as an organization has come a long way. The police organization is not a new concept of modern state. Infact it existed even in ancient time. The Mauryan period gave birth to well administered police organization having two distinct branches – regular and secret. This broad classification of police was followed by the Muslim rulers and carried forward by the British. The British made an attempt to redefine the police structure by enacting the Police Act, 1861. This Act forms the basis of Police organization till date. The women have also marked their presence in police. The number of women police though low has increased slowly but steadily during past few years. There is a wide gulf between the sanctioned strength of police and their actual strength. It is, therefore, important that result oriented efforts are made to bridge this gap. It will help not only the police to perform its duties effectively but will also make the country a safer place.

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Victimology is the Cinderella of criminology” writes Justice V.R.Krishna Iyer in the foreword of V.N.Rajan’s Book on “Victimology in India” and from this point of view of legal literature and sociological research, little attention has been paid to this branch of knowledge. Our law makers and law interpretators have never given due importance to the victimization and suffering of the victim, either due to ignorance or simple callousness.

Crime and punishment are not mere litigative exercises and are more than punitive imprisonment and other penalties. The law must also look to the plight of victim of a crime who suffers not for his own fault but for the violation of law by an offender. The concept of compensation to the victim of crime is not new and existed with civilization. References to victim compensation are also found in the code of Hammurabi. It is said that it was quite common for the early civilization to extract payments for the victims from the offenders which was known as restitution.

In ancient India the victim of an offence was taken care of by the prevalent law and the king who keen to consider the submission of the victim while imposing punishment to the offender. Kautilya believed that law is a royal command supported by “Danda” which is essential for the maintenance of worldly life, growth of science and pursuit of philosophy economics and the Vedas. The Arthashastra nowhere speaks of neglecting the victim but instead speaks in proper case where compensation ought to be given to satisfy the ends of justice.

What is Victimology? Victimology, is a discipline of recent origin, which deals with the study of the problem of the victims of crime and their right to claim compensation from the state or the offender. The word victimology is a combination of the latin word “Victim” and Greek word “Logus”. It is basically a study of crime from the point of view of the victim.

The Indian legislature has not defined the phrase ‘victim of crime’ under any law and probably the Indian judiciary is also on the same footing. However, victim of crime includes (i) anybody who suffers physical, emotional or financial harm as a direct result of crime (ii) spouse and children of the person who has so suffered and (iii) parents, foster parents siblings, guardians or other custodian of minor victims, mentally or physically incapacitated victims or victims of homicide. The United Nations General Assembly Declaration of Basic Principles of Justice for Victim and Abuse of power adopted in November’1985 in its Article 1 and 2 gives a picture of who is a victim:

**Article 1** : “Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that are in violation of criminal laws operative within member states, including those laws prescribing criminal abuse of power.

**Article 2** : A person may be considered a victim under this declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the

1 * Principal, L.R. Law College, Sambalpur, Odisha.
familiar relationship between the perpetrator and the victim. The term victim also includes where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Thus we find a very broad definition has been adopted by the UN which encompasses every person who can be categorized under the head victim’.

**INDIVIDUALISATION OF PUNISHMENT AND REFORMS IN PENOLOGICAL THOUGHT.**

The Benthamite theory of equal punishment for the same offence was severely criticized by the neo-classists which laid a foundation to individualization of punishment. Gradually reformatory ideas crept into the domain of criminology and the concepts like probation, parole, suspended sentence, indeterminate sentence ticket of leave etc. gained importance in criminological thinking. In this process the ends of justice almost became accused oriented, reformation and rehabilitation of the accused occupying the prime space and the position of the victim was reduced to a nullity; he was completely forgotten. V.N.Rajan writes in his book “Victimology in India”,

“And, so, what happens to the victim if he survives an offence and he reports his victimization to the police? His misery restarts. He enters the gateway to the criminal justice system. He is faced with interrogations, delays, postponements, court appearances, insults at the hands of people including police officers, lawyers, loss of earnings, waste of time and frustration and the painful realization dawns on him that the system does not live up to its ideals and does not serve- it serves only itself and its minions …..”

**LOGIC BEHIND VICTIM COMPENSATION**

In a welfare state it becomes the duty of the state to compensate the victims of crimes, it is the duty of the state to ensure its population not to be hurt by a law violator because the constitution which is the supreme law guarantees every individual a fundamental right known as right to life and personal liberty under Article 21. If the intended result can not be achieved, the state has to assume responsibility for the loss, pain or damage caused to any law abiding citizen by some one’s disobedience of the law.

Secondly a welfare state holds certain humanitarian duty towards the poor, the sick, the unemploye, the underprivileged etc. If this duty is stretched a little it also owes a duty to the victim of crime.

Thirdly, crime is held to be the result of certain conditions of modern civilization such as unemployment, squalor, broken or disorganized home, slum dwelling, lack of equal opportunity or education. A society which fails to eradicate such unfavourable and crime prone conditions must be made responsible for any unfortunate incident of criminal victimization of an innocent man

**RESTITUTION:**

Restitution is that process by which the offender tries to make good the loss of the victim of his crime in terms of money or service. Its benefits are two fold. First the offender is made more responsible for the crime and the second the victim receives attention and benefit directly from the offender. It gives an opportunity to both the victim and the offender to feel that a wrong is being
righted. When restitution involves service to the community, the whole society receives reparation from the offender.

Restitution is a positive measure and particularly appropriate for use in respect of juvenile offenders. The Rationale behind restitution is that the offender is made to recognize his responsibility to the victim, it maintains the dignity of the offender unlike imprisonment, it saves the society and the offender from the deleterious effect of incarceration and above all, it contributes to a sense of justice. It is an alternative sentencing strategy which helps the society and the criminal justice system by addressing to the problem like overcrowding in prisons and an effective supplement to probation.

**Statutory provisions regarding victim compensation:**

Certain statutory provisions are there which provide for payment of compensation to the victim of crime even though the provisions are silent about the adequacy of the compensation. Criminal procedure code, 1973 vide section 357(1)(b) provides for payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court recoverable by such person in a civil court out of the fine imposed to the accused. 375(1)(c) provides for payment of compensation to the victim who are entitled to recover compensation under the Fatal Accidents Act, 1955 when the accused is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence section 357(3) empowers the court, in its discretion to order the accused to pay compensation even though fine does not form part of compensation.

Power to award compensation to victims should be liberally exercised by courts to meet the ends of justice. The payment of compensation must be reasonable. The Quantum of Compensation depends upon facts, circumstances, the nature of the crime, the usefulness of the claim of victim and the capacity of the accused to pay. Where a Homeopath operated a lady for causing abortion and the lady died within few hours, the Supreme Court reduced the sentence of imprisonment but enhanced fine from Rs.50, 000/- to one lac, which was ordered to be deposited in a Nationalised Bank in the name of the minor son of the deceased.2

The Probation of Offenders Act, 1958 empowers the trial court to order for payment of compensation to the victim.3. But it is a matter of great regret that these beneficial provisions of law as pointed out in the case of Cr.P.C, 1973 and The P.O. Act, 1958 are sparing used by the trial courts and such judicial apathy has rendered compensatory provisions a non-efficacious one.

**Provisions in the Indian Constitution**

The Indian constitution has several provisions which endorse the principle of victim compensation. The constellation of articles and clause dealing with the fundamental rights (part-III) and the Directive Principles of State Policy (part-IV) laid the foundation for a new social order in which justice, social and economic would flow in the national life of the country. Article

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2 Jacob George(Dr.) v. State of Kerala, 1994 Cr.L.J 3851 (SC)
3 Section 5 P.O Act, 1958.
which has relevance to victimology in a wider perspective, mandates, inter alia, that the state shall make effective provision for “securing public assistance in cases of disablement and in other cases of undeserved want. Art.51(A) makes it a fundamental duty of every citizen of India to have compassion for living creatures and develop humanism. If a liberal interpretation is given to these provisions, it becomes vivid that the roots of victimology lies in those provisions. Again Article 21 which guarantees life and liberty to every human being has got obliging effect on the Government to compensate the victim in case of violation of that guarantee.

The constitution of India which has guaranteed fundamental rights to the citizens against the state, also grants for the constitutional remedies in the mode of writs under Art.32 and Art.226 to the Supreme Court and the High Courts respectively. Under these Articles, not only the victim gets his rights enforced expeditiously, but can also claim compensation for the violation of fundamental rights by the state.

**VICTIMS CONTRIBUTION TO CRIMINALITY**

There are some victims who contribute to the commission of the crime actively or passively. Benjamin Mendelsohn has divided such victims in five categories. The first category speaks of completely innocent victims for example children, in the second category, those victims are grouped who are victimized for minor fault or because of their ignorance. The third category speaks of voluntary victims such as those who commit suicide. In the fourth category victims who are more guilty than the offender are grouped and the fifth and the last category speaks of the most guilty type of victims who commit offences against others and are killed by their victim in self defence. The trial court while awarding compensation to the victim should also keep in mind, victims contribution to the criminality whole awarding compensation.

Abdel Fattah of Canada, has mentioned about five types of victims namely the non-participating, the latent, the provocative, the participating and the defiant

**ROLE OF JUDICIARY IN PROVIDING COMPENSATION TO THE VICTIM OF CRIME**

The administration of criminal justice all over the world seems to be guided by one cherished principle viz. the protection of rights of the accused. During the past few decades the protection of the rights of the accused was so very magnified that the entire system forgot about the plight of the victim. The perpetrator of the crime who killed or tortured his victim in violation of legal mandate occupied the central position at has drawn the sympathy from every quarter, but placed in the loosing end the victim was vanquished and could neither draw the attention of law or public support. In this juncture, it is worthwhile to discuss the role of judiciary in providing compensation to the victim of crime.

**(a) RAPE VICTIMS:**

Rape is sexual intercourse by a man with a woman without her consent. Rape is by and large the most heinous offence of all the offences committed against women. The victims of this offence should be handled very carefully and if necessary psychological counseling should be arranged for them. The present legal frame work is quite inadequate to provide suitable remedy to
rape victims. Section 357 Cr.P.C which is the main provision of victim compensation is very general and inadequate to handle even the less grave offences, than what to speak of Rape which is one of the most serious crimes against women. However, of late, the Supreme Court of India applying its original jurisdiction, though cases arising out of Public Interest, has granted compensation in rape cases where the state fails to defend the violation of dignity of a woman.

In a case\(^4\) the Bombay High Court had convicted two policeman of raping 16 years old tribal girl, Mathura. She complained that she was raped and molested in a police station in the middle of the night. The Honourable Supreme Court reversed the judgment of the Bombay High Court and acquitted the policemen. They dismissed Mathura’s testimony as blatant lies because there was no clear evidence that she has actively resisted intercourse with the two men and because there was proof that she was not a virgin.

Mathura’s rape case exposed the inherent limitation of an insensitive judiciary coupled with weak and ineffective laws relating to rape. The impact of this case was so enormous that the law relating to rape was amended to provide teeth to catch hold of the accused persons and punish them far their guilt.

In *P. Rathnam v. State of Gujrat*\(^5\), a tribal woman was raped in police custody. The amount ordered to be paid as interim compensation was Rs.50,000/- by the Apex Court with the observation, “Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law”.

Rape is a very serious offence, hence the criminal administration agency must act with that promptitude which it deservers, “we must remember that a rapist not only violates the victims privacy and personal integrity, but also inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault, it is often destructive of the whole personality of the victim. The courts therefore shoulder a great responsibility while trying an accused on the charge of rape”\(^6\).

**Murder Victims:**

Murder is the killing of human being in violation of law without any lawful excuse and it is considered as the worst crime both according to law and morals. It destroy the family life of the deceased and ushers misery on the family of the deceased.

The traditional approach to crime emphasized on severe punishment of the accused and practically no emphasis was laid on compensation to the victim. S.357 Cr.P.C speaks of payment of compensation out of the fine imposed, Murder is punishable u/s 302 are punished either with death or life sentence. When the accused is convicted of murder and is sentenced to serve life sentence or suffer death, then court feels hesitant to impose heavy fine which will act as fuel to fire in that case.

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4  Tukaram and another v. State of Maharashtra AIR 1979 SC 185
However, after the reorientation in victimology which has taken the shape of a movement within the last two three decades, the courts are also gradually becoming sympathetic towards the victims. The following case may be cited as an example in this direction.

In *Rachhpal Singh v. The State of Punjab*\(^7\) there was a civil dispute pending between the deceased and the appellant. The deceased obtained an interim order pertaining to the civil dispute. This in turn led to a fight between the deceased and the appellants. The first and the second appellants armed with guns attacked the deceased with three other accomplices. Both the first and the second appellants targeted their deceased and killed both of them and went away. The Sessions Judge after considering the materials placed before him, found the appellants guilty and convicted and sentenced the first two appellants to death for an offence under section 302 I.P.C and the other accused to life imprisonment.

**Victims of Homicide**

Homicides which are not murders stand on a separate footing. In a case where a Homeopath operated on a pregnant woman for causing miscarriage and the lady died, the Apex Court reduced the sentence of 4 years RI to 2 month’s R.I. that is the period already undergone but raised the fine from 5,000/- to Rs. 1,00,000/- which is to be paid to the victims for the maintenance of the children of the deceased.\(^8\)

In another very important case\(^9\) the Supreme Court has gone a step further and granted a huge compensation to the victim even after acquitting the accused respondent. The case involved the causing of death in the course of an altercation between the police officer – accused and the two deceased persons who were also officers of the police force. The Supreme Court upheld the decision of the High Court in holding that the accused was acting within his right of private defence. The Apex Court also maintained the order of acquittal of the accused respondent but directed him to pay a sum of Rs.5,00,000/- for the maintenance of the heirs of the victim. This decision is a landmark in the right of the victim to be paid compensation.

**Public Interest Litigation in furthering victim compensation:**

Whenever a legal wrong or legal injury is caused to a person by reason of violation of any constitutional or legal right and such person or determinate class of persons is by reason of poverty helplessness or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 of the constitution.\(^10\) Further, for the violation of any fundamental Right of such person or determinate class of persons remedy lies in the Supreme Court under Article 32 for seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. In Public Interest Litigations, the principle of locus standi is widened to cover representative actions, so that justice will not be a mirage to the common man,

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7. 2002 Cr-L.J. 3540 SC
8. Dr. Jacob George v. State of Kerala (1994) 3 SCC 430
10. People’s Union for Democratic Rights v. Union of India AIR 1982 SC 1473
who can not fight out their claim because of poverty.

In *Nilabati Behera v. The State of Orissa*,\(^{11}\) a letter was sent to the Supreme Court by Smt. Nilabati Behera alias Lalita Behera regarding custodial death of her 22 year old son Suman Behera. The deceased was taken from his home in police custody at about 8 AM on 1.12. 1987, in connection with the investigation of an offence of theft and detained at the police out post. At about 2 PM the next day on dated 2.12.1987. The petitioner came to know that the dead body of her son was found on the railway track near a bridge at some distance from the Railway Station. There were multiple injuries on the body of the deceased when it was found and obviously his death was unnatural, caused by those injuries. The prayer made in the petition is for award of compensation to the petitioner for contravention of the fundamental right to life guaranteed under Article 21 of the constitution. The court awarded Rs 1.50, 000/- to the victim lady for the custodial death of her son. Article 9(5) of the International covenant on civil and Political Rights, 1966 also enacts,” Any one who has been victim of unlawful arrest or detention shall have an enforceable right to compensation for enforcing fundamental rights, are enforceable”.

In *Vishaka v. State of Rajsthan*,\(^{12}\) a writ petition was filed by Vishaka, a non-governmental organization working for gender justice, seeking enforcement of fundamental rights of working women under Article 14, 19 and 21 of the constitution. In this case the Apex Court laid down detailed guidelines for protecting working women’s fundamental rights against sexual exploitation in the work place while confirming that in case of violation of their fundamental rights by way of sexual exploitation they may be properly compensated. The court held that it is the duty of the employer or other responsible person in work place and other institution, whether public or private, to prevent sexual harassment of working women.

Gang rape of a Bangladeshi woman at Howrah railway station Yatri Nivas which was brought to the notice of Calcutta High Court by way of a writ petition under Article 226 of the constitution is another very important case in the way of providing compensation to a foreigner under the constitutional law.\(^ {13}\) In this case, an advocate of Kolkata High Court filed a petition claiming compensation for the gang rape victim Smt. Hanuffa Khartoon, a Bangladeshi national who was gang raped by the employees of Railways. The High Court awarded Rs. 10 lacs as compensation to the victim. In appeal before the Supreme Court it was argued that the Railways are not liable to pay compensation because

(i) the victim a foreigner and not Indian National

(ii) the remedy should have been preferred in the domain of private law and

(iii) the lawyer is in no way connected with the victim.

\(^{11}\) AIR 1993 SC. 1960, 1993 2 SCC 746
\(^{12}\) AIR 1997 SC. 3011
\(^{13}\) Chairman, Railway Board v. Chandrima Das, AIR 2000 S.C 988.
The Supreme Court observed that where public functionaries are involving and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would be available under public law, notwithstanding that a suit could be filed for damages under the private law –

It is clear that the judiciary has made inroads in the territory of compensation even in writ proceedings in the exercise of extra ordinary jurisdiction. Compensation is an appropriate and effective and in some cases the only suitable remedy for the redressal of the grievance of the victim. A victim survey reveals that compensation with reasonable punishment is the first choice of the victims where as heavy compensation without punishment is the choice of only 60% of the victims.

**CONCLUSION AND SUGGESTIONS**

In ancient India the victim of crime was the central figure in any criminal setting but gradually his role and importance was reduced and the offender and his human rights are focused a lot. He was presumed innocent, his rights are protected, benefit of doubt was given to him and in this process the offender came out victorious and the victim vanquished. It is a matter of pleasure that recently due to advancement in victimological thinking, now there is a ray of hope of victim compensation. The Supreme Court has already set out that punishment of the offender is not the only purpose of criminal law but in appropriate cases the victim must also be compensated. The following suggestions may go a long way in this direction:

1. A separate and comprehensive legislation is the recent requirement for victim compensation programme. Section 357 Cr.P.C is not specific and does not speak about the details as to who will pay compensation and where from it will be paid if the fine could not be realized from the offender.

2. The state must pay compensation to the victim for which victim compensation Fund should be raised. In a welfare state where right to life is a fundamental right it becomes the obligation of the state to compensate the victim in case of its transgression.

3. Punishment of the accused and compensation to the victim are two different things, so, one should not be dependant on the other. Whether the accused is punished or acquitted, the victim should not lose his right to be compensated.

4. The victim of an offence should be legally allowed to intervene in the criminal case against the offender to claim compensation for loss or injury. The victim should be allowed to justify the claimed compensation.

5. Compensation should not depend on the mercy of the court rather it should be regarded as an inviolable right of the victim. It should not be less than a statutorily fixed sum in any case.

6. In case of death, there should be provision for solutions. There should also be provision for interim compensation to the victim in all suitable cases.

The above suggestions may be considered by the legislators and the judges for better justice to the victims who were hitherto beam neglected by the criminal administration of justice.

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Human Trafficking – A Violation of Human Rights

Dr. Jyoti J. Mozika\textsuperscript{1},

Abstract

Human Trafficking is a crime against humanity. It involves an act of recruiting, transporting, transferring, harbouring or receiving a person through the use of force, coercion or other means, for the purpose of exploiting them. Sex trafficking is a contemporary form of slavery that violates women’s fundamental human rights. Sex trafficking originates in poor countries having low regard for women, lack of educational and economic opportunities, inadequate awareness about the crime of trafficking, and inadequate laws to prosecute traffickers. Prostitution has been denounced in almost all societies and has been condemned as an evil. Societal responses to prostitution are of three kinds: suppression, regulation and abolition. In most countries, prostitution is illegal, while in very few, it is legalised. An attempt has been made through this paper to examine the various initiatives at national and international levels to address the issue of human trafficking, the role of NGOs and the approach of the Indian Judiciary in this regard. Some suggestions have also been made to strengthen the effectiveness of the laws.

Trafficking is an organised and systematic activity involving displacement and movement of persons from one place to other place for their exploitation. Immoral trafficking refers to trafficking of persons, especially girls and women for their immoral exploitation, i.e., their sexual exploitation. In the past decades, the volume of immoral trafficking of women and girls has increased to such an extent that today it is the third largest form of illegal trade after arms and drugs. The objectives of such immoral trafficking of girls and women is their sexual exploitation in various forms, viz., brothel-based prostitution, swinging and call girl racketeering, sex-tourism, pornography in electronic and print media etc. Indeed such immoral trafficking involves the worst form of human rights abuses, including emotional, psychic and physical and sexual violence with bleak possibilities of rescue, rehabilitation and re-integration.

Human Trafficking is a crime against humanity. It involves an act of recruiting, transporting, transferring, harbouring or receiving a person through the use of force, coercion or other means, for the purpose of exploiting them. Every year, thousands of men, women and children fall into the hands of traffickers, in their own countries and abroad. Every country in the world is affected by trafficking, whether as a country of origin, transit or destination for victims. Sex trafficking is a contemporary form of slavery that violates women’s fundamental human rights. These basic rights are enumerated in the Universal Declaration of Human Rights and in many international agreements, namely the right to life, liberty and security of persons, the right not to be held in slavery or servitude, and the right to be free from cruel or inhumane treatment. In a judicial system which lacks effective remedies for trafficking, ironically it is the defenceless and enslaved victims who are penalized, not the perpetrators. Trafficked women seeking help are locked up in prison for long periods of time because they are viewed solely as illegal aliens, not as victims of slavery or forced prostitution. Sex

\textsuperscript{1} Associate Professor & Head, Department of Law, NEHU, Shillong – 22
trafficking victims are sometimes arrested in brothel raids and then deported to their home country, where they further suffer the humiliation of being treated as criminals or pariahs - simply because they were duped into believing they could find legitimate work.

More than 2,000,000 women around the world are bought and sold each year for the purpose of sexual exploitation. Sex trafficking originates in poor countries having low regard for women, lack of educational and economic opportunities, inadequate awareness about the crime of trafficking, and inadequate laws to prosecute traffickers. Human trafficking destination countries are relatively rich.

The institution of prostitution is as old as human civilization. In the report prepared by the Advisory Committee of the League of Nations the following observations were made which indicate the tenacity with which prostitution persists in civilized communities:

“Prostitution has outlived every social, economic, ethical and political system which the West has known since the time of the Greek City States. It has had its vicissitudes; but, flourishing or languishing, public or clandestine, it has existed in large towns for the last 2500 years, thereby proving how deeply it is rooted in human social life.”

Prostitution describes sexual intercourse in exchange for remuneration. The terms generally used to refer to it are ‘commercial sex trade’, ‘commercial sex worker’ (CSW), female sex worker (FSW) or sex trade worker. Brothels are establishments specifically dedicated to prostitution, usually confined to special red-light areas in big cities. The devadasi (handmaiden of god) system of dedicating unmarried young girls to gods in Hindu temples, which often made them objects of sexual pleasure of temple priests and pilgrims, was an established custom in India as early as in 300 AD.

**Definition of the Concept**

According to the UN International Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, “trafficking in persons” means the recruitment, transportation, transfer, harbouring or receipt of persons by the threat or use of kidnapping, force, fraud, deception or coercion, or by the giving or receiving of unlawful payments or benefits to achieve the consent of a person having control over another person, for the purpose of sexual exploitation or forced labour. In other words, ‘trafficking’ includes the recruitment, abduction, transport, harbouring, transfer, sale, or receipt of persons within national or across international borders, through the use of fraud, coercion, force, or kidnapping, for the purposes of placing persons in situations of slavery-like conditions, forced labour, or services, domestic servitude, bonded sweat shop labour or other debt bondage.

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2 CIA report: Amy O’Neil Richard
5 The term “force,” as used in this definition of sex trafficking, signifies “coercion, drugging, kidnapping, violence, threats, intimidation, or other situation where there is lack of consent.”
6 Definition given by President’s Interagency Council on Women available at [http://www.eiconline.org/resources/publications/z_spotlighton/trafficking.pdf](http://www.eiconline.org/resources/publications/z_spotlighton/trafficking.pdf)
The element of “force” and the related concept of “consent” are key components in the definition of trafficking. If the trafficker can present evidence that the woman consented to or was not forced into the act of prostitution, the victim may not be successful in proving that a crime of sex trafficking was committed. The definition of force or coercion contained in the most recent draft of the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, includes both physical and psychological coercion.

The Victims Protection Act further refines the definition of the term sex trafficking. Sex trafficking is: “the recruitment, harbouring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”7 “Severe forms of trafficking in persons” which is a special classification that qualifies victims for enhanced benefits and services including possible permanent residency in the United States, is defined as: sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harbouring, transportation, provision or obtaining of a person for labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.8

Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines ‘Trafficking in Persons’ as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.9 From the definition given in the Trafficking in Persons Protocol, it is evident that trafficking in persons has three constituent elements:

**The Act** (What is done)-Recruitment, transportation, transfer, harbouring or receipt of persons

**The Means** (How it is done) - Threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim

**The Purpose** (Why it is done)-For the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs.

In 1994, the General Assembly of the United Nations referred to trafficking as the illicit and clandestine movement of persons across national and international borders… with the end goal forcing women and girl-children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers, crime syndicates as well as other illegal activities related to trafficking such

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8 Ibid, Section 103(8),
as forced domestic labour, false marriage, clandestine employment and forced adoption.

In *State of Bihar v. Jagrup Singh*\(^1\), the Court referred to the definition of the expression “prostitution” in the Suppression of Immoral Trafficking in Girls and Women Act, 1956 wherein ‘Prostitution’ means the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind. The Court observed that it is clear from this definition, that, in order to constitute prostitution, the act of the female must be an act of offering her body for promiscuous sexual intercourse and that this must be for some consideration or hire, whether in money or in kind. In other words, it is not enough to constitute prostitution within the meaning of the Act to offer the feminine body for promiscuous sexual intercourse, but it must be further established that such offering was for hire which might be either in money or in kind.

In Black’s Law Dictionary, ‘prostitution’ has been defined as common lewdness; whoredom; the act or practice of a woman who permits any man who will pay her price to have sexual intercourse with her. In the Oxford Dictionary, a prostitute has been defined as a woman who offers her body to indiscriminate sexual intercourse, for hire. Benmont, C.J. did not agree with “indiscriminate” or “promiscuous” but said that prostitution certainly involves more than intercourse with one man. According to him, a kept mistress who confines her sexual favours to one man is not a prostitute. Prostitution has been defined in the Immoral Traffic (Prevention) Act, 1956 to mean sexual exploitation or abuse of a person for commercial purposes\(^1\). The definition in the Act is vague. The earlier definition used “promiscuous intercourse” which has been deleted. Nevertheless the general meaning must be plural sex if not indiscriminate.

**CAUSES OF HUMAN TRAFFICKING**

The most common factor leading to immoral trafficking is economic, especially, where women enter into prostitution voluntarily. However, economic reasons do not hold good in cases where women are compelled by their abductors or buyers or even by family members including the husband. Other factors like alienation from the family or the decay of moral values could be at the root of the problem.\(^1\) While there may be some other factors for drifting into prostitution, poverty is the determining factor in most of the cases in India. Some of the causes peculiar to India which indirectly contribute towards the vice are social evils like dowry system, child marriage and the religious and social constraints on widow remarriage.\(^1\)

The Committee on ‘Status of Women’ appointed by the Government of India in its report of 1975 observed that recruitment to this profession is easy and girls from the middle class are also joining this profession and these women practise prostitution often with the connivance of their parents or husbands in order to secure huge sums of money to keep up an appearance of affluence. Educated and outwardly respectable, these women are prompted to take to prostitution because of the undue emphasis on the values of affluence.

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10 AIR 1963 Pat 381
11 Section 2(f).
12 See generally, Bilimoria Rani, Female Criminality, Eastern Book Company, Lucknow, 1983.
13 Ahmad Siddique, Criminology, EBC, Lucknow, 2005, p.460.
Causes of prostitution may include ill treatment by parents, bad company, family prostitutes, social customs, inability to arrange marriage, lack of sex education, media, prior incest and rape, early marriage and desertion, lack of recreational facilities, ignorance, and acceptance of prostitution. So long as men want to buy sex, prostitution is assumed to be inevitable.

**The Consequent Harms Of Prostitution**

Prostitution has been denunciated in almost all societies for various reasons; the most fundamental reason being that it offends the elementary norms of decency and culture and involves human debasement of the lowest order. It has been condemned as an evil, albeit inevitable, by social reformers, religious thinkers and philosophers alike. Illegitimate sex is considered to be a great sin under all the religious systems and it should be too evident that the lowest level of illegitimate sexual conduct is reached in prostitution.\(^\text{14}\) The other adverse effects are the creation of nuisance on the streets due to solicitation by the prostitutes or their agents, spread of venereal diseases and the psychic or emotional disturbance to children and young persons belonging to families of the prostitutes or living in the brothel areas.\(^\text{15}\) Besides the harm caused to society, prostitution may also give rise to crimes like cheating, blackmail and breaches of peace in an indirect manner.

In Western countries, prostitution was considered a ‘necessary evil’ and, as such, prostitution had the social function of satisfying the socially repressed male sexual needs which, if left unexpressed, would eventually be directed towards ‘honest’ virgins and married women.\(^\text{16}\)

Owing to the spread of most dreaded diseases due to prostitution, most of the States thought it prudent to enact laws making prostitution punishable. As there was no desired result, almost all States declared that prostitution *per se* is not punishable, but only commercialized sexual vice, coupled with exploitation or abuse of females. From time immemorial, only females were considered to be indulging in prostitution. But in modern times, such a perception has changed and we find that even males are sexually exploited and abused for gains. Thus, in the present times, a prostitute may be a female, male or transgender.

**Responses To Prostitution**

Societal responses to prostitution are of three kinds: suppression, regulation and abolition. In the UK, following the recommendation of the Wolfendon Committee, the Street Offences Act, 1959 was enacted with the object of preventing the nuisance aspect of prostitution and not to ban it.\(^\text{17}\) There are some other local and special laws like the Vagrancy Act, 1824 and the Universities Act, 1825 which also take care of the problems arising out of prostitution. The object of these legislations is to strike at the nuisance aspect of prostitution and to keep it away from some special areas.

In the USA, prostitution is prohibited in most states, except the State of Nevada where countries have the option to permit it if they so desire. The USA represents the system based on

\(^{14}\) Ibid p. 461.

\(^{15}\) Ibid.

\(^{16}\) George Simmel, 1968, 1984

\(^{17}\) Section 1 of the Act provides: “It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution.”
Existing Indian laws tolerate prostitution, but do not address violence within prostitution or ways to redress it.¹⁸

Supporters of the idea that prostitution should be legalised feel that it is a consensual act between adults and, therefore, the government should not ban it. Making prostitution illegal increases criminal activities and negatively affects the prostitutes. Those who advocate that prostitution should be made illegal hold the view that the victims are the prostitutes themselves and prostitution often leads to serious emotional, mental and physical long term effects to the people involved. Keeping prostitution illegal is the only way to prevent abusive and dangerous activities such as child prostitution, human trafficking, etc.

In most countries, prostitution is illegal, while in some, it is legalised. There is a huge difference worldwide over the position of prostitution and its law. Even in countries where it is legal, certain rules have been strictly laid down for the regulation of prostitution. In 1999, Sweden became the first country to make it illegal to pay for sex but not to offer sexual services, i.e., it is the client who commits a crime, but not the prostitute. In 2009, Norway and Iceland enacted the same law. In Thailand prostitution is illegal, but it is a hub for sex tourism. In the UK, although prostitution is not illegal, it is illegal to pay for sex with a prostitute who has been subjected to force. In Nevada (US), prostitution is legal except for a few counties. According to their laws, all the registered brothel prostitutes must be checked regularly for several sexually transmitted diseases and monthly for HIV, condoms are mandatory for all oral sex and sexual intercourse, brothel owners may be held accountable if customers become infected with HIV from a prostitute. Prostitution outside the licensed brothels is illegal throughout the state. Prostitution is legal in the Netherlands and is regulated and accepted by society. As per the law there, prostitutes are required to register; they receive a registration pass with a photograph and a registration number. Clients are required to check this pass. Sex companies, including brothels and escort agencies are required to have a license. An advertisement of an individual prostitute should contain his or her registration number and an advertisement of a sex company should also contain its license number.

In India, prostitution is not an offence, but soliciting in a public place, keeping a brothel, pimping are strictly prohibited. According to the Immoral Traffic (Prevention) Act - PITA, 1986, call girls are not allowed to publish phone numbers to the public. Sex workers are also punished for prostitution near any public place or notified area. A client can be charged if he engages in sex acts with a prostitute within 200 yards of a public place or ‘notified area.’ The client may also be punished if the sex worker is below 18 years of age; causing or procuring another to be a prostitute is also punishable.

INTERNATIONAL AND REGIONAL POSITION

A. International Laws and Efforts in Prohibiting Sex Trafficking

There are various international instruments which deal with the problem of human trafficking

for prostitution of women and children as violative of human rights. They deal with the rights and state obligations to ensure the protection of these rights. The international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of human trafficking. These condemnations are in the form of declarations, treaties, and United Nations resolutions and reports.

The Universal Declaration of Human Rights contains various provisions to deal with this problem. Article 1 declares that all human beings are born free and equal in dignity and rights. Article 2 states that everyone (which includes fallen women and their children) is entitled to all the rights and freedoms set forth in the Declaration without any distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 3 provides the right to life, liberty and security of person. Article 4 states that no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. The fallen victims in the flesh trade are no less than slaves. Article 5 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The fallen/trapped victims of flesh trade are subjected to cruel, inhuman and degrading treatment which are obnoxious, abominable and an affront to Article 5 of the said Declaration and also Article 21 of the Indian Constitution.

Article 6 declares that everyone has the right to recognition everywhere as a person before the law. Article 7 provides that all are equal before the law and are entitled without discrimination, to equal protection of the law. Denial of equality of the rights and opportunities and of dignity and of the rights of equal protection against any discrimination to fallen women is violation of Universal Declaration under Article 7 and as well as Article 14 of the Indian Constitution.

The International Covenant on Civil and Political Rights in Article 8 provides that no one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited and no one shall be held in servitude. No one shall be required to perform forced or compulsory labour. Article 24 outlines rights of child to a just and free childhood. It states that every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

By way of Article 10(3), the International Covenant on Economic, Social and Cultural Rights states that the States Parties to the Covenant recognize that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

The Tourism Bill of Rights and the Tourist Code, 1985, adopted by the WTO, enjoins that state parties should preclude any possibility of the use of tourism to exploit others for the purpose

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19 AIR 1997 SC 3021. page 3028 Para 6, line 16
20 Ibid. page 3028.
of prostitution. Article 11 of the Convention on the Rights of the Child, 1989 requires state parties to take measure to combat the illicit transfer and non return of children abroad. Under Articles 34 and 35, state parties must take appropriate national, bilateral and multilateral steps to protect children from all forms of sexual exploitation and abuse and also prevent the abduction, sale and trafficking of children. The Convention on the Protection of the Rights of Migrant Workers, 1990 seeks to put an end to the illegal or clandestine recruitment and trafficking of migrant workers and lays down binding international standards for their treatment, welfare and human rights. Article 3 of the ILO Convention on the Worst Forms of Child Labour, 1999 defines the worst forms of child labour as comprising all manifestations of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and servitude and forced or compulsory labour etc.

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2002, popularly known as the Sex Trafficking Protocol seeks to raise the standards for protecting children from all forms of sexual exploitation and abuse. The UN High Commission for Human Rights in 2002 developed standards so as to strengthen the human rights principles and perspective of the Trafficking Protocol. The document recommends 17 principles and 11 guidelines, which are meant to facilitate the effective implementation of the key provisions.

The International Agreement for the Suppression of the White Slave Traffic was drafted in 1902 and enacted in 1904 to prohibit procuration of women and girls for immoral purposes abroad and to protect female victims rather than to punish the procurers. Procuration is the “act or offence of procuring women for lewd purposes.” However, the 1904 Agreement did not work effectively to decrease the “white slave traffic” because of its limited scope. After World War I, the League of Nations agreed in Article XXIII of the Covenant of the League of Nations to entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children and the traffic in opium and other dangerous drugs. The International Convention for the Suppression of Traffic in Women and Children was concluded in 1921 under the auspices of the League of Nations, and was ratified by a substantially larger number of states than the earlier conventions. This does not provide explicit definitions of trafficking and forced prostitution. It does however define actions that are prohibited by the convention, penalizing any person who to gratify the passions of another: (1) procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; or (2) exploits the prostitution of another, even with the consent of that person. It also establishes 3 types of state obligations: (1) It binds states to a general anti-trafficking principle and obliges signatories to work for the abolition of sex trafficking. Viewing trafficked women as victims of pimps and customers, the 1949 Convention requires signatories to refrain from penalizing women who engage in prostitution, and to refrain from subjecting prostitutes to any special supervision or registration. (2). Signatories agree to participate in specific enforcement measures, including cooperating in the extradition of traffickers, coordinating investigation efforts, sharing information, and recognizing foreign trafficking convictions. (3). The signatories agree to attempt to rehabilitate and otherwise support the victims of prostitution by using various social welfare tools such as public education, health care, and social service. Thus, the provisions of the 1949 Convention made prostitution illegal regardless of consent by the prostituted person.
The United Nations Conventions, such as the Convention on the Rights of the Child, which has not been adopted by the United States, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) were adopted by the U.N. General Assembly in December 1979. These conventions prohibit the sexual exploitation of children and the discrimination against women. These two conventions play an important role in setting international norms for the elimination of sex trafficking. With regard to trafficking specifically, CEDAW, Article 6 states that the States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. As with other conventions, there is a committee established to review reports submitted by States Parties. The Government of India is signatory to the Convention on the Elimination of All Forms of Discrimination against Women but has made reservations to Article 16 dealing with family law and family life. In a famous case, *Visakha v. State of Rajasthan*[^21], the Supreme Court of India held that the Convention was an essential part of Indian law. The Indian Constitution specifically prohibits trafficking in Article 23 but the term is not defined in detail. It has been interpreted as a generic definition that applies to the State as well as private citizens.

One of the biggest steps began in 1998, when the United Nations General Assembly established a committee to negotiate an international convention against transnational organized crime. After two years of work, the General Assembly adopted the UN Convention Against Transnational Organized Crime[^22] along with two additional optional protocols. One of the optional protocols was the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. One hundred twenty-five states signed the convention when it was opened for signature and eighty-one states additionally signed the supplemental protocol on trafficking in persons. The optional protocol on trafficking in persons officially went into force on December 25, 2003. Till date, 117 states are signatories and ninety-five have ratified the protocol. The United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) was conceived to join forces and coordinate the global fight on human trafficking, on the basis of foremost international agreement reached at the UN. UN.GIFT aims to mobilize state and non-state actors to eradicate human trafficking by reducing both the vulnerability of potential victims and the demand for exploitation in all its forms; ensuring adequate protection and support to those who fall victim; and supporting the efficient prosecution of the criminals involved, while respecting the fundamental human rights of all persons. In carrying out its mission, UN.GIFT will increase the knowledge and awareness on human trafficking; promote effective rights-based responses; build capacity of state and non-state actors; and foster partnerships for joint action against human trafficking.

UNODC offers practical help to States, not only by helping to draft laws and create comprehensive national anti-trafficking strategies but also assisting with resources to implement them. States receive specialized assistance including the development of local capacity and expertise, as well as practical tools to encourage cross-border cooperation in investigations and prosecutions. As the guardian of the Protocol, UNODC addresses human trafficking issues through its Global Programme against Trafficking in Persons. The UNODC has issued a comprehensive

[^21]: AIR 1997 SC 3011
strategy setting out the complementary nature of UNODC’s work in preventing and combating both human trafficking and migrant smuggling, and defining the immediate priorities for UNODC’s future action and engagement on these crimes. The new strategy complements UNODC’s Thematic Programme Against Transnational Organized Crime And Illicit Trafficking (2011-2013). UNODC also produces research and issue papers on trafficking in persons and migrant smuggling and engages in both broad and targeted awareness-raising on these issues, notably through the Blue Heart Campaign against Human Trafficking. UNODC’s normative work on promoting the Protocols and capacity-building engages with Member States and working-level practitioners in providing legislative assistance, strategic planning and policy development, technical assistance for strengthened criminal justice responses, and protection and support to victims of trafficking in persons and smuggled migrants. Finally, UNODC initiatives on strengthening partnerships and coordination occur through its participation in inter-agency groups such as ICAT, UN.GIFT and GMG and its management of the UN Trust Fund for Victims of Trafficking in Persons.

International humanitarian law indirectly covers the crime of sex trafficking but it applies only in war time, in contrast to international human rights law, which applies in peacetime. Sex trafficking is subsumed under the crimes of rape and forced prostitution. In practice, forced prostitution has often been included in the analysis of rape that typically precedes or accompanies sex trafficking or forced prostitution in time of war. The Hague Regulations, annexed to the Hague Convention of 1907, provide only partial and indirect protection against rape. The 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties which was created by the preliminary Paris Peace Conference to inquire into the responsibility of the defeated World War I powers for offences committed during the war, includes “rape’ and the “abduction of girls and women for the purpose of enforced prostitution’ (i.e. trafficking) in its compilation of war crimes. Thus, in 1919, and for the first time in history, trafficking leading to forced prostitution is labelled as a war crime. During the Second World War, the Japanese and the Germans forced thousands of women into brothels. Nevertheless, trafficking and forced prostitution were not issues in the Nuremberg War Crimes Trials or the trials conducted in the Pacific after the war in the late 1940s. The Nuremberg Principles, adopted by the U.N. General Assembly, recognized rape as both a war crime and a crime against humanity, but did not separately mention trafficking or forced prostitution.

The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides that women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Despite this legislative protection, sex trafficking and forced prostitution in wartime still persist. The lack of effectiveness

of international conventions to protect women from rape, forced prostitution, and sex trafficking during wartime became apparent in the 1971 Bangladesh conflict when Pakistani soldiers raped thousands of women. Consequent to this, Protocol I to the Geneva Conventions (Protocol I) was passed, and Article 75 (2) (b) of Protocol I explicitly prohibits enforced prostitution at any time and in anyplace whatsoever. Article 75 of Protocol I is a fundamental rights provision that marks an important step in international law by declaring certain acts “always and universally outlawed” and by prohibiting any derogation. Article 4(2)(e) of Protocol II to the Geneva Conventions, which applies to non-international conflicts, forbids “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”

B. Regional Initiatives in Prohibiting Sex Trafficking

The adoption by the SAARC in 2002 of the Convention on Prevention of Trafficking in Women and Children for Prostitution has been a critical event. Though the convention is limited in its definitional understanding of the problem, however its importance lies in the fact that for the first time there is a regional treaty addressing trafficking. This in effect is an official acceptance of the regional nature of the problem and creates an important opening for dealing with the problem from within the formal structures of governance. The aim of this convention is to promote cooperation amongst member states to deal effectively with the various aspects of the prevention, interdiction and suppression of trafficking in women and children, the repatriation and rehabilitation of the victims of trafficking and the prevention of the use of women and children in international prostitution networks. It defines “prostitution,” “trafficking,” “traffickers” etc. in Article 1. The Conventional so provides measures to prevent and interdict trafficking in women and children and for the care, treatment, rehabilitation and repatriation of the victims.

Role Of Non-Governmental Organisations

The participation of Non-governmental organizations has been increasingly recognised in decision making, law making and in administrative context. In response to the limited scope of the definition of trafficking under current international law, numerous nongovernmental organizations and inter governmental organizations have proposed alternative definition of trafficking. Perhaps the most prominent of these proposals has been drafted by Global Alliance against Trafficking of Women (GAATW), a coalition of nongovernmental organizations working toward the elimination of trafficking in women. It defines trafficking as: All acts involved in the recruitment and/or transportation of a person within and across national borders for work or services by means of violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion. Accordingly, human rights organizations formed a central voice in the

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30 “Prostitution” means the sexual exploitation or abuse of persons for commercial purposes;
31 “Trafficking” means the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking;
32 “Traffickers” means persons, agencies or institutions engaged in any form of trafficking;
individualist camp.\textsuperscript{33}

Amnesty International considers that the trafficking of women into forced prostitution is one of the most widespread and pervasive forms of violence against women. It identifies trafficking as a series of abuses and violations of the human rights of trafficked women and girls, both at the hand of their traffickers and subsequently, within the criminal. It attempts to add to the growing understanding of trafficking as an abuse of human rights, not least the right to physical and mental integrity, and of the right to life, liberty and security of the person.

In January 1992, the Indian federal government established the National Commission for Women (NCW) as a specialist body, consisting of political appointees, to advise the federal government on issues relating to women. From 1996 onwards, the NCW began to examine seriously the question of sex work and trafficking. In the process, the NCW and corresponding state commissions for women at the provincial level carried out through NGOs regional and national studies which produced a fixed institutional narrative of the sex industry focused almost exclusively on brothel-based sex work in big cities, as well as of the most exploitative and violent mode of organization of sex work, where a trafficked sex worker was forced and beaten into sex work under conditions of bondage. At the regulatory level, the NCW played an active role in seeking both domestic and regional law reform.

In India also there are several NGOs engaged in the activities to combat sexual trafficking in women and children and have been successful in their attempt so far. ApneAap Women Worldwide has now spread to Maharashtra, Delhi, Bihar and West Bengal reaching out to almost 4800 women and girls and has set up five anti-trafficking units in red light areas and slums. Recently in Kolkata this NGO has made an attempt to amend the present law regarding trafficking in India i.e. Immoral Trafficking Prevention Act (ITPA). Under section 8 it makes soliciting at a public place a punishable offence. But prostitutes are forced to do so by the pimps. As a result, the women are arrested by the police and punished for a crime never committed by them. They have requested the authorities to delete this provision. They also want that Section 5 of the Act should be strictly enforced which provides for the arrest and punishment of pimps. The reason is that Section 5 of the Immoral Trafficking Prevention Act is hardly used whereas Section 8 is implemented in every state.

HELP, in Andhra Pradesh is an NGO working with children of women in prostitution for prevention of Second Generation Being Trafficked in coastal AP. It is a founder member and convener for NATSAP (Network Against Trafficking & Sexual Exploitation in Andhra Pradesh). It has undertaken trainings to sensitize the police officers and supporting officers on Trafficking. Over 1000 women in prostitution were benefited through their programmes and activities.

**INDIAN LEGAL POSITION**

It is seen that at the international level, different treaties deal with the issue of prostitution

\textsuperscript{33} The Human Rights Caucus, a coalition of rights organizations, became a steady and important player in the negotiation of the Protocol. The International Human Rights Law Group, or IHRLG (now known as Global Rights), formed one of the anchors of the Human Rights Caucus. For the IHRLG, a primary concern was to ensure that the Protocol recognize the importance of protecting the human rights of the trafficked persons.
and recognize it as a human rights violation and at the same time provide the rights and duties to be followed in order to protect women and young girls from forced prostitution. However it is not sufficient that actions be taken at the international level only. It is, therefore, necessary for domestic governments to recognize and assimilate these ideas by way of enacting different legislations for the purpose of furthering the interest of these victims. The Constitutional and statutory position in India is examined hereunder.

The constitutional mandate against trafficking and exploitation is contained in Article 23 of the Indian Constitution which prohibits traffic in human being, beggar and all forms of forced labour. The expression “traffic in human beings” used in Article 23(1) of the Indian Constitution, commonly known as slavery, implies the buying and selling of human beings as if they are chattels, and such a practice is abolished by Article 23(1). But the expression is a very wide one and includes the prohibition of traffic in women for immoral purposes.\(^\text{34}\) In *Vishaljit v. Union of India*\(^\text{35}\), it was held that “traffic in human being” is evidently a very wide expression including traffic in women and girls for immoral or other purposes. A significant feature of Article 23 is that it protects the individual not only against the state but also against private citizens.\(^\text{36}\) In *Peoples’ Union for Democratic Rights v. Union of India*\(^\text{37}\), it was observed that Article 23 is clearly designed to protect the individuals not only against the State but also against private citizens.

Further, Article 35(a)(ii) empowers and mandates the Parliament to make laws for prescribing punishment for those acts which are declared to be offences under Part III of the Constitution.\(^\text{38}\) Under Article 39(e), a directive principle is laid down according to which the State shall direct its policy towards securing 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 avocations unsuited to their age or strength. Under Article 46 also the State is directed to protect the weaker sections from social injustice and exploitation.\(^\text{39}\)

One of the mandates of the National Commission for Human Rights under Section 12 (h) of the Protection of Human Rights Act, 1993 is the promotion of human rights literacy and awareness. The Commission has been endeavouring to achieve the objectives with its own resources. The entire range of activities of the Commission is aimed at creating an environment in which rights can be better promoted and protected. The decisions taken by the Commission in respect of complaints, the programmes and projects undertaken, seminars and workshops held and its publications and discourses, all aim to create a culture of human rights in the country.

\(^{35}\) AIR 1990 SC 1412.
\(^{36}\) Ibid, p. 1189.
\(^{37}\) AIR 1982 SC 1473.
\(^{38}\) Under Article 35 such a law has to be passed by Parliament as soon as may be after the commencement of the Constitution.
\(^{39}\) Constitution of India, Article 46.- The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.
in the Indian Penal Code and the Police Acts. Section 366A of the IPC prohibits procurement of minor girls for illicit intercourse, while Section 366B bans importing minors from another country for the purpose of prostitution. Selling and buying of minors for the purpose of prostitution is proscribed under sections 372 and 373. Further, women in prostitution are subjected to provisions in the Police Acts in different states in India that aim to control ‘indecent behaviour’ and ‘public nuisance’. Women can also be arrested under section 292 for obscenity. The laws against publicly visible prostitution reveal a deep discomfort with uncontrolled sexuality – sexuality that is not confined to the private and controllable domain.

**THE IMMORAL TRAFFIC (PREVENTION) ACT, 1956 (ITPA)**

Pursuant to the ratification of the International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of Others by the Government of India in 1950 and the prohibition of traffic in human beings under Article 23 of the Constitution, the Indian Parliament passed the Suppression of Immoral Trafficking in Girls and Women Act, 1956 (SITA), which was comprehensively amended in 1986 and renamed as Immoral Traffic (Prevention) Act, 1956. The Statement of Reasons states it to be an Act for the prevention of immoral traffic in pursuance of the International Convention signed at New York on 9th May, 1950. The object of the Act was explained by the Madras High Court in *re Ratnamala*40. The Court stated that the object of the Act was not to render prostitution *per se* a criminal offence or to punish a woman because she prostitutes herself. The purpose is to inhibit or abolish the commercialised vice, i.e., traffics in women and girls for the purpose of prostitution as an organised means of living, as well as to rescue victims of immoral traffic and those in moral danger by providing for a rescue and rehabilitation machinery.

The laws were intended as a means of limiting and eventually abolishing prostitution in India by gradually criminalizing various aspects of sex work. The law itself is vague in many respects, since it does not make prostitution a crime, but forbids sex workers from publicly soliciting customers. The salient features of the Act are as follows:

1. **Prohibition of Immoral Trafficking**

The key concept “immoral trafficking” is not defined in the interpretation clause of the Immoral Traffic (Prevention) Act, 1956. Section 5 of the Act defines the offence by using the words ‘induces’, ‘procures’ and ‘takes’. It seeks to strike at immoral trafficking at the point of origin, transit and destination. Section 5(1)(a) and (b) which deal with the place of origin prohibit inducement or procuring a person for the purpose of prostitution. Section 5(1)(c) deal with the course of transit, i.e., it prohibits taking or attempting to take a person or cause a person to be taken, from one place to another for the purpose of prostitution. Section 6 deals with the destination and prohibits the detention of a person where prostitution is carried on. Under section 5, procuring, inducing or taking for the sake of prostitution is made punishable with varying periods of imprisonment, greater punishment being prescribed for offences against minors and children.

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40 AIR 1962 Mad 31.
2. **Prohibition on living on the earnings of prostitution**

Section 4 of the Act seeks to punish a person who is above the age of 18 years and lives knowingly, wholly or in part, on the earnings of prostitution of another person. This provision aims at touts and pimps. A person over 18 years of age shall be presumed to be living on the earnings of a prostitute if (i) he lives or habitually lives in a company of a prostitutes; (ii) exercises control, direction or influence over movements of a prostitute which shows that he is aiding, abetting or compelling a prostitute; or acts as a tout or pimp on behalf of a prostitute. The punishment prescribed for living on the earnings of prostitution is imprisonment which may extend to two years or with fine which may extend to one thousand rupees, or both. In case the earnings relate to those earned by a child or minor, the minimum term of imprisonment prescribed is seven years which may extend to ten years.

3. **Prohibition on keeping or managing of brothel or letting out or allowing premises to be used as brothel**

Brothel includes a house, room, conveyance or place which is used for sexual exploitation or abuse for the gain of another person, or for mutual gain of two or more prostitutes. Sec 3 of the Act seeks to punish any person who (i) keeps or manages a brothel; (ii) Allows tenants, lessees or any person to use his premises as brothel; and (iii) Lets out a building or premises for the purposes of a brothel. Such lease or agreement becomes void.

In *Tailor Krishnan v. Public Prosecutor, Madras*, it was held that that there is no need for evidence of repeated visits by persons. A single instance coupled with surrounding circumstances is sufficient to establish that the place was used as a brothel and the person alleged was keeping it.

4. **Prostitution in or in the vicinity of public place**

Prostitutes are forbidden to practice their trade within 200 yards of a “public place” or a notified area. Sec 7 of the Act prohibits carrying on of prostitution in any premises which is within a distance of 200 metres from any public place like place of public religious worship, educational institution, hotel, hospital, nursing home, notified by Police Commissioner or Magistrate. This section seeks to punish the person who carries on prostitution and also with whom prostitution is carried on. It apparently refers to (1) a pimp or tout and (2) a prostitute. Sec 7 is different from the other sections in that it makes prostitution *per se* indictable.

5. **Seducing or soliciting for the purpose of prostitution**

Sec 8 prohibits seducing or soliciting in any public place or within site of any public place so as to be seen or heard from. Seduction refers to tempting or attracting by words, gestures or

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41 Section 2(a), The Immoral Traffic (Prevention) Act, 1956.
42 AIR 1967 SC 567.
43 Section 2(h), ITPA: “public place” means any place intended for use by, or accessible to, the public and includes any public conveyance;
44 A “notified area” is a place that is declared by the government to be “prostitution-free” by the state government under Section 7(3) of the Act.
wilful exposure. Solicits means to molest, loiter or cause obstruction or annoyance or offend public decency. In *Kamala v. Unknown*[^45], the Madras High Court observed that the Act itself has not defined the word “solicits”; Section 8(a) which is a different offence, refers to the temptation of a person, or to attracting a person for the purpose of prostitution. Presumably, the word ‘solicits’ conveys something more, and has the essential import of an oral entreaty or persuasion, used to achieve the object of prostitution. Merely to indulge in some flirtation with a stranger, or to behave in such a way as to attract the attention of persons of the opposite sex, may, be regrettable or immodest, but *per se*, it does not amount to any offence under Section 8(b) of the Act.

### 6. Rescue and Rehabilitation

The government is legally obligated to provide rescue and rehabilitation in a protective home for any sex worker requesting assistance. The ITPA also provides for the appointment by the Government of a police officer to fight trafficking nationwide.

#### Judicial Response

Various judgments have been delivered by the Supreme Court of India dealing with the issue wherein directions have also been issued for the protection of the victims of sex-trafficking. In *State of Maharashtra v. Madhukar Narayan Mardikar*[^46], the Supreme Court protected the right to privacy of a prostitute. The Court held that even a woman of easy virtue is entitled to her privacy and no one can invade her privacy as and when he likes.

The Supreme Court has delivered two important judgments with regard to the issue of trafficking. On the issue of child prostitution, in the case of *Vishal Jeet v. Union of India*[^47], the Supreme Court called on the central and state governments to set up advisory committees to advise government on matters relating to child prostitution and social welfare. As a result of this decision, the Government of India set up a Central Advisory Committee on Child Prostitution and state governments also set up advisory committees. In the second decision, *Gaurav Jain v. Union of India*[^48], the Supreme Court in 1997 directed the Government to constitute a committee to make an in-depth study of the problem of prostitution and child prostitutes and to develop strategies for their rescue and rehabilitation. The Court issued directions for the prevention of induction of women into prostitution, rescue and rehabilitation and schemes for the welfare of prostitutes’ children and of children of prostitutes. Significantly, the judgment bases itself on two attitudes: one that prostitutes are ‘fallen women’ and second, that their children are best separated from them.

In *Khushi Harkishan Malhotra v. State of Maharashtra*,[^49] the Bombay High Court was faced with a case where a woman caught in a hotel room was, under the Immoral Traffic Prevention Act, 1956, remanded to a *Mahila Vasatigriha* (Women’s Reform Home) and unduly detained there.

[^45]: 1966 CriLJ 1021.
[^46]: AIR 1999 SC 495.
[^47]: AIR 1990 Sc 1412.
[^48]: AIR 1997 SC 3021.
[^49]: 2006 Cri.L.J. 612.
without following due procedure and examination of the details of the fact situation. She managed to escape and it was revealed that in the preceding two years 140 inmates had done the same. The High Court observed that the approach of the Courts below ought to have been very cautious considering the fact that the Court was dealing with the victim and not the accused. The Courts should have shown some more sensitivity. In fact, a mechanical approach has been adopted by the Court.

In the case *State of Uttar Pradesh v. Kaushalya*\(^{50}\), the constitutional validity of Section 20 of the ITPA was challenged on the ground of violation of guaranteed fundamental rights. The ITPA under Section 20 gives power to a Magistrate to direct prostitute residing in his geographical area of jurisdiction to remove himself/herself from the area and also to prohibit the person from re-entering without written permission from the Magistrate. The validity of the provision was challenged as discriminatory and as well as an infringement of the rights to move freely and to reside in any part of India. The Supreme Court observed that reasonable classification was permissible under Article 14 which guarantees the right to equality if it is in keeping with the objective to be achieved by the particular legislation. It held that there was a pronounced and real difference between a woman who is prostitute and a woman who is not. The judgment took the view that the classification had a nexus with the objective sought to be achieved by the Act and did not violate the fundamental right to equality. In respect to the violation of the fundamental rights to move around freely and reside in any part of India, the Court held that the reasonableness of a restriction depends upon the urgency of the evil sought to be controlled. It observed that one of the objects of the Act is to control the growing evil of prostitution and the restrictions imposed by Section 20 were in public interest. The judgment held that once a conclusion is reached that the activities of a prostitute in a particular area are so subversive of public morals and destructive of public health that it is necessary in public interest to deport her from that place, then the restrictions imposed are reasonable and permissible. The power to remove a prostitute under Section 20 of the Act was held to be not violative of the right to equality, a reasonable restriction on the right to move freely and reside in a place of choice and constitutionally valid. The Section is clearly discriminatory and violative of fundamental rights. The judgment clearly illustrates the role of prejudice and stigma with regard to the prostitute in declaring the provision as valid.

**Conclusion**

The increase of sex trafficking worldwide implies the serious violation of the human rights of women and the continuing marginalization of women’s roles in society which necessitates its eradication. In India, efforts have been made to curb this evil but it has been realised that the present Act, i.e. the Immoral Traffic (Prevention) Act, 1956 is not an outcome of a consolidated, sustained mass movement, rather the result of India being a signatory to the UN Convention of 1949. It lacks national conscience and represents a half-hearted approach both in the conceptual plane as well as in legal procedures. The UN Convention for Suppression of traffic in Persons and of the Exploitation and Prostitution of Others laid thrust on suppression of traffic and exploitation and prostitution of others and targeted at traffickers, pimps and agents. The ITPA was enacted to protect the exploitation and prostitution of sex workers by preventing immoral trafficking by punishing brothel keepers,

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\(^{50}\) AIR 1964 SC 416.
persons living on the earnings of prostitution, persons procuring, inducing or taking for prostitution or detaining a person where prostitution was carried out and a person seducing a person in custody etc. But in Sections 7 and 8 which prohibit prostitution in or in the vicinity of a public place and seducing or soliciting for prostitution in public places, punishment is prescribed for prostitutes. But, prostitutes are not the perpetrators rather the victims of the crime. Under the scheme of the Act the customer of prostitution without whom prostitution cannot be carried out is by and large excluded from the scope of the Act. The National Expert Committee under the chairmanship of Justice Krishna Iyer made a forceful plea to penalise the client by amending the law.

Thus, to effectively tackle the problem of sex trafficking, it is necessary that tougher punishment are provided. The punishments specified in the Act are not sufficient to deter the perpetrators as it is a lucrative business. To curb the problem, it is also necessary to establish co-ordination between the country of origin, transit and destination. Countries should enter into bilateral agreements to exchange information on crime syndicates and missing persons etc. In addition, a system of efficient reporting of missing persons must be established as people generally hesitate to report because of the stigma attached. There must be increased surveillance to match the modus operandi of the traffickers. A detailed database of disappeared women and children and traffickers should be developed. Non-governmental organisations are increasingly playing a role in controlling human trafficking. Their participation should thus be encouraged especially in the rescue and rehabilitation of victims. Mostly arrests are made under the penal laws. In such cases the arrested woman is bailed out by the traffickers and taken back to prostitution. There is a need to make arrests under the ITPA so that the woman can be sent to the protective homes where care would be taken to ensure that she was not forced to return to the profession.

The strict restrictions imposed by the Immoral Traffic (Prevention) Act on where and how prostitution could be practiced resulted in action being taken most of the time against the victims themselves. An amendment Bill introduced by the Manmohan Singh government in the earlier Lok Sabha in 2006 seemed to be a step in the right direction. But it lapsed in 2009 with the dissolution of the Lok Sabha. Thereafter, the proposal for reforming the trafficking law has not been revived. The reforms included deletion of the provisions that penalised prostitutes for soliciting clients. Instead, the 2006 Bill for the first time sought to punish any person visiting a brothel for the purpose of sexual exploitation of trafficked victims. Thus anti trafficking legislation should focus on trafficking and the punishment of traffickers, and not on the victims. It should concentrate on the problem of trafficking of minors and it should contain a comprehensive social welfare component based on respect for the economic and social rights of the trafficked woman. It is also necessary to identify the victims of trafficking and the reasons for their vulnerability. It is, therefore, necessary to keep the focus on the victim, the need for preventive measures, for early rescue operations, proper law enforcement, measures for rehabilitation of the rescued and the fixing of responsibility for rehabilitation and reintegration.

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Capital Punishment: Retention or Abolition

Dr. Sanjay Gupta¹*

The debate over capital punishment is complex and confused often oscillating between two extremes of retention and abolition. The retentionists believe that punishment is inversely proportional to crime and increase in one leads to decrease in other, whereas the abolitionists view that there is no determinate relation between crime and punishment as the crime is not controlled by punishment because it is triggered by multifarious factors unmindful of punishment. Capital punishment has been prevalent in the society from time immemorial sanctioned by religious and political institutions. It was mandated that death is sure punishment for killing of a human being which cannot be satisfied by any means except death. Infliction of punishment was considered the chief duty of the king and the punishment was expected to deter people from commission of a crime on the belief that crime and punishment are inversely proportional.

The Evolution and Retentionist View

In the middle ages indiscriminate use of severe punishment including death penalty was the hour of the day. Capital punishment was not only inflicted for homicide but for minor offences. Even the mode of execution was brutal and inhuman ranging from beheading, boiling in hot oil, pulling to pieces, poisoning, burning, crushing under the feet of an elephant, etc. Unprecedented executions are reported during reign of Henry VIII when 72000 people were hanged to death and a good many were executed. The imposition of death sentence was for crime against person- infanticide, patricide, lynching, rape, kidnapping; crime against property- robbery, speculation, theft; as well as crime against State- treason, spying, rebellion, mutiny, etc. Stoning to death was the mosaic punishment for the crimes of blasphemy, adultery, kidnapping, incest, murder, etc.

The frequent use of death penalty even for minor offences was on account of its recognition as a proper, effective, reasonable and proportional mode of punishment. The people believed that punishment was a passionate social reaction which was not aimed at avengement but defense. The desire for vengeance was a normal reaction of an individual which satisfied their animal instinct and is a common response to the stimuli in those days. The State undertook the responsibility to execute the vengeance on behalf of individuals in order to stop the individual chain reactions. The believers of positivist theory, deterrence theory, reformatory theory, transdental theory, expiatory theory, preventive theory recognizes the punishment as a reaction to crime but differ on account of

1 ¹Associate Professor, Deptt. of Law, University of Jammu.
2 ²Lev. 24:17; see also Brhaspati, xxii, 29
3 ³Num. 35:31
5 ⁵Id. 24
6 ⁶Id., 15; see also A.S.Altekar, State and Government in Ancient India; Subash C. Gupta, Capital Punishment in India, 1986.
7 ⁷Id. 17
the purpose of punishment.

The retentionists view punishment including capital punishment as a proper and effective way to deter people as it discourages criminal behavior, controls crime precipitation and satisfy victims. They believe that it is better to eliminate few than to put to peril the life of many. Moreover they view that execution is economically viable as confinement involves expenditure over a period of time as a waste. The money so saved can be utilized for other more constructive works and for the betterment of noble souls.

The retention of death penalty can be found in the statute books of the countries which are facing terrorist threats or the drug menace. Even in those countries the judiciary has been vibrant enough to safeguard the individuals against the abuse of the process. In *Jagmohan Singh v. State of U.P* 9, the court opined that death penalty is not unusual in India as it had been existing since ancient time. Even the procedure for appeal, reprieve, etc., make it a reasonable because the life is deprived as per the procedure established by law. Reliance was paid to the observation of the law commission of India which recommended for the retention of capital punishment10. The discretion with the judges was held to be proper and not unfettered as it is exercised after taking the aggravating and mitigating factors.

**The Abolitionist View**

Recent trends exhibit that the abolitionistic approach has emerged victorious over the retentionistic approach as the majority countries have either exterminated the capital punishment from their statute books or have reduced it to bare minimum. The humanistic approach stands recognized in the international instruments especially in the form of second optional protocol to the International Covenant on Civil and Political Rights wherein it is affirmed that abolition of death penalty will contribute towards enhancement of human dignity and progressive development of human rights.

The reformative approach to crime was initiated in the 18th century principally advocated by *Caser Beccaria* and *Jeremy Bentham*. They were very critical of the capital punishment and the ways of executing it. It was advocated that incapacitation and deterrence are the ends, and, to the extent possible, mildness should characterize the means of achieving them. Severity is gradations of intensity to deter men from committing crimes, if beyond the extent necessary, it is unjust11. Thus penitentiary was put forth as an alternative to capital punishment which was aimed at bringing about a radical transformation or a complete regeneration in the society. In the age of science, the tendency to commit crime is viewed as a diseased or disturbed state of mind which gets fired under stressful socio-economic conditions. Therefore the reformation aims at bringing about peace and solace to the perturbed state of mind, thus turning the beast out of human body. Even the studies are being carried out to ascertain the chromosomal links to criminality which if established will be a pointer to the

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9 AIR 1973 SC 947
10 35th REPORT, 1967
11 Walter Berns, *For Capital Punishment*, 1979, 28
diseased state of body and mind.

Krishna Iyer, J., pinpointed that every saint has a past and every sinner a future, never write off the man wearing the criminal attire but remove dangerous degeneracy in him, restore his retarded human potential by holistic healing of his fevered, fatigued, or frustrated inside and by repairing the repressive, though hidden, injustice of the social order which is vicariously guilty of the criminal behavior of many innocent convicts. Law must rise with life and jurisprudence responds to humanism. His Lordship is of the view that death penalty is a teasing illusion, a retributive barbarity, violent futility, violation of divinity, revocation of correctional possibilities, myopically unscientific and a farewell to human rights and human dignity.

In ancient India, amercement was recognized as an alternative to punishment provided the death was caused under delusion or it happened after a lapse of time. Abolitionists view the capital punishment as a barbaric, inhuman, cruel, irrevocable punishment especially on account of judicial fallibility. They view that life is a fundamental privilege enjoyed by a human being which should be extinguished in a natural way and not unnaturally by a human agency.

**The Middle Path**

Though the abolitionist viewpoint is gathering ground, yet the society has not paid farewell to retentionistic approach. Recently a resolution was moved in the general assembly of the UN for the abolition of death penalty wherein 107 members voted in favor, 36 members abstained from voting and 38 members voted against it including India, China, America, Iran, and Saudi Arabia. Indeed the countries with the high crime rate prefer to retain the death penalty but in India the judiciary has very effectively drawn a compromise between the extremes of retentionist and abolitionist views and has evolved the doctrine of rarest of rare cases in awarding death sentence.

The majority in Rajendra Prasad v. State of U.P strived to carve out special reasons for imposing death penalty in order to regulate the judicial discretion. Accordingly the death penalty can be imposed in very limited circumstances to uphold public order and social security which include the personal and social, the motivational and physical of the criminal; absence of mental imbalance, neurotic upsets and psychic crises; violent dacoity; organized economic offences; planned and intentional killing; professional murders; nefarious activity with a profit motive; killing of defenders of law; intentional killing by a professional or businessmen; hardened criminal who cannot be reformed according to current psychotherapy or curative techniques, etc.

Sen, J. delivering the minority judgment opined against putting the judicial discretion in a straight jacket formula as each case depends upon its peculiar facts and if they were to be guided by the classification, the imposition of death penalty shall be non-existent.

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14 R.P. Kangla, note 4, 283
15 AIR 1979 SC 916
16 Id., 945
In *Bachan Singh v. State of Punjab*\(^{17}\), the court deliberated whether section 302 of Indian Penal code is unconstitutional as it provides death penalty as an alternative punishment in cases of murder. The court by a majority opined that death penalty is not unconstitutional as it is or the execution is not unreasonable, cruel or unusual. According to court the signing of ICCPR does not affect the constitutional validity of death sentence as it does not defile the dignity of an individual. The court cautioned that relative weight should be given to aggravating and mitigating factors and it should be imposed in rarest of rare cases.

*P.N.Bhagwati*, J., in his minority judgment opined that death penalty has no rational nexus with any legitimate penological goal and it is arbitrary and irrational. Furthermore it confers unguided and standard less discretion to the court.

**Mandatory Capital Punishment**

The existence of capital punishment as an alternative mode of punishment is indeed reduced to bare minimum; but still countries have recognized mandatory capital punishment for violation of law especially in relation to heinous crimes including first degree murder, murder by life convict, sedition, terrorism, drug trafficking, etc. if a case is made out against the accused then the judiciary is compelled to impose mandatory death sentence in the absence of judicial discretion. These provisions take out the effective judicial determination of the guilt of the person and the judges to apply the strict standards of guilt determination. They cannot draw a balance between the mitigating and the aggravating circumstances. Moreover the shift in the principle from presumption of innocence to presumption of guilt complicates the procedural propriety making it difficult for the accused to defend himself from the rigors of law. Of late, there has been a shift in the judicial stance to apply constitutional standards in determining the validity of such legislations.

**Unconstitutionality of Statutory Provision**

In *Mithu v. State of Punjab*\(^{19}\), the constitutional validity of section 303 of the Indian Penal code was challenged as it imposes mandatory death sentence on a life convict. The court on the question of finality of legislative decision pointed out that legislative wisdom on justice and fairness is not final and court can always deplore the historical facts as well as fairness of procedure prescribed by law in depriving a man of his life. Courts cannot be imposed with dubious, unconscionable duty of imposing pre-ordained sentence of death by the legislature. On the question of rationality of death sentence approved by the apex court *in Bachan Singh v. State*\(^{20}\), the court observed that in that case the death penalty was an alternative and not mandatory or the only punishment prescribed. In case of death sentence as an alternative, the judiciary can reason out as to sentence, which is denied in mandatory sentencing. The judges cannot look to circumstances under which the offence is committed but have to compulsorily impose death sentence if a case is made out which is a denial

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17 AIR 1980 SC 898; See also *Shiv Ram v. State of U.P.*, AIR 1998 SC 49
18 *Bachan Singh v. State of Punjab*, AIR 1982 SC 1325 ( since the minority judgment was published in 1982)
19 AIR 1983 SC 473
20 Supra note 17
of judicious determination.

The court observed the impugned provision as unconstitutional as it denies the right to be heard as to sentence which is available to other accused persons. It takes away the right of judiciary to look into mitigating factors like systematic harassment, grave provocation, diseased state of mind, etc. Furthermore, it is unjust and unreasonable as it does not logically differentiate between a life convict who had undergone a sentence and commits murder and a life convict who commits murder during captivity.\footnote{Supra note 19, 479-480}

In \textit{George Summer v. Raymond Wallace Shuman}\footnote{483 US 66}, Nevada statute provided for mandatory death sentence to a convict who commits murder while undergoing life imprisonment. The majority opined through \textit{J. blackburn} that the statute is violative of Eight and Fourteenth amendment hence unconstitutional.

In \textit{Furman v. Georgia}\footnote{408 US 238 ( 1972 )}, the U.S Supreme Court observed every death penalty statute as unconstitutional as the death penalty is being imposed indiscriminately; and the legislature and jury never use the power to discern between the choices of life imprisonment and death penalty. Furthermore, the court opined the capital punishment being cruel and unusual is violative of 8th amendment.

After this determination, the State of North Carolina made an amendment in the statutes and instead of discretion provided mandatory death sentence for first degree murders. The constitutionality of the statute was challenged in \textit{Woodson v. North Carolina}\footnote{428 US 280 ( 1976 )}.

The court after looking into the history of death sentencing in America opined that death sentencing is considered to be unduly harsh and unworkably rigid and in majority of the cases, after 8th amendment was adopted, the jurors have given verdict against automatic death sentencing. The court deciphered the contemporary standards of decency rejecting death sentence from the aversion of jurors and legislators to death sentencing. The court observed that North Carolina’s mandatory death penalty statute departs markedly from contemporary standards as it failed to provide a constitutionally tolerable response to Furman’s rejection of unbridled jury discretion which talks of standardization of sentencing power and removing total discretion. The judiciary also loses its power to check the arbitrary and capricious exercise of that power through a review of death sentences. The mandatory death sentencing also accords no significance to relevant facets of character and record of individual offender and the diverse frailties of humankind but treats every offender as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

In \textit{Roberts v. Louisiana}\footnote{428 US 325 ( 1976 )}, the constitutionality of Louisiana mandatory death sentence statute was challenged which was held by the courts as unconstitutional as it does not provide the standard for jury trial and aims at capricious exercise of power by jurors in case they feel death
sentence is inappropriate. In *Reyes v. Rex*\(^{26}\), the privy council held the statute of Belize providing for mandatory death sentence as unconstitutional because it precludes the judicial consideration of the humanity elements. It was stressed that the job of court is to do justice, i.e. the determination of sentence which the aggressor deserves and fixing of appropriate sentence for the crime; and job of executive is to provide mercy i.e. the aggressor need not suffer the punishment which he deserves.

In *Regina v. Hughes*\(^{27}\), the privy council held the criminal law of saint Lucia providing for mandatory death sentence as unconstitutional because it is inhuman and degrading and moreover the judicial wing lacks judicial discretion.

In *Bowe v. Queen*\(^{28}\), the pricy council formulated principles to be observed while imposing death sentence;

1. It is fundamental principle of just sentencing that the punishment should be proportionate to crime.
2. Criminal culpability varies from case to case.
3. Every murderer does not deserve to die.
4. The discretionary judgment on measure of punishment must be made by the judiciary.

In *State of Punjab v. Dalbir Singh*\(^{29}\), the vires of sec. 27(3) of Arms Act, 1959 was challenged before the Supreme Court. In this case, a constable of CRPF fired upon from an SLR the Battalion Havaldar Major and the Deputy Commandant resulting in the death of Battalion Havaldar Major. When the accused was reloading the gun, he was over powered and disarmed. The accused was charged under ss. 302 and 307 of IPC read with sec. 27 of Arms Act. The Trial court sentenced him under the impugned section but the High Court reversed the order of conviction on the basis of irreconcilable inconsistency in the prosecution case. The apex court did not found any perversity in the finding of the High Court, therefore declined to interfere, but since vires of section 27 was questioned, the court examined it. The said section 27 consisted of three sub-sections; first part prohibited the use of arms and ammunition without a license and provided for a punishment with imprisonment of 3-7 years; the second part prohibited the use of prohibited arms and ammunition and provided punishment with imprisonment of 7 years to life imprisonment; and the third part provided that if a person does an act resulting into death of person, the punishment is mandatory death sentence.

The apex court opined that first two parts of section 27 are reasonably classified and proportionate but part third is unconstitutional. In the case section 27(3) was not called for because the accused was not using the prohibited arms in contravention to sec. 7 of the Act. The court observed that mere possession can entail death penalty or even accidental firing or unintentional use

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\(^{26}\) (2002) 2 AC 235  
\(^{27}\) (2002) 2 AC 259; see also Fox v. Rex (2002) 2 AC 284  
\(^{28}\) (2006) 1 WLR 1623  
\(^{29}\) Cr. Appeal no 117 of 2006, decided on 1.2.2012
can invite death penalty. Thus it is unreasonable as it is devoid of any guideline in determining the use and its effect. Moreover the said provision came into operation in post-constitutional era and is clearly violative of Art. 13 of the Constitution of India. Therefore, Sec 27 is against fundamental tenets of constitution and the judicial determination of death sentence in Mithu\textsuperscript{31} and Bachan Singh\textsuperscript{32} which have been recognized worldwide as proper.

**CONSTITUTIONALITY OF CAPITAL PUNISHMENT**

The constitutional validity of section 29 of Misuse of Drugs Act, 1973 was challenged in *Ong Ah Chuan v. Public Prosecutor*\textsuperscript{33} which provided for mandatory death sentence for persons convicted of trafficking in more than 15 gms. of heroin. two persons namely *Ong* and *Koh Chai Cheng* were arrested for carrying heroin in their cars for more than the prescribed quantity. *Ong* pleaded that he was carrying heroin for his personal consumption whereas *Koh* pleaded ignorance about presence of heroin in his car. Both were sentenced to death by the trial court. They appealed to Court of Criminal Appeals of Singapore but the same was dismissed. Thereafter they filed special appeal to Privy Council. The Constitution of the Republic of Singapore provided that no person shall be deprived of his life or personal liberty save in accordance with law\textsuperscript{34} and all persons are equal before the law and entitled to equal protection of the law\textsuperscript{35}.

It was argued on behalf of the defendant that replacement of presumption of innocence with the presumption of guilt violates Article 9 as there were no compelling reasons for the same and it operated unfairly. A fair inference is not enough to justify a prima facie breach. The government must show that it is difficult or impossible for the police to prove that possession is for the purpose of trafficking. This shift makes it almost impossible for the accused to rebut the presumption. Furthermore there should be pressing social needs dealt with by the statute and the means provided by the legislature must be proportional to the aims pursued. The classification of persons in possession of a controlled quantity and the variation in punishment is not justified. The standardization of the sentencing process which leaves little or no room for judicial discretion to take into account of the variations in culpability further makes mandatory death sentencing as unreasonable. The court cannot determine the quantity of drug, the state of mind of accused, age of the accused or other compelling reasons in case of mandatory sentencing\textsuperscript{36}.

*Lord Diplock* stressed that the defendants could not prove why they were in possession of controlled drugs more than in prescribed quantity; henceforth they were not in position to rebut the presumption. Moreover they have moved the drug in their car, hence in the absence of proper supportive evidences, it may be presumed that they were in possession for trafficking as action is

\textsuperscript{30} Amendment Act 42 of 1988.
\textsuperscript{31} Op.cit
\textsuperscript{32} Op.cit
\textsuperscript{33} (1981) AC 648
\textsuperscript{34} Article 9 (1)
\textsuperscript{35} Article 12 (1)
\textsuperscript{36} Supra note 25, 656-657
determined by what the offender actually did. The larger is the quantity the greater is the inference for presumption. His lordship opined that one of the fundamental rules of natural justice in the field of criminal law is that a person should not be punished for an offence unless it has established to the satisfaction of an independent and unbiased tribunal. This involves the tribunal being satisfied that all the physical and mental elements of the offence with which he is charged, conduct and state of mind were present. This cannot be described as presumption of innocence. What fundamental rules of natural justice do require is that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused is charged. Presumption of guilt is a common feature of modern legislation concerning the possession and use of things that present danger to society like additive drugs, explosives, arms and ammunition\(^{37}\).

It was pointed out that judges in their judicial capacity in no way concerned with arguments for or against capital punishment or its efficacy as there are questions to be decided by the legislature. The primary object of imposing a death sentence for offences that society regards with particular abhorrence is that it should act as a deterrent; particularly where the offence is one that is committed for profit by an offender who is prepared to take a calculated risk\(^ {38}\).

The classification does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed\(^ {39}\). In case of proved possession, there is no violation of Article 9 (1) as well as factors adopted by legislature on constituting a dissimilarity of circumstances were not purely arbitrary but bore a reasonable relation to social object of a law. It is not unreasonable for the legislature in differentiating between two classes of cases, i.e., persons possessing more than 15 gms. of heroin and persons possessing less than 15 gms. of heroin. Furthermore the prerogative of mercy is available to mitigate the rigors of the law\(^ {40}\).

**Concluding Observations**

Indeed the punishment serves the purpose of crime control and crime precipitation but despite existence of capital punishment from time immemorial there has been no retrogression of crime rate and even heinous crimes are constantly on the rise\(^ {41}\). This development invites serious deliberations to search for new alternatives of punishment which can bring about a total transformation in the society concerning the crime and the criminal. The abolitionist view concerning capital punishment which was endorsed by majority has again been seriously question in the wake of global terrorism and drug trafficking. These inhuman acts of gross violation of human rights can again bring about a radical change in the thought process and one can again witness a change to retentionist view.

In case of death sentencing, there is a need to provide life a chance as reformation and existence should always be preferred over elimination. Modern men boost of scientific advancement

\(^ {37}\) Id., 672

\(^ {38}\) Id., 673

\(^ {39}\) Ibid.

\(^ {40}\) Id., 674

\(^ {41}\) See the latest report of NCRB.
and the scientific development warrants a scientific answer to perception of people towards crime as well as scientific manner of punishment. The human being is considered to be best creation and the same should not be exterminated in a casual, unscientific manner. The chance of reformation should be given to a criminal and where the criminal does not respond to psychotherapy or is certified to be a man beyond correction, the severity in punishment invariably should be brought into action. There should always be proportionality review in cases of sentencing in order to bring out a uniformity in the sentencing process. Even in gravest of crimes, there must be gradation of punishment in accordance with the gravity of commission and execution of crime and capital punishment should always be the last sentence.
Provisions of Rape Under Criminal Law Recent Trends in India

Dr. Shaber Ali. G

“One in three women may suffer from abuse and violence in her lifetime. This is an appalling human rights violation, yet it remains one of the invisible and under-recognized pandemics of our time.”

Nicole Kidman

INTRODUCTION:

Women constitutes half of human population, still they are not treated equally in the society. Women have been greatly praised in the literature and religion of our country. They have been called as ‘goddess’ yet their actual position is made clear at the time they go out of house alone. Religious and social customs have left women weak and fragile. From time to time she was subjected to various kinds of ill treatment. They have to face unwelcome sexual advances, request for sexual favours and other verbal or physical conduct for sexual nature.

Violence against woman is very common phenomena in our society. She is a victim of tyranny at the hands of man. Most of the incidents of sexual offenses are not reported in press. Everyone is shocked to open the newspaper to read about victimization of women in the form of rape, molestation, sexual harassment, eve teasing etc. Violence against women is increasing horizontally and vertically. There is no doubt that the cases of sexual violence and indecent behaviour towards women are increasing phenomenally. Various enactments were made from time to time to protect her from such ill-treatment. One of the most important enactments to protect the women is Indian Penal Code, 1860. Various offenses were recognized under Indian Penal Code, 1860 to punish the offender in case of ill-treatment against women.

Indian Penal Code was drafted by the British, during their rule. Even after independence we are following the same Penal Code to punish the offender with minor changes or amendments. Most of the offenses recognized during 1860 are still prevalent and occupies an important place to deal with ill-treatment against women like rape, sexual harassment, eve teasing and molestation are most common amongst such sexual offenses. In such situation victim can avail the remedy before the criminal court. The remedy is punishment or imprisonment of the offender.

Indian Penal Code mainly defines various kinds of offenses committed against women and imposes corporal punishment. The main purpose of criminal justice administration is to punish the wrongdoer. He is punished by the state. It is one of the main functions of a modern state to protect, peaceful and law abiding citizens from anything that upsets smooth operation of the economic life in the society.

1  Associate Professor, V.M. Salgaocar College of Law, Miramar, Panaji, Goa.
2  http://www.doonethign.org/quotes/violence-quotes.htm
Women were discriminated from time immemorial socially and physically. They were treated separately from men. The most important and heinous offense under the Penal law is offense against human body. The most important offenses against women are Dowry death, Causing miscarriage, Outraging modesty of women, Kidnapping, abduction and Rape.

Out of all these the most important offence against woman is rape. In this article an attempt is made to discuss one of the most heinous offences against human body that is rape. For the purpose of easy understanding and convenience this articles is divided in to the following aspects.

1. Concept of rape and statistical data
2. Provisions of rape under IPC, 1860
3. Role of Judiciary and punishment for rape
4. Marital rape – Indian position
5. Amendments relating to rape
   a. New Draft Bill
   b. Consensual Sex
6. Conclusions

1. CONCEPT OF RAPE AND STATISTICAL DATA:

Rape is one of the most serious offenses against dignity and modesty of women. Rape is not only a crime against woman, it is a crime against entire society. Rape is a crime that infringes the basic human right of women. Rape per se is an offense against woman, violating her dignity and self respect. Ordinarily rape is violation with violence. It does not victimize the woman, but it leaves a stigma of being raped. It causes great degradation to the victim and members of her family. It destroys the entire psychology of a woman and pushes her in to deep emotional crisis.

Before analyzing the provisions under criminal law dealing with rape let us look in to statistical data dealing with reported rape cases, rate of crime, conviction rate etc.,

According to government statistics released on 27th October, 2012, Delhi is perhaps the most unsafe city for women as 414 rape cases were reported in the national capital in 2010, the highest among 35 major cities in the country, while Mumbai followed it with 194 such incidents. 23 per cent of rape cases in urban areas in Delhi and 10.8 percent in Mumbai. Pune reported third highest number of 91 rape cases in 2010 followed by Jabalpur where 81 Rapes. Software city Bangalore recorded 65 incidents of rape while Indore reported 69 incidents of rape in 2010.

Among the states, Madhya Pradesh reported the highest number 3,135 of rape incidents in 2010 followed by West Bengal where 2,311 cases were reported. Assam, Maharashtra, Uttar Pradesh and Andhra Pradesh reported 1,721, 1,599, 1,563 and 1,362 cases respectively. There were 1,012 incidents of rape in Chhattisgarh, 1,025 in Orissa and 795 in Bihar.  

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3  27th October, 2011 Press Trust of India, verify http://ww.ndtv.com/article/india/most-rapes-in-delhi-is-second-
The following data is collected from National Crime Record Bureau, the below table indicates total number of rape cases against women under Sec. 376 of IPC, 1860, from 2006 to 2010.

**Incidents of rape against Women during 2006 - 2010**

<table>
<thead>
<tr>
<th>Crime Head</th>
<th>Year</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rape (Sec. 376 IPC)</td>
<td></td>
<td>19,348</td>
<td>20,737</td>
<td>21,467</td>
<td>21,397</td>
<td>22,172</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>1,64,765</td>
<td>1,85,312</td>
<td>1,95,856</td>
<td>2,03,804</td>
<td>2,13,585</td>
</tr>
</tbody>
</table>

The above table indicates there is increasing trend in cases of rape has been observed during 2006 - 2008. A mixed trend in the incidence of rape has been observed during 2008 - 2010. These cases reported an increase of 7.2% in 2007 over 2006, an increase of 3.5% in 2008 over 2007, a decline of 0.3% in 2009 over 2008 and an increase of 3.6% in 2010 over 2009. Madhya Pradesh has reported the highest number of Rape cases (3,135) accounting for 14.1% of total such cases reported in the country. However, Mizoram has reported the highest crime rate 9.1 as compared to National average of 1.9. Rape cases have been further categorized as Incest Rape and other Rape cases.

Further the analysis shows that there were 22,193 victims of Rape out of 22,172 reported Rape cases in the country. 8.9% (1,975) of the total victims of Rape were girls under the 14 years of age, while 16.1% (3,570) were teenaged girls (14-18 years). 57.4% (12,749) were women in the age-group 18-30 years. 3,763 victims (17.0%) were in the age-group of 30-50 years while 0.6% (136) were over 50 years of age.

After going through the incidence of rape against women from 2006 to 2010, now let us analyze the incidence of rape at glance during the year 2010.

<table>
<thead>
<tr>
<th>Crime heads</th>
<th>Cases reported</th>
<th>% to total IPC crimes</th>
<th>Rate of crime</th>
<th>Charge-sheeting rate</th>
<th>Conviction rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rape</td>
<td>22172</td>
<td>1.0</td>
<td>1.9</td>
<td>94.5</td>
<td>26.6</td>
</tr>
</tbody>
</table>

This table indicates a total of 2, 13,585 incidents of crime against women (both under IPC and Special Local Laws) were reported in the India during 2010 as compared to 2, 03,804. There is record increase of 4.8% during 2010 when compared to 2009. These crimes have continuously increased during 2006 - 2010 with 1,64,765 cases in 2006, 1,85,312 cases in 2007, 1,95,856 cases in 2008, 2,03,804 cases in 2009 and 2,13,585 cases in 2010. Andhra Pradesh, accounting for nearly 7.1% of the country’s population, has accounted for 12.8% of total crimes against women in the country.

by reporting 27,244 cases. West Bengal with 7.6% share of country’s population has accounted for nearly 12.2% of total crime against women by reporting 26,125 cases in 2010\(^7\).

Rape statistics in India or for that matter of any other country must be taken with the proverbial pinch of salt. The figure may be highly misleading since the visible part of the crime as known, reported, investigated and taken to the courts may be like the tip of floating iceberg. The victim may not disclose the incident due to fear of scandal and social stigma. The victim’s family members in spite of their knowing about the offence, may decide not to report the same to the police. Such inhibitions as matter of fact may operate more in India than in many other countries. Criminal proceedings are also highly annoying and embarrassing to the victim and the family\(^8\).

The data indicates crime against woman in rape cases are increasing but the conviction rate is low. Rape is a combination of illegal sex and violence. It is a traumatic experience to the victim. In almost all the societies it is regarded as an extremely grave crime. In many countries it is punishable with death\(^9\). But in India minimum punishment is not less than seven years. Let us verify the provision of rape under IPC,1860 and the role played by the judiciary in imposing punishment in rape cases.

2. **Provisions of Rape under IPC, 1860:**

A man commits rape when he engages in intercourse with a woman, not his wife, by force or threat of force, against her will and without her consent. This is the traditional Common law definition of rape in our Penal Code. Even after approximately 150 years, we are following the same British law definition drafted by Lord Mac Caulay and his assessors during 1860’s with minor changes to punish the criminal in sexual offenses.

**Section 375**, exclusively deal with the offense of rape. **Section 375 of IPC**\(^10\) as amended state that a rape would be deemed to have been committed under any one of the six descriptions. These

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\(^8\) Siddique Ahmed, *Criminology Problems and Perspectives*, by Qadri SMA, (Eastern Book Company, Lucknow, 5\(^{th}\) Ed. 2005) at 449

\(^9\) Id at. 451

\(^10\) Sec. 375 of Indian Penal Code, 1860:

A man is said to commit ‘rape’ who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

First – Against her will
Second – Without her consent
Third – with her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt
Fourth – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully marries
Fifth – With her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequence of that to which she gives consent
Sixth – With or without her consent, when she is under sixteen years of age
include having sexual intercourse with a woman without her free and voluntary consent, through deception, unsoundness of mind, or intoxication, or putting her in fear of death or of hurt. The later also includes threats of death or injury to a third party with a view to forcing a woman to submit to sexual intercourse.

In rape case conviction of the accused can be based solely on the evidence of the prosecutrix if her evidence is worthy of credence. The rule of corroboration is not a rule of law in case of rape. It is a rule of prudence. Insistence on corroboration is advisable but it is not compulsory in the eye of law. The nature and extent of corroboration necessarily varies with the circumstances of each and every rape case.

Section 376 (1) of the Penal Code provides that punishment for rape shall not be less than seven years, under Clause (2) in case of rape on pregnant woman, gang rape or rape on a female under 12 years of age etc, the offender shall be punished with rigorous imprisonment for a term which shall not be less than ten year but which may be for life and shall also be liable to fine. But the court can impose lesser punishment than the minimum prescribed under this Section if the Court specifies the adequate or special reasons for doing so.

Besides Section 376 four more new sections were added to punish offenders of rape by way of Criminal Law (Amendment) Act, 1983. Section 376 A, punishes a man committing sexual intercourse with his wife during separation. Section 376 B imposes punishment on public servant who commits sexual intercourse with a woman in his custody. Section 376 C deals with intercourse by Superintendent of Jail, Remand Home etc. Finally Section 376 D imposes punishment in case of sexual intercourse by any member of the management or staff of a hospital with any woman in that hospital. Under all these sections punishment may vary from two years to five years imprisonment

As per Section 376 of IPC in case of rape punishment shall not be less than the prescribed imprisonment. But court can award lesser punishment, by mentioning adequate or special reasons in doing so. The following cases deals with this concept.

3. Role of Judiciary and punishment for Rape:

Courts in India have taken a very serious view about rape cases and have in strong words condemned this heinous offense against innocent girls. The Apex Court in various cases has said that the attitude of the courts in cases of rape should not be casual and inappropriate. Courts must hear the loud cry for justice by the society in heinous crimes of rape of innocent, helpless girls of tender age and respond by imposing of proper sentence\textsuperscript{11}. In State of Karnataka v. Krishnappa\textsuperscript{12}, the court observed that `public adherence of the crime needs reflections through imposition of appropriate sentence by the court and pleaded for deterrent theory of punishment'.

In Satendra Kumar Singh v. State of Bihar\textsuperscript{13}, the accused was convicted for rape of a minor girl. He got married with her. His sentence of nine years imprisonment under Sec. 376 was reduced to five years. His sentence under Sec.366 for enticing away a minor girl was also reduced to five years.

\textsuperscript{11} Supra note. 6 at 451
\textsuperscript{12} (2000) 4 SCC 75
\textsuperscript{13} 2003 Cr.L.J. 392
In *Prakash Chand v. State of HP*\(^{14}\), where rape on a 14 years old girl was proved by medical evidence and the accused had taken advantage of her loneliness at the moment and forcibly raped her causing some injuries to her. It was held that he deserved no leniency and the sentence of seven years rigorous imprisonment and fine of Rs. 5000 was justified.

In *Rajendra v. State of TN*\(^{15}\), gang rape by ten persons mercilessly on a girl of 19 years one after the other by each accused, the fact that they were youngsters at the time was not considered as adequate and special reasons for imposing lesser sentence. Further in *Bhupinder v. State of Haryana*\(^{16}\), the accused committed rape on a girl of 8/9 years. He raised the plea that he was aged 18/19 years and on the threshold of his life. Due to extreme youth he could not control his passion. It was held that this was not sufficient to lessen down the sentence awarded to him as he had acted like a savage and brute in raping so young girl.

The Supreme Court has provided guidance that a sentence less than the statutory minimum should be imposed only in exceptional circumstances. In *State of AP v. Polamala Raju*\(^{17}\), the offense was committed on a child below 12 years of age. The trial court awarded the prescribed minimum sentence of 10 years RI. The reduction of the sentence by the Appellant Court without disclosing any special or adequate reasons was held to be not proper. The long pendency of proceedings is not an extenuating factor.

The above cases clearly prove that there is no hard and fast rule regarding punishment in rape cases. The court can determine the punishment basing on the facts and circumstances of the case. In majority of the cases the court is awarding the maximum punishment. However, taking into account the reformative theory of punishment the courts are reducing the sentence even in rape cases. Court should not reduce the punishment in rape cases.

According to *Section 114 A*\(^{18}\) of *Indian Evidence Act, 1872* in a prosecution of rape case under Section 376 of IPC once the sexual intercourse by the accused person is proved. The question whether there was consent of the victim alleged to have been raped, the court shall presume that she did not consent. If the victim states that she was raped, the court shall presume that she did not consent. This presumption was incorporated to protect the victim in rape cases otherwise there will be a further torture for her in the course of trial. Generally according to tradition bound Indian society, no female will approach the court stating that she was raped. If approach the court, then the court shall presume there was no consent. Some people feel that this stringent provision of rape law would expose men to blackmail by interested elements and women of easy virtue. However,

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\(^{14}\) (1995) 1 Cr.L.J. 158 (HP)

\(^{15}\) 2002 Cr.L.J. 2292 (Mad)

\(^{16}\) 2002 Cr.L.J. 1286 (P&H)

\(^{17}\) AIR 2002SC 2854

\(^{18}\) Sec. 114 A of Indian Evidence Act, 1872: Presumption as to absence of consent in certain prosecutions for rape.- In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual inter course by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.
the Supreme Court in *Bhagwada Boghinbhai Hirji v. State of Gujarat*¹⁹, rejecting this contention court observed that, ‘instances of false allegations of sexual molestation which are made by western society women who are gold diggers and seek to extract money by holding out the gun of public disclosure are extremely rare in tradition bound non permissive society, where by an large sex is taboo’.

Further *Section 228 A of Indian Penal Code*, punishes a person who prints or publishes the name or any matter which may identify any person against whom rape was committed or alleged to be committed. This protection is introduced to protect the rape victims from the public harassment. In *State of Punjab v. Gurmit Singh*²⁰, the court observed that ‘public abhorrence of the crime needs reflections through imposition if appropriate sentence by the court and pleaded for deterrent theory of punishment.

Once again the Apex Court in *State of Punjab v. Gurmit Singh*²¹, held that trial of rape cases must invariably be tried in camera. Further it was held that avoid disclosing the names of the rape victim in order to save them from further embarrassment. The anonymity of the victim of the crime must be maintained throughout the trial process. *Section 327*²² of *Criminal Procedure Code, 1973* clearly specifies that the inquiry into and trial of rape or an offense under Section 376 shall be conducted’ in camera’.

In *State of Maharashtra v. Madhukar N. Mardikar*²³, the Supreme Court has laid down that the unchastity of a woman does not make her ‘open to any and every person to violate her person as and when he wishes’. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to get the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard. At the most the officer called upon to evaluate her evidence would be required to administer caution to himself before accepting her evidence. In the circumstances of the case, however, there was sufficient corroboration of the fact that the police inspector’s attempt to bend her by force to submission the evidence was generated by the inspector’s unsuccessful bid to cover-up the incident into a prohibition raid.

To protect the interest of rape victims the Apex Court awarded compensation to rape victim in number of cases. In *Bodhisattwa Gautam v. Sudhira Chakraborti*²⁴, the accused person developed sexual relationship with the female on false assurance of marriage. Later he secretly married her before God by putting vermilion on her forehead. The Supreme Court observed that corroboration is not compulsory. The court ordered compensation to the victim at the rate of Rs.1000 per month during the pendency of the trial.

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¹⁹ AIR 1983 SC 753
²⁰ (2000) 4 SCC 75
²¹ (1996) 1 SCC 485
²² Sec. 327 of Cr.P.C, 1973: Clause (2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code, 1860 shall be conducted in camera:
²³ AIR 1991 SC 207
²⁴ (1996) 1 SCC 490
Recently the Supreme Court in *State of Himachal Pradesh v. Asha Ram*\(^{25}\), recorded its displeasure and dismay at the accused father having raped his minor daughter and observed that there can never be a graver and heinous crime than the father being charged of raping his own daughter. Supreme Court enhanced the sentence from 5 years rigorous imprisonment to imprisonment for life. Court also enhanced the fine amount of Rs. 1000 to Rs. 25000. The fine amount was to be paid to the prosecutrix.

### 4. Marital Rape – Indian Position:

Penal Code fails to punish the husband in case of marital rape. No separate provisions were incorporated under our penal law. Martial rape is an offense in USA, Sweden, Denmark and Australia. There is a need to amend our Penal Code to impose severe penalty in case of marital rape. The provisions regarding marital rape can be inferred from the exceptions under Section 375 and Section 376 A of *IPC*. Therefore marital rape under *IPC* can be classified into the following categories:

1. When the wife is between 12 to 15 years of age the sentence may go up to two years of imprisonment
2. Rape of a woman, who is judicially or customarily separated wife is punishable with imprisonment up to two years
3. Rape of a wife above 15 years is not punishable. Hence marital rape continues to be an exception to Sec. 375

The object of this exception is to protect the married women who are less than fifteen years against being forced into premature sexual intercourse with their husbands with terrible consequences to themselves and also the infant mortality and maternal morality, which may follow cohabitation.

Though the India Parliament made changes to punish the offender in rape cases still the existing law relating to sexual offenses need to be suitably amended. It has rightly been said that rape is a legal technicality in as much as it is nothing but passive resistance on the part of female victim against the sexual act of man.

The rape law should be aimed at protecting women’s honour, dignity, personal safety and freedom of choice. Here lies the importance of effective legal and judicial machinery to prevent the escape of offenders from punishment and to ensure protection to victim in the society. In *Delhi Domestic Working Woman’s Forum v. Union of India*\(^{26}\), the Supreme Court observed that ‘there are cries for harshest penalties, but often times such cries eclipse the real plight of the victim. Rape shakes the foundation of lives of the victims. In addition to the trauma of rape itself, victims have had to suffer further agony during the legal proceedings’.

### 5. Amendments relating to Rape:

It is realized that rape should not be treated as a serious crime but it should be viewed as

\(^{25}\) AIR 2006 SC381

\(^{26}\) (1995) 1 SCC 14 at 16
an aggressive crime against person. Researchers have shown that very often the intention of the offender is aggression rather than sex enjoyment.

For the first time rape provisions were amended by Criminal Law Amendment Act, 1983 and introduced certain important changes. New Section 114 A has been inserted under Indian Evidence Act, 1872. Though the amendment has been widely acclaimed and criticized by anti rape movement, it has brought to fore, key issues around press censorship, age of consent, appropriate punishment, burden of proof, custodial rape and the past sexual history of the victim. To that extent it has helped in controlling violence against women.

In 1997 a voluntary organization interested in the issues concerning women approached the Supreme Court through a Public Interest Litigation with the plea that existing Sec. 375 and 376 of IPC and judicial interpretation thereof is not in tune with the current state of affairs. In this petition it is contended that sexual intercourse under Sec. 375 should include all forms of penetration, such as vaginal and oral penetration as also penetration by any part of body or any object. As a result the Supreme Court directed the 15th Law Commission to examine the issue. After careful review the Law Commission in its 172nd Report submitted to the Government of India on March, 2000, recommended that the law relating to rape may be made gender neutral, wider and more comprehensive to bring it in tune with current thinking. However, a two judge bench of the Supreme Court in Sakshi v. Union of India, has rejected the plea for interpretation of the provision of Sec. 375 of IPC to give them a wide import by expressly specifying various forms of penetration within its ambit. The court noted that there is absolutely no doubt about the interpretation of the provisions of Sec 375 and the law is well settled. Reinterpretation of Sec. 375 of IPC will lead to a serious confusion in the minds of prosecuting agencies and would unnecessarily prolong the legal proceedings and would have adverse impact on society as a whole.

a. New Draft Bill:

Finally the Government of India has decided to amend the IPC, 1860 by replacing the word ‘rape’ with ‘sexual assault’ in the existing law in order to broaden the ambit of crime covered under Sec. 375 of IPC and to make the provisions gender neutral. The Home Ministry is working on a Draft Bill, it will soon be brought in the public domain for discussion. Presently, any sexual misdemeanor less than rape or forced sexual intercourse, is dealt with under the lesser category of molestation and the guilty face a maximum of two years imprisonment. If the term rape is misplaced with the term sexual assault, means the present penalty for rape seven years imprisonment, would apply to a broader category of sexual offences. According to the bill sexual assault and rape come under a single umbrella. Draft Bill describes sexual assault as an act in which a man ‘penetrates’ the vagina, anus, urethra or mouth of a woman with ‘any part of his body’ or ‘any object manipulated by him’ the Bill excludes penetrations by objects carried out for hygienic or medical reasons. This

27 Paranjape NV, Criminology and Penology, (Central Law Publication, 13th Ed. 2007) at 177
28 Sakshi v. Union of India (1996) 6 SCC 591
29 (2004) 6 SCALE 15
30 Times of India, Daily News Paper, Goa edition, 10th March, 2010 at 1
bill was criticized and termed as ‘anti men’ with wide scope or misuse\textsuperscript{31}. Further people are worried that the nuances of the law could be used to file false cases against men even if a sexual relationship was consensual. This law is gender discriminatory as it recognized only sexual assault of women by men and not other way around. Till now the government did not pass this Bill.

\textbf{b. Consensual sex:}

Recently passed Protection of Children from Sexual Offences (PCSO) Act, 2012, which is awaiting the President’s assent, has made sex with a person below 18 years a criminal offence. Sex with a minor or even if it is consensual that would be tantamount to rape in the eyes of the law. The offender is liable to be punished with a jail term of at least seven years. It may even extend to life imprisonment\textsuperscript{32}.

This new Act is completely a departure from the current legislation Indian Penal Code, 1860 as per Section 375, states that sex with a person who is younger than 16 years would alone considered as rape. Thus far, a consensual sexual act with a person between 16 and 18 years was not regarded as rape\textsuperscript{33}. Once the new Act comes in to operation there will be a need to amend Sec. 375 of IPC, to comply with the new provisions under PCSO Act.

The new PCSO Act seeks to protect children from offences such as sexual assault, sexual harassment and pornography. It defines any person below the age of 18 years as a ‘child’ and seeks to penalize anybody who commits a sexual offence against him or her. Further this Act, would be a huge deterrent for those who abuse children, it will also protect the girl child from being raped and reduce child trafficking,

However, the act has been roundly criticized by activists and legal experts alike for making the issue of ‘consent’ irrelevant. There are high chances of this act being misused. Youngsters who are 16 or 17 may want to explore and enter into sexual relationships. They could end up being criminalized. This law could be seriously repressive and the chance of it being misused in the hands of the executive, especially the police, is very high. So we have to now wait and see how the act is executed, what the gaps are and what effect it has on society\textsuperscript{34}.

Just raising the age of consent and bringing in a comprehensive set of laws will not stop sexual violence or illicit relationships in society. Since ours is not an open society, parents and schools play a major role in the sex education of children. Creating awareness among the youngsters about this Act is more important to prevent them from becoming a victim under this Act.

\textbf{6. Conclusions:}

Though there are various provisions under the criminal law to protect women from different kinds of sexual harassment. Woman has and still continues to be victimized by man and society. There is a need to acknowledge her as a human being and give her the respect and dignity she

\textsuperscript{31} Times of India, Daily News paper, Goa edition, 22\textsuperscript{nd} May, 2010

\textsuperscript{32} The Telegraph, Magazine, Calcutta, 6\textsuperscript{th} June, 2012 at. 13

\textsuperscript{33} Ibid

\textsuperscript{34} Ibid
deserves. It is a crime against basic human right, namely the right to life as contained under Art. 21 of the Indian Constitution. Further there is a need to provide her personal freedom, choice, feelings and self worth for women. Law enforcement agencies such as police, the lawyers, the judiciary, rehabilitation centers and voluntary social organizations should involve in enforcement of the legal provisions. Law is only an instrument through which crimes can be prevented provided the law enforcement machinery implements the provisions of law effectively. As it was shown in the records that the conviction rate is very low in rape case. We can increase the conviction rate in rape cases if there is active cooperation and support of Law enforcement agencies.

_We can all take responsibility for helping to bring about change, and keeping our friends and colleagues safe from domestic violence._

*Charles Clarke*

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35 Supra note. 2
Tryst to Destiny: Towards Auto Consumer Protection

Dr. S. C. Roy

ABSTRACT

Protection and promotion of Consumer welfare is the common goal of Consumer and Competition Law. Both the legislations recognize the unequal relation between the consumer and the producer. Under Consumer protection Act, the term deficiency and defect has been defined to set minimum quality specification and safety standards for both goods and services and mechanism to redress grievances. The Competition Act ensures that no producers attain a position of dominance. Earlier the MRTP Act was trying to prohibit Concentration of wealth in few hands. But with the liberalization of market, a number of producers and service providers are available in the market to provide goods and services to the consumers. Therefore, with the liberalization policy, the role of competition law and policy along with the consumer protection law is highly Challengeable.

The consumer protection Act 1986 is based on UN guidelines of better protection of consumer interest. IT provides safeguards for the various types of exploitation and unfair dealings. But it has compensatory rather than punitive or preventive approach. The rights of the consumers have been enumerated, i.e. protection against marketing of goods and services which are hazardous to life or property, right to be informed about quality, quantity, purity, standard and price of goods and services in order to protect the consumer from unfair trade practices; the right to be assured of access to a variety of goods and services at competitive prices; the right to seek redresses against unfair and restrictive trade practices; unscrupulous exploitation of consumers; the right to consumer education.

The comprehensive amendment in 2002 in the Act seems effective, functional and purposeful. But in practice, it is only for academic discourse and satisfaction. Almost all consumers are still uneducated in consumerism. Even the vegetable sellers cheat very easily by offering the goods at higher prices with sub standard weights and measures. The quality of goods is out of the reach of common people at reasonable market price. Competition law is not successful in making a ‘Buyers guild’ over sales price and monopolizes in the market. Consumers also believe costly goods or services as of high quality. Those who have extra means can afford without question as a ‘show of prestige. Therefore, the market has become ‘seller’s’ market’, Consumers are bewildering in the market in search of quality good at reasonable price. In case of cloth industry, there is no MRP printed and the sale is solely based on design of the clothes causing heavy ‘cost ‘ on the purchaser which ultimately affects the income budget- saving of the consumer In this Context, the paper seeks to study the competition and consumer policy in India. How far these two legislative policies have been able to protect the interest of the consumer? What mechanism should be applied for the effective competition of the market and auto consumer protection? Although the sellers refer that there is competition in the market and the consumer has to select and decide for the deal. But the consumer is confused because of limited brand/varieties in the particular local market-More so, they have

1 Associate Professor, Chanakya National Law University, Patna
their own association which fixes the policy of sale. There is lack of ‘Consumer Guide’ who can educate the customer on the spot. The supply department and the administrative machinery which is responsible for all checks towards cost, quality, quantity of goods and services are dormant. Even Guarantee/warranty given by the seller is not maintained. The readymade garments are sold on flat discount which is befooling tactic of the business man. Thus, right from the daily consumables to the costly luxury goods, even the educated mass are confused and they have to pay more than the accurate. The consumers do not know the price fixation mechanism and the amount of profit charged. More So, VAT, Service Taxes, Sales Taxes are extra burden on the consumers which also enriches the business man. Thus, overall lose is suffered by the consumer; in this scenario, the protection of the consumer seems herculean never the less utopian.

**Introduction:**

Consumption is essence of life. Life starts with consumption. Initially, the consumption is for the basic requirements of life, later it becomes luxurious as per the means. Everywhere, the consumer wants qualitative goods and sincere services. The payment made for the goods and services are as per the price demanded by the seller. But the purchaser/consumer is deceived and bewildered. In order to check the menace of consumer exploitation, the consumer movement started in USA which spread different European countries and in India it got concretization in the form of consumer protection Act 1986. The Act brought rays of hope among the consumers having remedies from consumer forums, i.e. District Consumer Redressal forum, state commission, National Commission, and finally appeal to the Supreme Court for the defect in goods and deficiency in services. But the situation is almost the same in spite of the enactment. The basic problem lies in the day to day consumption deal in the market. Every day the purchaser has to face the problem of weights and measures, high price, hidden profits in the price, quality goods, spurious drugs, services in the banks, insurance, financial institution etc. There is no exact price on the commodity. Every consumer is bound to spend more, minus quality product and services. The organization i.e. Education, the students are losing their vital time in their life due to lack of professionalism in teaching. The communication sector is also cheating under various excuses and the consumers are wasting time, money and timely work². Electricity Service to the urban and rural area is almost irritating. Water supplies, cleanliness, traffic etc for which municipal corporations are responsible, are poorly managed. In Every step, quality of goods and services are a cry. Although slogans are given from all dealers assuring best quality in goods and services, but they are only invitation to sale. Once the sale/deal is effective, the purchaser is left on the fate. Hotel industry, board and lodging, rail services³, road services, aero plane are also not exception. Even the services under private medical institution are on the same path of Govt. hospitals. More so, the consumers below the poverty line are the worst sufferer from fraud, excessive prices, exorbitant credit charges, poor quality of merchandise, and services⁴. The concept of the end

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² Inspire of assurance of fast speed by the Broad band, Wi-Fi, photon internet services, the factual Evidence is different.
³ Every one knows about the low quality of food supply in the trains at high prices. At the same time, there is no safety of the passengers traveling.
⁴ Treatise on consumer protection Laws, ILI, New Delhi, P.15
of the maxim, i.e. the Caveat Emptor (Let the buyer be aware) is still in practice. The concept of caveat vendetta (Let the seller be aware) is yet to achieve. Since Consumerism is an activity sine qua non, therefore the decency of life Under Article 21\(^5\) of the constitution cannot be achieved. The life means decent life for which all the basic requirements are essential. Article 38 of the constitution mandates the state to bring social order in which Justice, Social, economic and political shall inform all the institutions of life, the consumer cannot be ignored while giving any practical shape to this mandate\(^6\). Article 39 (b) and (c)\(^7\) can be treated as soul to the constitution for Socio-economic Justice. This article provides constitutional protection to the consumers. The Supreme Court has held that Institutions even if not public utility have to comply the directives of Article 39 and charge only fair prices\(^8\). Article 43 ensures all workers, agricultural, industrial or otherwise, a living wages in tune with ILO, promoting the interest of workers as consumers. In similar spirit Article 47 of the constitution requires the state to raise the standard of living to improve public health and to prohibit consumption of intoxicating drinks or drugs which are injurious to health. At the same time, the freedom of trade and profession has not been an absolute fundamental Right rather relative as per Article 19(2).

Most of the subjects relating to consumer protection have been placed under concurrent list. i.e. adulteration of food stuffs, weights and measures, price control, essential commodities, Electricity etc.

In this way, it can be said that the consumer protection provisions already exist in our constitution, although, it got exposure and interpretation after the enactment of consumer protection Act 1986. But this is not the only law, rather it is a law through which the consumer is identified, rights are determined and remedies are provided through consumer forums. This Act provides remedies if defect and deficiency is found in the goods or services respectively. Where as the particular transaction has its own law. The consumer protection law cannot protect the consumer on spot of dealing. Thus, remedies can be provided only when the aggrieved consumer approaches the forum. So, it seems that consumer movement has not focused on the actual problem of the consumer. Although the competition law has tried to encourage competition and maintain competitive markets in order to auto maximize consumer welfare and consumer satisfaction, yet the reality on the ground is different. The sellers have their hold on the market through association, purchasers are unorganized in spite of large population. In this scenario, it is urgent to explore the mechanism of the effective implementation of consumer laws in India.

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5 Article 21 reads as: No person shall be deprived of his life and personal liberty except according to the procedure established by law.


7 As per this article, the state is required to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub service the common good, and the operation of the Economic system should not result in the concentration of wealth and means of production to the common detriment.

8 The oil and natural gas commission & Association of Natural Gas consuming industries of Gujarat and others, AIR, 1990 SC, 1851.
CONSUMER PROTECTION LAWS AND CONSUMERISM.

In the outset, it is presumed that consumer protection Act 1986 is the only law which can protect and provide remedies to the consumers. But the different nature of cases which are thronging in the consumer forums, commissions have proved that ‘defect’ and ‘deficiency’ is a common word in every branch/aspects of consumerism, for basics or pleasures. The consumer Laws in India touches all the aspects of consumerism, i.e. food adulteration⁹, black marketing¹⁰, standards of weights and measures¹¹, Problems related to Essential Commodities¹², infant milk & feeding bottles¹³, Drugs and cosmetics¹⁴, Services-Electricity¹⁵, telecommunications, rail and transports, hotel, banking & insurances, etc.

Now days, the packaging industries are one of the major industries providing impetus to food and beverage industries. The cost on the packages is included with the commodities decreasing the quantity or volume of the commodity. In this way the price is increased and consumer is affected. More so, the duplicate/substandard goods are supplied violating the trade marks laws. The consumers are not in a position to challenge the seller, nor even the industry in spite of competition law. Thus, the consumers at large are every time, everyday being affected.

Although every one has right to trade and profession under Article 19(1)(g) of the constitution. But there is a limitation enshrined under Article 19(2)-(6) keeping in mind the objectives of Article 38 and 39 of the constitution. This is the reason licenses and permits are required for carrying on the business or trade. The licenses are issued on the basis of clear policies laid down, taking due consideration of consumer interest. Generally, an existing license cannot be revoked without giving the licensee an opportunity of being heard¹⁶. This safe guard to the trader is fair and reasonable. But whether this hearing is before the consumers or representatives of consumers? The answer is obviously, no. Then the very purpose of protecting consumer interest becomes in fructuous. Therefore the Administrative authority requires being cautious while dealing with the cases related to license and permits in the interest of consumer. The most important thing is that the authorities themselves are consumers. They are not different from common man. At the same time the traders are also consumers. But the authorities and traders have their specialty in terms of income and possessions, while the common man are no where living with starving means. This is the reason that the consumer protection laws have been enacted. Sections 264 and 267 of the Indian penal code 1860 have made punishable keeping false instruments for weighting, fraudulent use and possession, with fine or one year imprisonment. But who cares? The public health¹⁷ has been protected under the code. It has declared adulteration of food or drink, making it noxious, and sale of noxious food

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⁹ The Prevention of Food and adulteration Act 1954.
¹¹ The Standards of weights and measures Act 1976.
¹² The Essential Commodities Act 1955.
¹⁴ The Drugs and Cosmetic Act 1940.
¹⁵ The Electricity Act 2003.
¹⁷ Section. 272 & 273 IPC.1860.
or drink punishable with six months imprisonment or fine up to one thousand rupees. The sale of adulterated drugs is an offence punishable with similar sentences\textsuperscript{18}. The Trade Marks Act does not protect property marks. The Indian penal code protects the consumer from false property\textsuperscript{19} marks in order to protect the interest of the consumers. Chapter XIX of the IPC is very much constructed in the interest of helpless persons\textsuperscript{20} for all these provisions the police has power under criminal procedure code to inspect, search and seize in the common interest of the consumers\textsuperscript{21}.

Under the contract law, the third party interference is limited in the nature of privacy of contract. In spite of such limitation, the contract Act is important from the consumer perspective\textsuperscript{22}. Here again the yaksha prasna (the million dollar question) is as to who will bell the cat? The consumers are always on weak footing therefore, it is easy to kick them on back foot. The consumers are weaker parties with unequal bargaining power even superseding the exemption clauses. In England, to prevent undue advantage out of unequal bargaining power, various statutes have been passed to bar exclusion of liability. But in India, there is no such legislation concerning exclusion of contractual liability\textsuperscript{23}. Thus, the clause limiting the liability of a dry cleaner to 50% of the price of the sari lost, mentioned on the reverse of the receipt, is against public policy and, therefore, void\textsuperscript{24}. S.27 of the contract Act 1872\textsuperscript{25} also serves consumer interest by promoting competition and restricting monopolistic tendencies. S.73\textsuperscript{26} & 74\textsuperscript{27} of the contract Act also protects the interest of the consumers. The sales of goods Act 1930 is at par with English sales of goods Act 1893, for the protection of consumer interests dealing clearly the conditions and warranties”. The Hire purchase Act 1972 has socio-economic importance. It is a convenient and useful legal device for acquiring consumer durable goods. The Excise Act 1944 empowers the central Govt. to levy excise duty. In the public interest, it can grant exemption full or partial from payment of basic excise duty in respect of any articles\textsuperscript{28}. But the excise tax on production is increasing causing hardship to the consumer. Here, consumers are not aware of these issues and they continue to suffer.

Thus, the consumers have relief under various legislations. They have remedies under common law too. But the major question is how to make all these statutory as well as common law provisions more effective. Consumers are unorganized and dispersed, having different needs, where as service providers and traders are comparatively few in numbers, but organized. The traders have profit motive, not welfare motive. In between traders and consumers, the machinery is not effectively functioning. Even the consumer protection laws are not accumulated at one place. They

\begin{itemize}
\item \textsuperscript{18} Section. 275 & 276 IPC. 1860.
\item \textsuperscript{19} Section. 479 & S.489. IPC. 1860.
\item \textsuperscript{20} Section.491, IPC 1860.
\item \textsuperscript{21} Section. 153. Cr.p.c. 1973
\item \textsuperscript{22} Corlyll v. Carbolic Smoke Ball Co. case.
\item \textsuperscript{23} A Treatise on consumer protection laws, ILI Publication, New Delhi. P.23.
\item \textsuperscript{24} Lily white v. Munuswami, AIR, 1966, Mad-13.
\item \textsuperscript{25} It declares agreements in restraint of trade as void.
\item \textsuperscript{26} It deals with compensation for loss or damage by breach of contract.
\item \textsuperscript{27} It provides alternative remedies under specific Relief Act, under section 21 and 22.
\item \textsuperscript{28} Section .5A of the Central Excise Act 1944.
\end{itemize}
are in different legislations, more so, the mechanism of implementation is confusing. In this scenario, the auto consumer protection seems utopian dream.

**COMPETITION LAW AND CONSUMER WELFARE.**

The competition Act, 2002 is one of the most significant legislation to regulate the new economic regime, i.e. privatization, liberalization and globalization and to create an attitude of competition for proper development. The Act continues for prevention of unfair trade practices having consumer interest. The amendment in MRTP Act 1969 on the basis of Sachar committee has been incorporated u/s 36A to 36E. Of the MRTP Act, i.e. misleading advertisements and false representations; falsely offering sale of goods or services at bargain price; offering gift or prizes to consumers with the incentives of not providing them; non-compliance of product safety standards; hoarding to raise the price of goods. The unfair trade practices Act also included the making of a false promise to replace, maintain a repair an article or any part thereof, misleading the public concerning the price of any product or services, giving false and misleading facts of materials and service a trade of another persons. The publication of any advertisement to be a bargain price, that were not intended to be so provided, is an unfair trade practices. Besides an advertisement offering any gift, prize or any other item not intending to provide, amounts to unfair trade practices. Likewise, conducting of any contest, lottery or game of chance of skill for the purpose of promoting the sale, use or supply of any product or any business interest also amounts to unfair trade practice. In spite of various protective provisions in the MRTP Act, the new issues in the era of globalization was not relevant to this Act. Because the objective of MRTP was to prevent concentration of economic power to the common detriment and to control monopolistic, restrictive, and unfair trade practices. Therefore, it could not control the anti-completive practices like cartels, boycotts, predatory pricing, bid rigging, abuse of dominance etc. Thus, in order to promote competition, discourage anti competitive measures, the competition Act 2002 has been enacted.

The objectives of competition Act, 2002 are –promotion of competition in the market and prevention of anti competitive activities, ensuring freedom of trade and protection of consumer interest.

The Act establishes competition commission in order to fulfill the objectives the Act is consumer friendly. It has defined the term consumer which is almost similar to the definition under consumer protection Act 1980. According to this definition a buyer of any goods and the hirer of any services for consideration is a consumer. Thus, the competition Act prohibits all anti-competitive agreements, which may lead to concentration of economic power in few hands leading to exploitation.

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29 Section.36A (1) of MRTP Act, 1969.

30 Section.36A (2) of MRTP Act ,1969.

31 Section.36A(3) of MRTP ACT

32 Ibid.


34 Section.2 (f) of the competition Act, 2002.
of the consumers.\(^{35}\) The competition commission works for the promotion of the consumer interest and ensures freedom of trade. The competition commission has power to punish for a term of one year civil imprisonment or penalty not exceeding rupees ten laths.\(^{36}\) Thus, competition Act 2002 is a supplementary and complimentary provision to the consumer protection Act 1986. In spite of all the provisions, the yaksha prasna as to why the consumers are still bewildering and suffocating is still roaming in the mind of intellectuals and the consumers as well.

**Analysis**

It is obvious that every one of us is consumer. Therefore, in order to supply the goods and provide services, a class has emerged, i.e. the traders. They have constitution as well as fundamental right to trade\(^ {37}\) and earn profit that is for the return on investment and wages of the proprietors and supporting staff. No one can deny the appropriate return on sale of the goods and provision of services. It becomes tiresome when such business groups become unbridled, control the market, create anti competitive situation and exploit the consumer in large. The situation becomes grimmer when the authorities under different consumer friendly legislations, become helpless because of one or another reasons. Thus, the consumers have to pay more for the goods and services telling upon their budget. This affects their standard of living, health, education and ultimately on the savings for future for life cycle needs. Beginning from the standards of weights and measures Act, the food adulteration Act, the drugs and cosmetic Act, prevention of Black-marketing Acts, the essential commodities Act. The Agricultural products Act are the various legislations to protect consumers from exploitation in any respect. At the some time, the electricity Act, Telecom regulatory Authority Act is also major legislations to protect the interest of the consumers. In spite of all these dozens of legislation consumers are being cheated in the broad day light. The reason is obvious. The authorities in their respective legislations are either insincere or indifferent to the cause of consumers. Businessmen or traders have their own associations. The representatives of the people are less cooperative; taxation policy is unscientific and irrational. Now, the consumer goods are sold in package. On the package, the ingredient of the goods is printed. The MRP (Maximum retail price) is printed. But the whole sale price is not printed over the package. Then how can the consumer know the ordinary price and bargain with the seller. More so, there is no listing of material cost, labor cost, fixed cost, floating cost and profit on the package or wrapper. Thus, the consumer feels cheated regarding the actual price of the product. Where there is no packaging, even MRP is not available and the consumers have to accept the fixed price of the goods. In the fixation of the price of clothing, the ‘sticker’ is pasted on the material product and the consumers have to pay. There is no standard of price fixation and transparency available to the consumers. Likewise, service sector enjoys the monopoly and exploits the people. In this way, the objectives behind the competition Act is left in the pages of the books. It is hardly seen on the floor of the market and the consumers at large have to curse their fate.

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35 Section.3 of the competition Act 2002.
36 Section.42 of competition Act 2002.
37 Article 19(1)(9) of the constitution.
CONCLUDING REMARKS.

Before the commencement of modern consumer movement, the consumers had to depend on the substantive law, i.e. contract Act, sales of goods Act etc. for remedies against the defects in goods. But with the enactment of MRTP Act, 1969, consumer protection Act 1986, and further new legislation deleting the MRTP- The competition Act 2002, the consumers have got legal support for their cause. In spite of these legislation various consumer legislations are already in action, although, on paper. The aims and object of all these legislations are to protect the consumer interest in their minute to minute needs and instant protection and instant justice. But the actual situation is obviously known to everyone consumers are always on the back foot, generally the weaker party, only laws cannot keep out the consumer from the web/trap of the traders and market. Traders have their associations of unions, where as consumers are always all alone. It is not only the case with consumer goods related to eatables, footwear or clothing, rather service sector, health, medicine, everywhere the consumers are on back foot. There is no buyers market, rather sellers market. The sellers create the scarcity and black marketing starts leading price rise. Here intervention is required by the law enforcement officer. But it becomes too late in normalizing the situation. People have to weep in isolation.

Thus, the auto consumer protection seems to be an utopian concept although not impossible. The mass consumer awareness program is required for awakening the consumers. At the same time, each consumer is required ‘marketing training’ of commodities and services. In each market a consumer society (NGO) is required to monitor the behavior of market and help the needy consumer during market. This NGO can also monitor the action or inaction of the authorities concerned to their legislations and legislative duties. Listing of cost, profits, etc on the material goods can help the consumers. The misleading advertisement and addition of the adv. Cost on the goods needs to be minimized. Thus, ‘consumer watch’ as monitoring agency in each market can bring the dream of Auto Consumer protection to be true.

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Ethical Duties of Doctor’s and the Law
Dr. Rajneesh Kumar Patel*1

In our Vedas it is mentioned that we have Tridev, viz, Bramha Vishnu and Mahesh, traditionally recognized as source of birth, care and the ultimate respectively. That’s why doctors have been regarded as Lord Vishnu, and because of that they have got respect in the society and the Medical Profession has been treated as a Nobel profession. That was the reason why certain duties and responsibilities have been cast on persons who adopt the sacred profession as exemplified by Charak’s Oath2 and Hippocratic Oath.3 As the doctor patient relationship is a crucial one, it is necessary to know about the Duties and Obligations of a Doctor, Doctor-Patient contract and what constitutes Professional Negligence. The patient comes for treatment with certain unknown complications and if he is not properly attended by the medical persons, he feels very sorrow and a wrong image is developed in his mind forever, not only about the physician, but also about entire medical profession. In this way the patient develops the fear, which in long run creates tension and ultimately the cardio and neurological problems.

With this background, an attempt has been made in this paper to know about doctor’s ethical duties and norms prescribed for medico fraternity within legal framework.

Expectations Of Law Towards Doctors

Any man practicing a profession requires particular level of learning, which impliedly assures a person dealing with him, that he possesses such requisite knowledge, expertise and will profess his skill with reasonable degree of care and caution. It should be taken in to consideration that the professional should command the “corpus of knowledge” of his profession. In its general sense ethics of a profession is a code of conduct by which it regulates actions and sets standards for its members and assures high standard of skill and worthiness in a given field. It strengthens the relationship among its members and promotes the welfare of the whole community. Therefore, it is the rules of conduct pertaining to particular class of human action. When we talk of ethics of medical profession, we refer to the action of the members of the medico fraternity in discharge of their duties and obligations and in the exercise of their rights and privileges. It deals with the duties of the professionals which they owe to the public, to other professional brethren and to the patients. It demands the members of the medical profession from the very beginning of their stepping into the profession to cultivate truth, simplicity, condour, fairness and proper care, which are the virtues of a doctor.

The term professional ethics connotes two words, the profession and the ethics. The term profession connotes and aims at predominantly intellectual task as opposed to mental, mechanical or physical work. It is an employment or calling, which is not mechanical but an activity which requires some degree of learning, special skill and personal ability7. It depends on personal qualification and

1 Asstt. Professor, Law School, B.H.U. Varanasi
2 About, (1000 B.C.)
3 About, (460 B.C.).
ability derived from training and experience.

On the other hand the word ethics means norms, usage and custom among members of any profession involving their moral and professional duties towards one-another. “It is only concerned with human character and conduct, and so it is branch of moral science”\(8\). It is that branch of moral science which treats such duties which a member of the medical profession owes to the patient, the society and to his professional brethren. The term professional ethics is not defined in any statute book. It may be taken to mean general principles of conduct which are not confined only to a corpus of specific rules. It is more an expression of self-fulfillment and self control\(9\). It is a code by which it regulates actions and sets standards for its members and it assumes high tone of skill and worthiness in a given field.

*The Oxford Companion* explains professional ethics as the “standards of right and honourable conducts which should be observed by members of learned profession in their dealing one with another and in protecting the interests and life or handling the affairs of a man”\(10\).

*The Canadian Law Dictionary* defined the term ethics as the basic principles of right action. It says that “Ethics of a profession “means the general body of rules, written or unwritten relative to the conduct of the members of the profession intended to guide them in maintaining certain basic standards of behaviour”\(11\).

Black Law Dictionary\(12\) explains professional ethics as an act or behaviour relating to moral action, conduct, motive or character; as ethical emotion; also treating of moral feeling, duties or conduct; containing precepts of morality; morals professionally right or befitting; conforming to professional of conduct.

In the field of medical, it is also known as “medical ethics”. It is the application of proper care and attention for saving the life of patients.

The above definitions of the term professional ethics clarify that it is a branch of moral science. As we know that the Ethymological origin of the word moral and ethics appear to be the same. The word moral comes from the Latin word *Mos*, which means “customs or way of life”. The related term ethics is derived from the Greek word *ethos* which also means custom or character\(16\).

Thus, both the term moral and ethics are essentially synonymous and refer to a type of behaviour which tends to become customary because of the approval or practice of the group.

The above discussion shows that the term ethics and morality are closely related. In the earlier usage, the term referred to morality itself, but to the field of study, or branch of inquiry that has morality as its subject matter. In this sense ethics is equivalent to moral philosophy: but it does not mean that professional ethics and morality is the same thing. Ethics is distinguishable from morality or law as a command of sovereign. In this connection it is important to note that the term ethics is slightly different from the Greek word *ethos* also, because ethics is a part of moral science and consists of a set of moral principles, but the term *ethos* is the characteristic spirit and beliefs of a community, people, system or person\(17\).

Ethics is also distinguishable from morality which involves mystery and has divine origin.
It appears to be that, morality ordinarily refers to the conduct itself, while ethics ordinarily suggests the study of moral conduct or the system or the code which is followed.\(^{18}\) It is worth mentioning that because of divine origin of morality the priesthood become the ultimate interpreter of morality. It, thereby acquired power for itself, which could not be readily relinquished. Consequently the link between morality and religion has been so firmly forged that during the course of time it has become very difficult to assume the existence of morality without religion. On the other hand ethics appears to be the branch of theology.

In the field of medicine the term professional ethics are also not exclusively rule-based. The customs and cultures of the doctors and nurses to the extent that they have some effect on the medico or health care system, should also be included within the wider definition of the term professional ethics\(^{19}\).

Ethics may be called science also, in the sense, science means anybody of facts in a particular sphere classified and systematized. However, it is distinguishable from natural science in so far as it is concerned with the value of an activity in the form of ends or ideals of certain forms of activities. Therefore, ethics is the science of what is morally right. In other words while natural science deals with “what exists”, the ethics deals with what matters.

Harold J. Titus has explained the position of professional ethics very succinctly. To quote him –

“Professional ethics, as distinct from morals and from law, gives attention to certain additional ideals and practices which grow out of a man’s professional privileges and responsibilities. Professional ethics applies to certain functional groups and is the expression of the attempt to define situations, which otherwise would remain indefinite or uncertain. The ethical codes are the result of the attempt to direct the moral consciousness of the members of the profession to its peculiar problems, they crystallize moral opinion and define behaviour in these specialized fields”\(^{20}\).

The definition-cum-explanation of Harold J. Titus is very elaborate and appealing. It depicts that ethics is not an independent phenomena or the independent field of study. Although ethics has always been viewed as a branch of philosophy and it is also applied to any system of moral values or moral principles, its all-embracing practical nature links it with many other areas of study, including anthropology, biology, economics, history, politics, sociology and theology.

Yet ethics remains distinct from such disciplines because it is not a matter of factual knowledge in the way that the science and other branches of inquiry are, rather, it has to do with determining the nature of normative theories and applying these sets of principles to practical moral problems.

Ethics deals with a variety of questions how should we live? Shall we choose happiness or knowledge, virtue or the creation of beautiful objects? If we choose happiness, will it be our own or happiness of all? The more particular questions we face, is. Is there right to be dishonest in a good cause? What are our obligations if any, to the generations of humans, who will come after us and to the non human animals with whom we share the planet?
Ethics deals with such questions at all levels. Its subject consists of the fundamental issues of practical decisions making and its major concerns include the nature of ultimate value. The members of the medical profession owe allegiance to these ethical values and canons of conduct which have been shaped through ages. Such canons of conduct serve as guide to understand the social as well as professional responsibility of doctors and nurses.

Thus, the standards of morals which are applied to an ordinary citizen in any other walk of life shall be the standards of morals for the members of the medical profession also.

**Norms of Professional Conduct for Doctors**

The above analysis of this paper depicts that the rules of professional ethics cannot always be discovered by institutions. In fact good number of them rest on the ordinary ethical ideas, which regulate the conduct of men in general. The first and foremost question arises that when ethics did begin and how did it originate? Although there is no historical record of the origin of the term ethics; history cannot reveal; nor is anthropology of any help, because all human societies that have been studied so far had their own forms of morality and ethics. Our ‘Shastras’ enjoin that, success in life is measured not by the riches one is able to collect money or the power wielded but by the faithful and efficient performance of duties according to one’s capacities and there is no greater virtue than living up to one’s ‘Dharma’.

In the oldest of the Indian writings – the Vedas; ethics is an integral aspect of philosophy and religious speculation about the nature of reality. It is interesting to note that Vedas have been described as the oldest philosophical literature in the world” and what they say about how people ought to live may, therefore, be the first philosophical ethics. The ‘Vedas’ are, in a sense, hymns; however, the Gods to which they refer are not persons but manifestations of ultimate truth and reality. Ethics could have come into existence, only when human beings started to reflect on the best way of life. This reflective stage emerged long after human societies had developed some kind of morality, usually in the form of customary standards of right and wrong. The process of reflection tended to arise from such customs, even if in the end it may have found them wanting. In the Vedic philosophy the basic principles of the universe, the ultimate reality on which the cosmos exists, is the ‘principles of Ritam’ and this principle is closely related with the term ethics.

It must be remember that medical profession is a profession, not a trade or business, and as a profession certain standards, intellectual and ethical must be maintained both for dignity of profession and for better quality of service to the public. The moral quality of this work makes the profession most honorable. Its root lies in the code of ethics, which create a proper balance between relation to his patient and the professionals.

Actually the relationship between doctors and his patient mainly rests on the principle of contract. This aspect brings a direct relationship between doctor and his patient. The closeness of this relation imposes a lot of duties upon the shoulder of a doctor, which he is expected to obey in relation to his patient. In a series of judicial pronouncements these duties have been announced by the different High Courts as well as Supreme judicial body of the land. With a view to ensure the proper relationship between the doctors and his patients the certain norms of professional ethics
and etiquettes are also provided by Medical Council of India which casts various duties on the doctors and other medico professionals. Though the entire medical profession is governed by various national and international Codes and legislations but under this paper author will focus only that norms which provides by the Medical Council of India. Following duties are provided by the medical Councils of India for the regulation of conducts of the doctors:

1. A physician shall uphold the dignity and honour of his profession.

2. The prime object of the medical profession is to render service to humanity; reward or financial gain is a subordinate consideration. Who-so-ever chooses his profession, assumes the obligation to conduct him in accordance with its ideals. A physician should be an upright man, instructed in the art of healings. He shall keep himself pure in character and be diligent in caring for the sick; he should be modest, sober, patient, prompt in discharging his duty without anxiety; conducting himself with propriety in his profession and in all the actions of his life.

3. No person other than a doctor having qualification recognised by Medical Council of India and registered with Medical Council of India/State Medical Council(s) is allowed to practice Modern system of Medicine or Surgery. A person obtaining qualification in any other system of Medicine is not allowed to practice Modern system of Medicine in any form.

4. The principal objective of the medical profession is to render service to humanity with full respect for the dignity of profession and man. Physicians should merit the confidence of patients entrusted to their care, rendering to each a full measure of service and devotion. Physicians should try continuously to improve medical knowledge and skills and should make available to their patients and colleagues the benefits of their professional attainments. The physician should practice methods of healing founded on scientific basis and should not associate professionally with anyone who violates this principle. The honoured ideals of the medical profession imply that the responsibilities of the physician extend not only to individuals but also to society.

5. A Physician should participate in professional meetings as part of Continuing Medical Education programmes, for at least 30 hours every five years, organized by reputed professional academic bodies or any other authorized organisations. The compliance of this requirement shall be informed regularly to Medical Council of India or the State Medical Councils as the case may be.

6. Every physician shall maintain the medical records pertaining to his / her indoor patients for a period of 3 years from the date of commencement of the treatment in a standard proforma laid

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4 Code of Medical Ethics of Medical Council of India; Hippocratic Oath; Declaration of Geneva; Declaration of Helsinki; International Code of Medical Ethics; and Government of India Guidelines for Sterilization.

5 Rule 1.1.1 of the Code of Medical Council Of India, 2002.

6 Rule 1.1.2 of the Code of Medical Council Of India, 2002.

7 Rule 1.1.3 of the Code of Medical Council Of India, 2002.

8 Rule 1.2.1 of the Code of Medical Council Of India, 2002.

9 Rule 1.2.3 of the Code of Medical Council Of India, 2002.
down by the Medical Council of India and attached as Appendix 3.  

7. If any request is made for medical records either by the patients / authorised attendant or legal authorities involved, the same may be duly acknowledged and documents shall be issued within the period of 72 hours.  

8. A Registered medical practitioner shall maintain a Register of Medical Certificates giving full details of certificates issued. When issuing a medical certificate he / she shall always enter the identification marks of the patient and keep a copy of the certificate. He / She shall not omit to record the signature and/or thumbmark, address and at least one identification mark of the patient on the medical certificates or report. The medical certificate shall be prepared as in Appendix 2.  

9. Efforts shall be made to computerize medical records for quick retrieval.  

10. Every physician shall display the registration number accorded to him by the State Medical Council / Medical Council of India in his clinic and in all his prescriptions, certificates, money receipts given to his patients.  

11. Physicians shall display as suffix to their names only recognized medical degrees or such certificates/diplomas and memberships/honours which confer professional knowledge or recognizes any exemplary qualification/achievements.  

12. Every physician should, as far as possible, prescribe drugs with generic names and he / she shall ensure that there is a rational prescription and use of drugs.  

13. Every physician should aid in safeguarding the profession against admission to it of those who are deficient in moral character or education. Physician shall not employ in connection with his professional practice any attendant who is neither registered nor enlisted under the Medical Acts in force and shall not permit such persons to attend, treat or perform operations upon patients wherever professional discretion or skill is required.  

14. A Physician should expose, without fear or favour, incompetent or corrupt, dishonest or unethical conduct on the part of members of the profession.  

15. And the last, but not least, this professional code says that, The physician, engaged in the practice of medicine shall give priority to the interests of patients. The personal financial records shall be computerized for quick retrieval. The medical certificates shall be prepared as in Appendix 2.  

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10 Rull 1.3.1 of the Code of Medical Council Of India,2002.  
11 Rull 1.3.2 of the Code of Medical Council Of India,2002.  
12 Rull 1.3.3 of the Code of Medical Council Of India,2002.  
13 Rull 1.3.4 of the Code of Medical Council Of India,2002.  
14 Rull 1.4.1 of the Code of Medical Council Of India,2002.  
15 Rull 1.4.2 of the Code of Medical Council Of India,2002.  
16 Rull 1.5 of the Code of Medical Council Of India,2002.  
17 Rull 1.6 of the Code of Medical Council Of India,2002.  
18 Rull 1.7 of the Code of Medical Council Of India,2002.
interests of a physician should not conflict with the medical interests of patients. A physician should announce his fees before rendering service and not after the operation or treatment is under way. Remuneration received for such services should be in the form and amount specifically announced to the patient at the time the service is rendered. It is unethical to enter into a contract of “no cure no payment”. Physician rendering service on behalf of the state shall refrain from anticipating or accepting any consideration.

Expectations from doctors to follow the law of land also emerge, when the conducts rules say that, the physician shall observe the laws of the country in regulating the practice of medicine and shall also not assist others to evade such laws. He should be cooperative in observance and enforcement of sanitary laws and regulations in the interest of public health. A physician should observe the provisions of the State Acts like Drugs and Cosmetics Act, 1940; Pharmacy Act, 1948; Narcotic Drugs and Psychotropic substances Act, 1985; Medical Termination of Pregnancy Act, 1971; Transplantation of Human Organ Act, 1994; Mental Health Act, 1987; Environmental Protection Act, 1986; Pre-natal Sex Determination Test Act, 1994; Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954; Persons with Disabilities (Equal Opportunities and Full Participation) Act, 1995 and Bio-Medical Waste (Management and Handling) Rules, 1998 and such other Acts, Rules, Regulations made by the Central/State Governments or local Administrative Bodies or any other relevant Act relating to the protection and promotion of public health.

Thus it is clear from the above rules and norms of the Medical Council of India that the medical profession is the profession of great honour and dignity and by these norms it is intended that conduct of the doctors should be always in the favour of his patients. The sole purpose of these norms is doctors must proved that he is really in the place of God and he must exercise this skill in accordance with a reasonable body of medical opinion skilled in the area of medicine. Not only this but these rules also says that, though a physician is not bound to treat each and every person asking his services, he should not only be ever ready to respond to the calls of the sick and the injured, but should be mindful of the high character of his mission and the responsibility he discharges in the course of his professional duties. In his treatment, he should never forget that the health and the lives of those entrusted to his care depend on his skill and attention. A physician should endeavour to add to the comfort of the sick by making his visits at the hour indicated to the patients. A physician advising a patient to seek service of another physician is acceptable; however, in case of emergency a physician must treat the patient. No physician shall arbitrarily refuse treatment to a patient. However for good reason, when a patient is suffering from an ailment which is not within the range of experience of the treating physician, the physician may refuse treatment and refer the patient to another physician. Medical practitioner having any incapacity detrimental to the patient or which can affect his performance vis-à-vis the patient is not permitted to practice his profession. Therefore Patience and delicacy should characterize the physician. Confidences concerning individual or domestic life entrusted by patients to a physician and defects in the disposition or character of patients observed during medical attendance should never be revealed unless their revelation is required by the laws of the State. Sometimes, however, a physician must determine whether his duty to society requires him to employ knowledge, obtained through confidence as a physician, to protect a healthy person
against a communicable disease to which he is about to be exposed. In such instance, the physician should act as he would wish another to act toward one of his own family in like circumstances. The physician should neither exaggerate nor minimize the gravity of a patient’s condition. He should ensure himself that the patient, his relatives or his responsible friends have such knowledge of the patient’s condition as will serve the best interests of the patient and the family. A physician is free to choose whom he will serve. He should, however, respond to any request for his assistance in an emergency. Once having undertaken a case, the physician should not neglect the patient, nor should he withdraw from the case without giving adequate notice to the patient and his family. Provisionally or fully registered medical practitioner shall not willfully commit an act of negligence that may deprive his patient or patients from necessary medical care. When a physician who has been engaged to attend an obstetric case is absent and another is sent for and delivery accomplished, the acting physician is entitled to his professional fees, but should secure the patient’s consent to resign on the arrival of the physician engaged.

However in case of serious illness and in doubtful or difficult conditions, the physician should request consultation, but under any circumstances such consultation should be justifiable and in the interest of the patient only and not for any other consideration. Consulting pathologists/radiologists or asking for any other diagnostic Lab investigation should be done judiciously and not in a routine manner. In every consultation, the benefit to the patient is of foremost importance. All physicians engaged in the case should be frank with the patient and his attendants’. Utmost punctuality should be observed by a physician in making themselves available for consultations. All statements to the patient or his representatives should take place in the presence of the consulting physicians, except as otherwise agreed. The disclosure of the opinion to the patient or his relatives or friends shall rest with the medical attendant. Differences of opinion should not be divulged unnecessarily but when there is irreconcilable difference of opinion the circumstances should be frankly and impartially explained to the patient or his relatives or friends. It would be opened to them to seek further advice as they so desire. No decision should restrain the attending physician from making such subsequent variations in the treatment if any unexpected change occurs, but at the next consultation, reasons for the variations should be explained. The same privilege, with its obligations, belongs to the consultant when sent for in an emergency during the absence of attending physician. The attending physician may prescribe medicine at any time for the patient, whereas the consultant may prescribe only in case of emergency or as an expert when called for. When a patient is referred to a specialist by the attending physician, a case summary of the patient should be given to the specialist, who should communicate his opinion in writing to the attending physician. A physician shall clearly display his fees and other charges on the board of his chamber and/or the hospitals he is visiting. Prescription should also make clear if the Physician himself dispensed any medicine. Physician shall write his name and designation in full along with registration particulars in his prescription letter head.

**Consequences of Violation of the Norms**

The above norms clearly indicate that medical professionals are not only bound to obey the prescribed norms but they are also under prime obligation to apply the proper skill and prudence with the due care and attention, in dealing with their professional duties. Any violation of these norms will
attract punishment which may be mainly two types, i.e. civil\textsuperscript{19} and criminal nature\textsuperscript{20}.

It should be clear that liability in civil law is based upon the amount of damages incurred and in criminal law, the amount and degree of negligence is a factor in determining liability. However, certain elements must be established to determine criminal liability in any particular case, the motive of the offence, the magnitude of the offence, and the character of the offender.

In India Civil liabilities will covered under the Consumer Protection Act of 1986 as well as Law of Torts and Criminal liabilities will be dealt with Indian Penal Code, 1860. The complaints of civil negligence are tried in Consumer Dispute Redressal Agencies at the district, state or national levels for the adjudication of consumer disputes. Here the proof of burden lies with the complainant. In some cases the principle of res ispa loquitur or “the thing speaks for itself is also accepted which itself is evidence of negligence. There are many more legal remedies available to the victim patients but in recent time it is observed that these laws established by the legal system in India are inefficient in providing justice. Even some of the Supreme Court judgments have shown more emphasis on the accurate guidelines for investigation of such cases and these guidelines, being lax, have ensued into false judgments. Some cases have shown that the doctor himself, which leads to biased verdicts, influences the process of investigation of such cases. Such cases have slandered the entire medical organization and have shown that at the end of the day, it’s the consumer that suffers due to the pseudo hand of God. The present research will shed some light on difficulties faced by the law and will further provide some practical procedures that should be adopted by the concerned authority. This will be more supportive for accurate investigation and provide appropriate justice to the deserving.

In the year of 1995, the Supreme Court’s decision in Indian Medical Association v. VP Shantha\textsuperscript{21} brought the medical profession within the ambit of a ‘service’ as defined in the Consumer Protection Act, 1986. Therefore, patients who had sustained injuries in the course of treatment could now sue doctors under consumer forums for compensation. In the instant case Court held that even though services rendered by medical practitioners are of a personal nature they cannot be treated as contracts of personal service.

Under Article 21 of Indian Constitution, Right to health care is a Right granted to each and every citizen as well as non- citizens. It is quite contrary to Right to refuse to attend a patient, granted to doctors. In Parmananda Katara v. Union of India\textsuperscript{22} Supreme Court held that Right to refuse to attend a patient is a right of every doctor but cannot be claimed in whatsoever emergency state. If a doctor does so, it is considered as a breach to legal duty, an essential element of negligence.

Right to health care is also declared as Human Right in Article 25(2) of Universal Declarations of Human Rights and Article 7(b) of International Covenants on Economic, Social and Cultural Rights. Our honorable Supreme Court has cited this while upholding the Right to health for workers

\footnotesize{\textsuperscript{19} Section 2 (1) (0) of the Consumer Protection Act, 1986.\textsuperscript{20} Section 304A of the Indian Penal Code of 1860 states that whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with a fine, or with both.\textsuperscript{21} AIR 1996 SC 550\textsuperscript{22} AIR 1989 SC 2039}
Thus, it is clear that state is bound with the responsibility to protect the citizens against the evil, but it is not always that the doctors are at fault. Medical professions being noble profession of all, doctors are always provided with the high magnitude of reverence and there cannot be any intention involved to kill or injure any person. There is definitely need for new accurate guidelines and specified laws.

Before the case of Jacob Mathew v. State of Punjab, the Supreme Court of India delivered two different opinions on doctors’ liability. In the case of Mohanan v. Prabha G Nair and another, it ruled that a doctor’s negligence could be ascertained only by scanning the material and expert evidence that might be presented during a trial. In Suresh Gupta’s case, the standard of negligence that had to be proved to fix a doctor’s criminal liability was set at “gross negligence” or “recklessness.”

In the instant case the Supreme Court distinguished between an error of judgement and culpable negligence. It held that criminal prosecution of doctors without adequate medical opinion pointing to their guilt would do great disservice to the community. A doctor cannot be tried for culpable or criminal negligence in all cases of medical mishaps or misfortunes. A doctor may be liable in a civil case for negligence but mere carelessness or want of due attention and skill cannot be described as so reckless or grossly negligent as to make her/him criminally liable. The courts held that this distinction was necessary so that the hazards of medical professionals being exposed to civil liability may not unreasonably extend to criminal liability and expose them to the risk of imprisonment for alleged criminal negligence.

Hence the complaint against the doctor must show negligence or rashness of such a degree as to indicate a mental state that can be described as totally apathetic towards the patient. Such gross negligence alone is punishable. However, in the case of Jacob Mathew v. State of Punjab the Apex Court directed the central government to frame guidelines to save doctors from unnecessary harassment and undue pressure in performing their duties. It ruled that until the government framed such guidelines. Therefore, now a private complaint of rashness or negligence against a doctor may not be entertained without prima facie evidence in the form of a credible opinion of another competent doctor supporting the charge. In addition, the investigating officer should give an independent opinion, preferably of a government doctor. Finally, a doctor may be arrested only if the investigating officer believes that she/he would not be available for prosecution unless arrested.

It is submitted that the above decision will provide relief to the doctors but it should not be confused that now doctors can do each and everything, because the Supreme Court has not says that doctors cannot be prosecuted for medical negligence. The Court has only says that there is need for care and caution in prosecuting doctors in the interest of the society. However, gross negligence and violation of prescribed norms are always punishable under the law.
OBSERVATIONS

From the prescribed norms and various decisions it is clear that medical profession aspects from its member, a high degree of morality, care and attention towards his professional norms, on which the respect of this profession is based. A ethical doctor always follow the norm of his profession, however in this regard it will be relevant to note some of the general feelings of the society about medico persons at present.

1. It has become prime motive of the doctors to earn more money form the patients by means of increasing the number of patients instead of giving attention to the needy patients. In this way they get more money but the objectives of the mission of the medical profession is fully defeated.

2. It is also observe that while registering the patient the doctors show full attentions but while examining and giving prescription they are pre occupied with the motive of earning more money and they simply go ahead by giving half hearted attentions to the current patient.

3. Now a day it also happened in society that doctors prescribed only those medicines, which is instructed by the medicine company on the consideration of money or goods.

4. Unnecessary medical and pathological checkup is also becomes the general practice in present days.

5. And the last but not least, the worst condition of hunger for the money is observed when the doctors go for removable of the vital organs for the sake of making money in a short span of time knowing that, this act will detoriate the condition of patient and even danger for his life.

CONCLUSION

It is understood that medical profession is a profession of great honour and dignity. Doctors are always treated as elite class of the society. They always found respect in the society. That’s why they owe certain responsibility towards society also. People believe them as like the God on earth and therefore, they are supposed to behave with the patient accordingly. They should always keep in mind that they are in a profession where money is not important and money is not the criteria for measuring the success of life or profession. Only the quality makes them perfect and they should try to achieve quality and not the money.

Though they have been regarded as representative of the god on the earth, with lapse of time, they are inclining more towards money instead of the mission of service, as propounded by our ancestors like Charak, Srusuta and the Dhanvanatari. Because of this it has become general observation of the society that doctors have lost the faith of the patients due to lack of dedication and service by the doctors towards the present society and if it continue further, naturally they will get the lesser respect and devotion by the society. They prescribed only that medicine which is instructed by the medicines companies. No doubt they are also the man and they should be allowed to get money for their services but nobility of the medical profession never be destroy at any cost.

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De-Criminalization of Elections vis-a-Vis Electoral Reforms: A Judicial Perspective

Dr. Rupam Jagota

Justice without power is inefficient; power without justice is tyranny. Justice without power is opposed, because there are always wicked men. Power without justice is soon questioned. Justice and power must therefore be brought together, so that whatever is just may be powerful, and whatever is powerful may be just

These words reflect the fact that Rule of law is a necessity for exploitation, fulfillment and promotion of civil & political rights of individuals as well as for establishing a socio-legal society where his legitimate desires and dignity may be realized. Framers of the Constitution had envisaged India as a Sovereign, Socialist, Secular, Democratic Republic wherein Balance of Powers & Separation of Powers shall be ensured between the organs of the Government. Parliamentary democracy symbolizes a representative democracy where ‘We the People of India’ give a reflection of their opinion and general will through elections. The democratic polity of India has been declared in the preamble, which specifies the need to hold free and fair elections. Election are conspicuous and central to the actual functioning of a democratic system. They have been shaped and conditioned by the environmental, social, political factors that have served a link between the polity & society between the traditional & modern aspects of life that affect political behavior. Elections are not only indicators but also the means through which the system attains its evolution. Elections are critical to the maintenance and development of democratic tradition because at one level, these are influenced by the political culture in which they operate, but at another, they also generate strong influences that can improve or distort this political culture.

Elections has been embodied in Part XV of the Constitution to imply the entire procedure to be gone through, to return a candidate to the legislature, as it fills a seat or seats in either house of the Parliament or in either house of the legislature of a state. Elections legitimize the change of power through peaceful means and offer a smooth transition between the regimes of varied political ideologies. Elections as a prerequisite should be free, fair and transparent was recognized even in the first Statue of West Minister in England in 1275. The statue had provided that, “because elections ought to be free, the king commanded upon great forfeiture that no great man or other big force of arms, nor by malice, or menacing shall disturb any to make free elections”. Even the Bill of Rights in 1689 had emphasized that “election of members of parliament ought to be free”.

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1 *Sr Assist Prof ,Dept of Laws, GNDU Regional Campus, Ladhewali, Jalandhar, Punjab.
4 Ibid
6 Supranote 3 at p-624.
7 Ibid
CRIMINALIZATION OF POLITICS

67 years of India’s Independence portrays a mixed feeling of achievement & dismay.⁸ Achievement because of uninterrupted elections every five years and thus a smooth transfer of power (except a brief spell of emergency) but on the other hand corruption is rampant & criminalization of elections and politicization of crime has put in jeopardy the impeachable reputation of electoral reforms. A nation wedded to democracy where elections are primary for the governance of the nation but growth and multiplicity of criminal gangs, drug mafia & criminal lobbies has eroded the government functionaries at every level. There were approximately 100 candidates with criminal charges in the 14th Lok Sabha.. 120 MP’s out of 543 in the house that is 22%, Number of cases of serious crimes- 333 which included BJP-29, INC-24, SP-11, RJD-2, CPM-7, BSP-7, NCP-5, CPI-2.⁹ The 15th Lok Sabha had 150 newly elected MP’s , 72 with serious criminal charges , 412 MP’s with criminal cases against them and 213 MP’s with serious penal sections . There has been a record 17.2% increase in MP’s with criminal records and 30.9% increase in the number of MP’s with serious criminal records .These criminal elements have acquired political status seriously jeopardizing the functioning of administration and corrupted the government machinery at all level, wielding financial and muscle power. Majority of our representatives are elected by minority of votes cast thereby making their representative credentials doubtful. The result is that the legitimacy of our electoral process becomes grave .

The maximum criminal charges are against INC’s Gujrat’s MP Vitthalbhai Hansrajbhai Radadiya .There are 16 cases out of which 5 are of serious nature .Jagdish Sharma of JD(U) from Jahanabad , Bihar had maximum serious charges under IPC . Punjab is not behind in electoral corruption and fielding of candidates with criminal credentials . BJP MLA Raj Kumar has been arrested .Industries Minister Manoranjan Kalia has been named in the CBI’S FIR and was pressurized to resign while Swaran Ram ,Technical Education Minister’s name figured in the bribery case and is under investigation. Akali dal its political alliance is even worse . Sohan Singh from Mahilpur has been convicted while Badals got relief after a long drawn judicial battle in having assets disproportionate to the known sources of income .¹⁰

The political parties prefer criminals as candidates as elections are increasingly undermined by rigging , booth capturing so man with muscle power has a fair chance of winning than a clean , decent candidate without such capabilities .The increased presence of criminals in the representative institutions proves the fact .The technical and natural justice aspect cannot be ignored that no one can be called a criminal till proved by a court of law . Moreover , ‘they have been elected by the people so what if they are criminals.’

A government constituted by electoral malpractices and coercion of electorate can hardly be representative of the people. An electoral system which fails to represent the majority of electorate cannot be called democratic even though periodic elections are held and they maintain the trappings of democracy.

⁹ Eciresults.nic.in
¹⁰ The Tribune , 7.05.2012, p-12.
LEGAL THREADS

Elections provide an opportunity to the people to express their faith in the government and change it when it loses one. Criminalization of elections and politics and leaders known to have criminal antecedents are becoming a matter of grave concern among the intelligentsia. The Representation of People’s Act, 1951, under Chapter III Section 8, states, that a person can be disqualified from being chosen to either House of the Parliament or the Legislative Assembly or Legislative Council of the State if he has:

(i) been convicted of an offence punishable under the Indian Penal Code, 1860.
(ii) under the Protection of Civil Rights Act, 1955, which provides punishment for preaching and practice of “untouchability” and enforcement of disabilities arising from it;
(iii) under Section 11 of Customs Act 1962 for importing and exporting prohibited goods;
(iv) under Section 10 to 12 of the Unlawful Activities (Prevention), Act, 1967;
(v) Foreign Exchange (Regulation) Act, 1973;
(vi) Narcotics Drugs and Psychotropic Substances Act, 1986;
(vii) Offences under the Religious Institutions (Prevention of Misuse) Act, 1988;
(viii) Section 125, 135, 135A and Section 136(2)(a) of the People’s Representation. Act, 1951 whereby offences of booth capturing, removal of ballot paper from polling stations or fraudulently destroying nomination papers.11

The Indian Penal Code, 1860 categorizes certain actions related to elections as punishable offences. It includes:-

1. Disqualification for six years from the date of conviction for certain offences.

2. Disqualification, when convicted for certain other listed offences, is also for a period of six years but not from the date of conviction but from the date of release of the person from such conviction.

However, Section 8(4) of the Act provides that if this conviction is against an MP or an MLA in any State, the disqualification shall not take effect for three months or if within this period there is an appeal, then till the appeal is disposed of by the court. The People’s Representation Act, 1951 debarres people with criminal record from contesting elections but cannot prevent those under trial or those whose appeal is pending for disposal. In Navjot Sidhu v State of Punjab12, he was convicted under Section 304 of IPC for 3 years. He resigned. Bye elections were announced and he sought to fight them. The SC stayed his conviction temporarily & he won the election. The criminals are taking advantage and making mockery of the system. The acceptance of the preposition implies giving every criminal an access to contest elections as provisions of appeal are numerous and can go on for years. On the other hand it would deprive large number of activists from fighting elections as

11 Section8-A of the Representation of People’s Act, 1951.
instances of fake cases against political rivals by party in power are abundant.

In spite of the strict penalties under the People’s Representation Act 1951, the recent ‘cash for query scams, vote scam which rocked the Parliament has once again exposed the crucial fact that corruption is rampant and has become the most infallible symptom of Constitutional Liberty.

The Supreme Court entertaining the two writ petitions clearly emphasized that the growth and multiplicity of criminal gangs, drug mafia and economic lobbies has eroded the government functionaries at every level. These criminal elements have today acquired political status seriously jeopardizing the functioning of administration and corrupted the government machinery at all level, wielding financial and muscle power. This has rendered the work of enforcement and investigative agencies extremely difficult in ensuring safety of life and property of common man. Criminalization of politics by such candidates vest them with ultimate power to manipulate the machinery and governance to suite their interests as cases get decided in their favour or are kept pending over a long period without encroaching their political plans.

Emphasizing on the rising chart of criminals entering and occupying higher echelons in Parliament, the writ petitions filed under Article 226 before the High Court and under Article 32 before the Supreme Court, called for an analyses of three core issues;

1. Whether Election Commission is empowered to issue directions as per the orders of the High Court.
2. Whether a voter being a citizen of this country has a right to get relevant information about the candidate contesting the election.
3. Whether the Election Commission can order mandatory declaration by the candidates with respect to their financial assets, educational and criminal antecedents every year during their tenure as elected representatives.

The Supreme Court’s judgment on May 2, 2002, clearly aimed at restricting the persons with criminal background from entering the Parliament. It clearly mandates that candidate should disclose their criminal antecedents, if any, as well as their financial and educational background.

**Criminal Antecedants And Election Commission**

The Election Commission ordered the candidates to file fresh affidavits furnishing information on:

1. Whether criminal charges were framed against the candidate and he was acquitted or convicted or discharged of any criminal offence in the past.
2. Whether six months prior to filing of nomination papers, a candidate is accused in any pending case of any offence punishable with imprisonment for two years or more. He must disclose the

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14 Ibid
The candidate must disclose his movable and immovable assets and that of his spouse and dependants.

4. The candidate must disclose his or her educational qualifications.

The returning officers were empowered to reject nominations of those candidate who do not make the required disclosure or give false information. The Election Commission exercised its power under Article 324 of the Constitution which empower it with the power of superintendence, direction and control of the conduct of all elections to the Parliament and to the legislature. A similar independent Constitutional Authority has been created for conduct of elections to municipalities, Panchayats and other local bodies under Article 243K & Article 248Z.

Though the Supreme Court and the Election Commission had good motives but their bureaucratic conclusions seemed impractical and potentially harmful. Despite the strictness of the Election Commission and Patna High Court tightening its noose around the politicians having criminal background, over a dozen people with Criminal records have won the assembly elections. **People like Rama Singh Surendra Yadav – former Bihar Minister and RJD leader facing several criminal cases won the polls from behind the bars. Aruna Devi wife of dreaded gangster Abhilesh Singh retained her seat. Atiq Ahmed was elected even though he was having 35 criminal cases against him including murder.**

Today criminals are an integral part of the political structural set up which I call a **License-Permit Democracy.** It permits mafia to manipulate the reigns of power and ultimately to control and canalize it. Thus, **Power - Wealth -Power vicious circle rolls on.** There are approximately 266 persons with criminal background including 12 MPs, 70 legislators, 10 former MPs and 20 former legislators enjoying official security in UP alone.

**Statistics Of Election 2012**

In 2012 elections BSP came under criticism for corruption and publicity for theerection of statues and parks in honour of its Chief Minister. The BSP fired some ministers and denied re-election to sitting legislators to avoid the corruption stigma. The proposed division into four smaller provinces to which the primary opposition party, the Samajwadi Party, was opposed to set the tables against them. The election was conducted in seven phases on 8, 11, 15, 19, 23, 28 February and 3 March. 59.5% voters exercised their franchise. Akhilesh Yadav took over as the Chief Minister-designate of UP.

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16 Section33A(i) of The Representation Of People’s(Amendment), Act 2002.
17 Section75A(i); ibid.
18 Ibid
20 Thehindubusiness.com, retrieved on 1.06.2012.
UP ELECTIONS 2012

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PUNJAB ELECTIONS 2012

On 30th Jan 2012 Akali Dal won 56, BJP 12, Congress 46 & Others 3. Voting was held in Punjab State for all the 117 assembly constituencies. Except few minor incidents of clashes, elections were held peacefully. The voter turnout was 76.63 percent which is record polling in the history of Punjab assembly elections. The governance of the ruling coalition was the main election issue. A new entrant was the front Sanjha Morcha consisting of the newly formed People’s Party of Punjab (PPP) led by former finance minister Manpreet Singh Badal. The Sanjha Morcha consists of the PPP, the Communist Party of India, the Communist Party of India - Marxist and the Akali Dal (Longowal). The party’s main political card was the rampant corruption and family legacy of the government but the election result as shown below reflected a clear mandate for the work done, development projects and other initiatives taken by them despite the corrupt practices.

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<td>Total</td>
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These conclusions opened up a plethora of legal suits and category of Lame Duck MPs with a sword of disqualification hanging over their heads. Money and muscle power will play an even more predominant role in the proposed system. The markets and elections are a good example of

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21 Punjab 2012 Assembly Elections, Punjabnewsline.com visited on 1.06.2012.
22 Ibid
multitudes of free individuals interacting amongst themselves in order to bring out the best solution. Their motives might be wrong but their instincts are sound and conclusions are right. This perhaps seemed to be the apparent reason for political parties who despite their ideological differences have decided to counter the Supreme Court’s judgment on revision in the election procedure.

**Political Parties And Judiciary Perspective**

The political parties vehemently rejected this scheme viewing it as an attempt to invade and injure their political career. Such disclosures in an affidavit could be used to affix criminality and corruption charges against them. The power of the Election Commission being plenary, it operates in areas left uncovered by legislation. On behalf of the political parties it was contended that High Court should not have given directions till the amendment to Acts and rules have been made. Moreover, it is the political parties who have to decide whether amendments should be made or not. The Acts and rules nowhere disqualify a candidate for non-disclosure of the assets or pending charge in a criminal case. Voters are not interested in the education or wealth of the candidate nor is it relevant for contesting elections. To Stop criminalization and entry of criminals in legislature is a question to be decided by the Parliament. If the Parliament has not amended the Act or rules despite the recommendation of the Law Commission, and reports of the Vohra Committee, then there is no question of giving any directions by the High Court to the Election Commission.

The Supreme Court exercising the powers under Article 32 read with Article 142, issued necessary directions to fill the vacuum till the legislature steps into cover the gaps. The Parliament in the resolution passed in its special session in August 1997 had accepted the fact that there is a criminal nexus between the political parties and anti social elements which has led to criminalization of elections as more and more criminals are taking resort to politics as a ticket to enter the mainstream and control the decisions and politics of the Government. They today have emerged as the new representatives of the people as all political parties are giving tickets to such elements to exhibit their power and win the elections. Once they are in power they would not only control & manipulate the system but also demand a reward for assisting the party in winning. Despite having 8070 candidates in elections of 2009 fielded by 369 parties only 36 parties succeeded in sending 1 MP to the Lok Sabha. 333 parties could not win a single seat. Though there are uninterrupted conduct of elections every 5 years and smooth transition of power at the behest of the small man with a small ballot in a small booth, but they are at an unacceptable level of communalization and criminalization. Yesterday they were hired to win elections today they have emerged as representatives wielding power. It is not a scramble for power, its for what power can do.

The directions of the High Court and the order of the Election Commission should have been accepted by the political parties if they had a true inclination to divorce elections from criminality and to restrict further amputation of its limbs.

“All power is trust that we are accountable for its exercise that from the people and for the people all springs and all must exist.”

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23 UOI v. Association For Democratic Reforms, AIR2002SC2121.
**Right Of The Citizens**

The voters being the citizens of the country have a right to know the antecedents of the candidates contesting elections and is within the purview of Article 19(1)(a), freedom of speech and expression. Since democracy cannot survive without free and fair elections, without free and fairly informed electorates so, freedom of speech and expression includes right to get material information with respect to candidates contesting elections. The powers of the Court and Election Commission is an effort to cleanse the corrupt political parties and check the entry of criminals. Though, under Article 105(2) Legislatures and Members of Parliament who accept bribes or indulge in power equations enjoy constitutional protection from prosecution as Members of Parliament are immune from any proceeding in respect of anything said or any vote given by them. However, the lesser mortal do not enjoy such immunities and privileges.

**Election Commission And Judicial Approach**

Elections are usually contested by political parties who field candidates and conduct election campaigns. The Election commission is a Constitutional body which is responsible for the conduct of elections ie the mode of holding elections, the right of persons entitled to vote, preparation of electoral rolls, delimitation of constituencies. The founding fathers of the Constitution intended to make independence of elections a fundamental right of every citizen but at the same time they wanted to place the election machinery outside the control of the executive government. However the constitution never intended to make the election commission an open body vested with the legislative powers at the behest of the parliament. The judiciary being an arm of social revolution has been upholding the equality that Indians longed for. Election Commission has been capacitated to discharge its Constitutional duties due to the judicial support by the SC&HC.

The Supreme Court in Sadiq Ali held that powers under Article 324 are conditioned by the rules made by the Central government for the conduct of all elections and they should be laid before each house of the Parliament. Article 324 had a limited operation as it was to be functional only in areas left unoccupied by the legislation. Power of the Election Commission is to be exercised with legal circumspection as it cannot be contrary to law. The Supreme Court in Mohinder Singh Gill v. Chief election Commission, held. “Two limitations are at least laid into its plenary character. Firstly, when Parliament or any State legislature has made valid law relating to or in connection with election, the commission shall act in conformity with, not in violation of such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rules of laws, act bonafide and be amenable to the norms of Natural Justice in so

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25 Articles 324-328, Constitution of India.
26 Meghraj v.Delimitation Commission, AIR1967SC669 ;Article 329(b) , provides that no election petition shall be called in question except by an election petition.
27 AIR1972SC187.
28 AIR1978SC851.
far as conformance to such canons can reasonably and realistically be required of it as fair-play-in-action, is a most important area of the Constitutional orders i.e. elections.29

The court once again emphasized that before an election machinery can be brought into operation there are three pre-requisites-:30

(i) There should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with elections and it should be decided as to how these laws and rules are to be made.

(ii) There should be an executive charged with a duty of securing the due conduct of elections.

(iii) There should be a judicial tribunal to deal with disputes arising out of or in connection with the elections.

The election commission’s power of superintendence, direction and conduct of elections includes the power to cancel the polls as a consequence of mob violence at the time of counting of votes and ordering repolls,31 postpone the elections in any State or part of it due to disturbance, power to regulate use of loudspeakers, power to requisition staff for conduct of elections,32 to scrutinize the election expenditure incurred by the candidate and his political party during elections.33 It also includes the power to prepare electoral rolls.34 Election commission being a neutral body has a secular character and cannot exclude people from electoral rolls on the ground of religion, race, caste or sex.

The Supreme Court has set aside the election of Kerala CPM MLA P. Jayarajan35 on the basis that he had been convicted and sentenced for more than two years on the date of filing the nomination papers. Section 8(3) of The People’s Representation Act states that those sentenced for more than two years are liable to be disqualified. He however, argued that while he had been convicted for various offences and awarded separate sentences, the disqualification clause did not apply as no single sentence exceeding 2 years has been pronounced upon him. The Apex Court rejected the plea holding that sentences were to run consecutively and the total period for which he was to be in jail exceeded 2 years.36

In PC Thomas v. PM Ismail37 the SC held that soliciting votes on religious basis was within the purview of corrupt practices. The elected candidate printed & distributed photo calendar & statement of leader of religious community as an appeal to vote. HC invalidated the election of the

29 Ibid.
30 N.P. Ponnuswami v. Returning Officer, Nemabbal Constituency, AIR 1952 SC 64.
31 Supranote at fn.29.
32 1995 AIR SC 1078.
33 J.T.1996(3)SC721.
34 Article 324, Constitution of India.
35 Times of India, 12.01.2005.
36 ibid
37 AIR 2010 SC 905
The researcher has made an initiative to assess

1. Whether these changes have reduced if not curtailed the innumerable distortions and crime which has invaded the electoral process

2. Has Identified the grey areas wherein the legislature is required to further strengthen and improve the electoral machinery

38 AIR 2010 Karnataka113.

39 Section 83 of the Representation of People’s Act (43 of 1951).

40 Ibid

41 The Tribune, 7.03.2009.
3 To explore the fundamental truth that parliamentarians being representatives of the common man (electorates) should act as role models by employing cost effective methods of campaigning and using election funds in the right perspective to earn the faith and trust of voters rather than to indulge in malpractices for their vested interests.

**Threat Areas**

The research paper analysis the main problems which have threatened the faith of the voters and restricted electoral reforms;

1. Elections are expensive and this has cultivated unethical, illegal and even mafia aided electoral funding. The mounting election expenditures have led to increase in corruption, criminalization and black money generation in varied forms.

2. With the electorate having no role in the selection of candidates and with majority of candidates being elected by minority of votes under the first-past-the-post system, the representative character of the representatives itself becomes doubtful or so to say their representational legitimacy is seriously eroded. In many cases, more votes are cast against the winning candidates than for them. One of the significant probable causes may be the mismatch between the majority or first-past-the-post system and the multiplicity of parties and large number of independents. Elected candidates don’t even command ¼ of the total votes polled in a constituency.

3. Electorates are geographically dispersed so social action on the part of the candidate is inadequate, thereby giving scope for purchase and sale of distant their representatives accountable nor does the representatives consider himself voters through intermediary brokers. The electorates are in no capacity to be answerable to the people. Electorates are not interested in casting votes as a poor turn out in elections despite a holiday proves all. They have become indifferent as they have nothing to gain or lose whosoever comes to power.

4 The presence of Section77(1), Explanation I of the Representation of People Act, has allowed unaccounted money to be brought into the election system by maintaining that expenditure incurred or authorized by any one other than the candidate including the political party, friends, supporters is not counted as election expenditure. This has been debated for more than 25 years now but Parliament has yet not found time to delete Explanation 1. Possibly, because it is convenient and comfortable for the politicians to have a system which can be manipulated. Big money is brought into the elections under its garb which has removed even the “fig leaf to hide the reality” of its impact on the outcome of elections.\(^\text{42}\)

5 Booth capturing and fraudulent voting by rigging and impersonation. The flagrant use of raw muscle power in the form of intimidating voters either to vote against their will or not to vote at all, thus taking away the right of free voting from large sections of society and distorting the result thereby.

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a Involvement of officials and local administration in subverting the electoral process
b Engineered mistakes in counting of votes

Criminalization of the electoral process as there is an increase in the number of contestants with serious criminal antecedents, including the misuse of religion and caste in the process of political mobilization of group identities.

An ineffective and slow process of dealing with election petitions, rendering the whole process meaningless thereby depriving the faith of the electorates in the electoral process and judiciary. Sincere voters are eschewed from voting as he finds himself left out.

The Parliament has added Chapter-III electoral offences specifying that any person who in connection with election promotes, attempts to promote an grounds of religion, race, caste, colour, community, language etc. enmity shall be subjected to imprisonment for 3 years or five. Any person who files a false affidavit or create disturbance at election meeting shall be punished with imprisonment upto 6 months or fine or both. However they are flagrantly violated.

**Determinants Of Electoral Results**

Elections in parts of the country have become synonymous with intimidation of voters specially poorer sections, rigging, booth capturing, violence against and even killing of candidates and political workers, connivance of officials at the polling stations and at times a complete hijacking of the polling process by unruly and criminal elements. Reports of irregularities in the conduct of elections have become so common that the people are not surprised. Money and muscle power alone being the determinants of electoral results, has become easy for the organized criminals and hostile foreign powers to hijack the the entire machinery for a few thousand crores, destroying the Sovereignty of ‘We –The People ’ Many suggestions have been made time and again to address these in order to implement the existing rules and laws effectively.

*The butcher, the baker, the candlestick maker, the bonded labourer, the pavement dweller, the damsel in distress, the sweated worker, the starving child, the dalit, the tribal and the socio-economic pariah shall have a vested interest in the Republic, only if the Constitution has a vested interest in their Survival, their human worth and personhood.*

**Suggestions To Ensure Electoral Reforms**

The election commission has been seriously working to introduce electoral reforms so as to restore the dwelling faith of electorates in the democratic set up. It includes;

1. Introduction of list system of elections in addition to the present first-past-the-past system since those elected do not have the support of majority. Since majority of representatives are

43 Section 125 of the Representation of People’s Act, 1951.
44 Section 125(A); ibid.
45 V.R.Krishna Iyer, Off the Bench, Universal Publications Co. Pvt Ltd, Delhi, p-40
elected on minority votes, the legitimacy of FPTP system stands eroded. Hung houses threaten the stability of the government before its formation. Coalition equations prevent which are channelized by money & muscle power. Constitution was not designed for machinations, of opportunistic alliances. Majority of votes polled are wasted as the voice of those voters is not heard in elected bodies. Therefore, only a person who gets a majority mandate should get elected. Candidates should try to secure 50% of the votes polled and if there are more candidates than there will be run-off in the second round in which two candidates polling the largest number of votes in the first round will contest again but it is an expensive processor initialing entitle money, material & man power. However, mushrooming of parties & candidates can arrest this evil.

2. In the list system fixed number of seats will be filled by indirect election on the basis of a list of names submitted by political parties. This would secure;

(i) Representation to a party which gets as large number of votes but fault to win a proportionate number of seats.

(ii) To enable the parties to bring into the Lok Sabha eminent persons who do not like to contest. A criteria for inclusion should be evolved or else the parties would pack the list with their party candidates who cannot win elections. Moreover, this would require fresh delimitation of constituencies which will become larger & would thereby dissuade independent & small parties from contesting. This would strengthen them to national parties and help in polarization.

3 The electoral rolls in urban areas reveal the obvious discrepancies and inaccuracies Taking advantage of these defects, political parties and influential persons manage large-scale registration of bogus voters, or large-scale deletion of names of “unfriendly” voters. It is quite possible that in the rural areas there may be fewer errors, but informal estimates by most observers put these errors at 15% to 20%.

What is known, however, is that there are serious irregularities and a large number of electorate is disenfranchised partly by default and partly by impersonation that is made easy by the flawed electoral rolls. Large swings in seats that are won are caused by small swings in voting percentages, and again given that the margins of victory are generally narrow, the need to have accurate electoral rolls becomes all the more critical. Electoral rolls are very close to people and the irregularities in them are exposed very quickly at the grassroots level. There have been cases of entire sections of villages disenfranchised leading to immense cynicism. Therefore, the legitimacy of the whole electoral process is compromised because of faulty electoral rolls.

(i) Under section 58A of the Act, the Election Commission should not only be empowered to countermand the election and order a fresh election as now provided under the law, but also should be empowered to declare the earlier poll to be void and order only a re-poll in the entire constituency, instead of a re-election there, depending on the nature and seriousness of each case.
(ii) Election Commission may also be empowered to initiate investigations of booth capturing and other violations of the electoral law through the Central or State police investigating agency and/or by the establishment of special courts and/or by appointment of public prosecutors.

4 Some reasonable restrictions should be placed to restrict misuse of people’s & public property by avoiding:

a. Wall writings
b. Display of cut-outs, hoardings and banners
c. Hoisting of flags (except at party officers, public meetings and other specified places)
d. Use of more than a specified number of vehicles for election campaign and for processions
e. Announcements or publicity by more than a specified number of moving vehicles
f. Holding of public meetings beyond the specified hours
g. Display of posters at places, other than those specified by the district/electoral authorities.

5. The EC should be appointed by a neutral body consisting of the Prime Minister, the Vice President, the Speaker, the Leader of the Opposition and the Chief Justice of India. This would make his position totally impartial in the eyes of all political parties and factions. The EC should not be appointed to any other office after retirement.

6. An independent auditing authority should be appointed for auditing annual statements of accounts of all political parties and the audited accounts should be published for public scrutiny.

7. To control political funding, it has been suggested that in a situation of so-called ‘hung’ house, the best course would be to have the house elect its leader as it elects the Speaker. The leader so elected may be appointed the Prime or Chief Minister and his government should be removable only on a constructive vote of no-confidence. At the time of introducing the vote of no-confidence, a simultaneous vote of confidence has to be passed in favour of an alternative leadership, which will be sworn in if the vote goes through. In other words, there may be a change of leadership, or even a change of government but the country would not go back to polls, nor would there be time for horse-trading after the fall of a government to cobble up artificial majorities. The period of office for Lok Sabha and Assemblies should be reduced to 4 years. If India can have only one election every four years this would be a huge national saving apart from creating stability that at least gives a chance for better and development-oriented governance. Some have suggested that if a vote of no confidence is proposed and is defeated in the House, a fresh vote of no-confidence should not be permitted for a period of time say a year or two.

8. To discourage booth capturing the EC might consider having some form of tamper-proof video cameras or surveillance equipment as a deterrent in sensitive areas.

9. Special electoral courts in the nature of elected tribunals should be set up by the Election
Commission for pronouncing summary decisions. All cases should be heard on daily basis and final judgment should be delivered within a period of 3 months without delay. They should not be permitted to take oath till the court discharges them of charges nor be entitled to privileges as elected member. This approach would be a disincentive to criminal elements as they will try to stay away from cases being filed against them. This may help to keep habitual and hardened criminals away.

10. The minimum number of valid votes polled should be increased to 25% in order not to forfeit the deposit. Also, the amount of deposit should be again increased substantially. These two steps would further reduce non-serious candidates.

11. The political parties should take the initiative to ensure that candidates with criminal record should not represent the people. It is the duty of political party to enforce the charge sheet disqualification through their own mechanism to bring about democratic accountability and political transparency. Framing of charges should itself be a ground for disqualification after investigation rules out political vandalism or political rivalry as a reason.

12. Election campaigns are expensive and money flows as all contesting candidates employ resources to please the electorates. Selective ban on certain election expenditure should be made:
   i) Higher ceiling than what currently exists
   ii) Regular revision of the ceiling before every general election
   iii) All expenditure to be brought within the purview
   iv) Mechanism for routine verification of returns filed
   v) Publicity of returns filed by the candidate in the local press.

13. Election Commission should specify the election expenditures to check donations and gifts given to the representatives of political parties as they are liberally accepted under the garb of promises to be fulfilled if they are elected. The recent decision of the election Commission in Rajasthan that SMS on mobiles and use of electronic means would be inclusive under election expenditure incurred by a party. Individual accounts of candidates are checked as they have to furnish their details within 30 days of declaration of result. Campaign period has been decreased from 21 to 14 days to curtail expenditure and criminal manipulations. They have been given access to state owned media for election campaign. 122 hours were allocated.

14. Non serious candidates should be eliminated from election arena to save expenditures and time. One candidate should contest only from one seat at one point of time. Frivolous candidates who contest only for personal satisfaction should be restrained. Independent candidates who keep the options open for joining the party coming to power should not be allowed to contest to prevent undesirable division of votes.

15. The Election Commission has suggested on the need to float a poll fund of Rs 100 crore, with an annual contribution of 10 crore each by the centre and the State for five years for financing
the electronic machines and campaign of candidates for eliminating their dependence on black money. A fund can be constituted and election–tax can be imposed to generate funds.

16. Account of income, expenditure, assets and liabilities should be maintained by political parties and duly audited. Annual statement must be submitted to the election commission for assessment.

17. All candidates should be required to clear all government dues e.g. huge I.T. arrears before their candidature is accepted. This pertains also to holding on the accommodation, telephones, and government facilities used while in power.

18. EC should have full disciplinary authority over the officials who are involved in election duty. It is said that at present there are too many complaints of compromised or partisan officials but EC is unable to take any stringent action. The question however is whether the Election Commission could have the same disciplinary powers over all the officers and staff engaged on election duty as that of the appointing authority.

19. The electorates should have a right to recall elected representatives who ignore the interests of the people and are guilty of malfeasance and improper conduct or indulge in corrupt and criminal activities. Is it a political perpect of Machiavelli to suit the the Indian tradition of Chanakya, that when out of power a party may make any promise and on coming to power it need not implement the promise if it is no longer necessary or beneficial to it.

CONCLUSION

In essence, a transformation is necessary to effectively alter the course of working of the system by preventing a possible distortion of the machinery by its operators that is the representatives and allowing the electoral system to change the system in which they operate and to which they have to respond. Electoral reforms is the need of the hour. The representatives must rise above the 3 M’s – Money power, Muscle Power and Mafia Power and 4 C’s – Criminalization, Communalization, Corruption and Casteism which have vitiated the political arena and compromised the legitimacy of the political process. The reformation of the political electoral set up would lead to a consistent improved democratic set up.
Media Trial: A Legal Dilemma

Dr. Sant Lal Nirvaan

Media is regarded as hallmark of democracy. Media has gained increasingly its recognition as the fourth pillar of every state affair, the remaining three being bureaucracy, administration and judiciary. Media plays a vital role in shaping the opinion of the society and it is capable of changing the whole perspective through which people identify various events. The media can be commended for starting a trend where the media plays an active role in bringing the accused to hook and eye. Freedom of nation lies in the freedom of media as is responsible for making the public aware about the affairs in the vicinity. Thus a free and a strong press is indispensable to the healthy functioning of democracy. In a democratic setup active participation of people in all affairs of their community and the state is must. It is their right to be kept informed about the current political, social, economic and cultural issues of the day in order to enable them to understand and contribute to the scenario in which they are being managed, tackled and administered by the government and their functionaries.

The issue “trial by media” is discussed in recent times by constitutional lawyers, judges, academicians and various groups of social organization. With the coming into being of the television and cable-channels, the amount of publicity which any crime or suspect or accused gets in the media has reached alarming proportions. Innocents may be condemned for no reason or those who are guilty may not get a fair trial or may get a higher sentence after trial than they deserved. There appears to be very little restraint in the media in so far as the administration of criminal justice is concerned. We are aware that in a democratic country like ours, freedom of expression is an important right but such a right is not absolute in as much as the Constitution itself, while it grants the freedom under Article 19(1) (a), permitted the legislature to impose reasonable restriction on the right, in the interests of various matters, one of which is the fair administration of justice as protected by the Contempt of Courts Act, 1971.

Right to Freedom of Speech and Constitution

As we know that our Constitution does not separately refer to the freedom of the press or of the electronic media in Part III but these rights are treated by the law as part of the ‘Freedom of speech and expression’ assured by Article 19 (1)(a) of the Constitution of India. The guarantee is subject to ‘reasonable restrictions’ which can be made by legislation to the extent permitted by Article 19(2). The Article reads thus: “Article 19(1): All citizens shall have the right (a) to freedom of speech and expression;

1. Assistant Professor, Institute of Law, Kurukshetra University, Kurukshetra
4. The Constitution of India, Article 19 clauses (a) to (g).
5. The Constitution of India, Article 19(2).
(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause, in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence”. ‘Contempt of Court law’ deals with non-interference with the “administration of justice” and that is how the “due course of justice” that is required for a fair trial, can require imposition of limitations on the freedom of speech and expression.

Article 20, clause (1) of the Constitution states that “no person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence and not be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.” Art 20, clause (2) states that no person shall be prosecuted and punished for the same offence more than once. Art 20, clause (3) is important and it deals with the right against self-incrimination. It states: “Art 20(3): No person accused of any offence shall be compelled to be a witness against himself.” Art 21 is the crucial article which guarantees the right to life and liberty. It reads’ “Art. 21: No person shall be deprived of his life or personal liberty except according to procedure established by law’. Article 22(2) requires that a person who is arrested has to be produced before a Magistrate within 24 hours of the arrest. The Supreme Court in Menka Gandhi’s case has interpreted the words ‘according to procedure established by law’ in Art 21 as requiring a procedure which is fair, just and equitable and not arbitrary. The Supreme Court of India, in Life Insurance Corporation of India v. Manubhai D Shah has stated that the “freedom of speech and expression” in Article 19(1) (a) means the right to express one’s convictions and opinions freely, by word of mouth, writing, printing, pictures or electronic media or in any other manner. In Romesh Thapar v. State of Madras, it was held that the freedom includes the freedom of ideas, their publication and circulation. It was stated in Hamdard Dawakhana v. Union of India that the right includes the right to acquire and impart ideas and information about matters of common interest. The right to telecast includes the right to educate, to inform and to entertain and also the right to be educated, be informed and be entertained. The former is the right of the telecaster, while the latter is the right of the viewers. The right under Art 19(1) (a) includes the right to information and the right to disseminate through all types of media, whether print, electronic or audio-visual. The Supreme Court has held that a trial

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6 The Constitution of India, Article 20(1),(2) and (3)
7 The Constitution of India, Article 21
8 AIR 1978 SC 597
9 Life Insurance Corporation of India v. Manubhai D Shah (1992 (3) SCC 637)
10 Romesh Thapar v. State of Madras : 1950 SCR 594,
11 Hamdard Dawakhana v. Union of India : 1960 (2) SCR 671,
12 Secretary, Ministry of Information & Broadcasting v. Cricket Ass. of West Bengal,1995(2)SCC 161
13 Ibid
by press, electronic media or by way of a public agitation is the very anti-thesis of rule of law and can lead to miscarriage of justice. A Judge is to guard himself against such pressure\textsuperscript{14}.

In \textit{Anukul Chandra Pradhan v. Union of India}, the Supreme Court observed that “No occasion should arise for an impression that the publicity attached to these matters (Hawala case) has tended to dilute the emphasis on the essentials of a fair trial and the basic principles of jurisprudence including the presumption of innocence of the accused unless found guilty at the end of the trial” To achieve this objective people need a clear and truthful account of events, so that they may form their own opinion and offer their own comments and viewpoints on such matters and issues and select their future course of action\textsuperscript{15}. The right to freedom of speech and expression in contained in article 19 of the constitution. However the freedom is not absolute as it is bound by the sub clause (2) of the same article. However the right it freedom and speech and expression does not embrace the freedom to commit contempt of court. But after these guidelines media interfering in the legal proceeding and acting as aggressive journalism. By the Delhi High Court in \textit{Mother Dairy Foods & Processing Ltd v. Zee Tele films}\textsuperscript{16} aptly describe the state of affairs of today’s media. He says that journalism and ethics stand apart. While journalists are distinctive facilitators for the democratic process to function without hindrance the media has to follow the virtues of ‘accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect or autonomy of ordinary people’. These are all part of the democratic process. But practical considerations, namely, pursuit of successful career, promotion to be obtained, compulsion of meeting deadlines and satisfying Media Managers by meeting growth targets, are recognized as factors for the ‘temptation to print trivial stories salaciously presented’. In the temptation to sell stories, what is presented is what ‘public is interested in’ rather than ‘what is in public interest’.

After the above said discussion, it is observed that the media isn’t violating the provisions of the constitution but also interfering in the privacy of the people’s life. It is true, in last decade media highlighted many suspense’s and mysteries of murder and corruption cases but by overriding the rule of law and fundamental rights of common man\textsuperscript{17}. It should be stopped.

\textbf{RIGHT TO FREEDOM OF SPEECH AND CONTEMPT OF COURT}

No doubt the constitution has been created by the people, but this instrument has itself created the Courts, which means that the people in their wisdom realized that there must be a forum where disputes between the people could be resolved and grievances of the people redressed peacefully. It is in the nature of things that in every society there will be disputes between the people and grievances of the people. If there is no forum to resolve these disputes and redress these grievances peacefully, they will be resolved violently with bombs, guns, knives and lathis. Hence the judiciary is a great safety valve. By giving a hearing to a person having a grievance, and by giving a verdict on the basis of settled legal principles, the Court pacifies that person; otherwise the grievance may erupt

\textsuperscript{14} State of Maharashtra v. Rajendra Jawannal Gandhi  1997 (8) SCC 386  
\textsuperscript{15} Anukul Chandra Pradhan v. Union of India, 1996(6) SCC 354  
\textsuperscript{17} The State of Bombay v. P. AIR1959 Bomb 182
violently. The judiciary thus maintains peace in society, and no society can do without it. Looking at it from this angle one can immediately realize that in a democracy the purpose of the contempt of court power can only be to enable the Court to function. The power is not to prevent the people from criticizing their public servant (the Judges) if the latter do not function properly or commit misconduct. Article 19(1) (a) of the Constitution gives the right of freedom of speech and expression to all citizens. But Articles 129 and 215 give the power of Contempt of Court to the higher judiciary, and this power limits the freedom granted by Article 19(1) (a). How are these two provisions to be reconciled? In my opinion once it is accepted that India is a democracy, and that in a democracy the people are supreme, the reconciliation can only be affected by treating the right of the citizens of free speech and expression under Article 19(1) (a) to be primary, and the power of contempt to be subordinate. In other words, the people are free, and have the right to criticize Judges, but they should not go to the extent of making the functioning of the judiciary impossible or extremely difficult. Thus in my opinion the test to determine whether an act amounts to Contempt of Court or not is this: does it make the functioning of the Judges impossible or extremely difficult? If it does not, then it does not amount to Contempt of Court, even if it is harsh criticism. Much of our Contempt Law is a hangover from British rule. But under British rule India was not free and democratic, and the people were not supreme, rather it was the British rulers who were supreme. Also there was no Constitution at that time containing provisions like Article 19(1) (a). So the question is that how can the law of those days be applicable today?

On the other hand Press Council of India issues guidelines from time to time and in some cases, it does take action. But, even if ‘apologies’ are directed to be published; they are published in such a way that either they are not apologies or if published in the papers, then not at the most prominent places. The most objectionable part, and unfortunate too, of the recently incarnated role of media is that the coverage of a sensational crime and its adducing of ‘evidence’ begins very early, mostly even before the person who will eventually preside over the trial even takes cognizance of the offence, and secondly that the media is not bound by the traditional rules of evidence which regulate what material can, and cannot be used to convict an accused. So far as interference with criminal law is concerned, Sections 2 and 3 of the Contempt of Courts Act, 1971 are relevant. Section 2(c) defines ‘Criminal Contempt’ as: “Section 2(c): ‘Criminal contempt’ means the publication, (whether by words, spoken or written or by signs, or by visible representations, or otherwise), of any matter or the doing of any other act whatsoever which

(i) … … … …
(ii) prejudices or interferes or tends to interfere with the due course of any judicial proceedings; or

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18 Article 215 and 129 of Constitution of India
19 The Constitution of India, Articles 129 and 215 give the power of Contempt of Court to the higher judiciary, and this power limits the freedom granted by Article 19(1)(a)
21 Sections 2 and 3 of the Contempt of Courts Act, 1971
(iii) interferes or tends to interfere with or obstructs or tends to obstruct, the administration of justice in any manner”. Section 3(1), however, exempts the following: “innocent publication, if the publisher had no reasonable grounds for believing that the proceeding was pending”.

The media has again come in focus in its role in the trial of Jessica Lal murder case\(^\text{22}\). The concept of media trial is not a new concept. The role of media was debated in the Priyadarishini Mattoo case\(^\text{23}\) and likewise many other high profile cases. There have been numerous instances in which media has been accused of conducting the trial of the accused and passing the ‘verdict’ even before the court passes its judgment. Trial is essentially a process to be carried out by the courts. The trial by media is definitely an undue interference in the process of justice delivery. Before delving into the issue of justifiability of media trial it would be pertinent to first try to define what actually the ‘trial by media’ means. Trial is a word which is associated with the process of justice. It is the essential component on any judicial system that the accused should receive a fair trial\(^\text{24}\).

However, the freedom of press, resulting in publication of events and comments relating to sub judice matters, often is a threat of contempt proceedings (recently happened in Home Minister Mr. P. Chidambram’s case). This act of media is like uncontrolled horse. Although, there are two sides to a coin, with this increased role and importance attached to the media, the need for its accountability and professional ethics which should be governed strictly.

**IMPACT ON JUDICIARY**

The wide range of protest from eminent journalist and citizens of the country against the verdict of the High court in the matter. They feel that the right of freedom of expression has been suppressed and that the reports based on truth and facts do not amount to the contempt of court. The court on the other hand, many feel, has neglected the truth as a defence against the contempt of court. Former Lok Sabha speaker Somnath Chaterjee in his remarks has expressed the need for probe into the matter. Eminent former Chief Justice of India, V.N. Khare, former Chief Justice of India, Verma, former Chief Justice of India, P.N. Bhagwati & former Chief Justice of India, G.B. Pattnaik also stated in their views that there should be an enquiry initiated in the matter so that the image of the judiciary can be held in high esteem in the eyes of common man. The political parties have played smart. None of them have reacted against the matter and have chosen to remain silent on the issue\(^\text{25}\).

The judiciary has often voiced its nervousness about media trying to guide the course of justice. In 1993, a judge of the TADA\(^\text{26}\) court in Mumbai appealed to the media not to go overboard in reporting the 1993 serial blasts case. It is another matter that the trial has concluded and verdicts remain to be delivered. But in most cases, the media begin to cross the path of investigation and subsequent trial from the time a suspect is arrested. This kind of coverage of crime mostly comes from TV channels and news papers, which prefer the softer and low cost option of reporting crime...
to doing cumbersome reporting of economic crime that calls for skills and intelligence that are expensive to hire. It is now a routine tool for the police to invite the media and parade before them suspects and incriminate them even before a charge-sheet is filed. As Supreme Court judge K.G. Balakrishnan said at a Delhi seminar\(^{27}\), publication of photographs of suspects tended to interfere with the test identification parade while details regarding the criminal background of the suspect hurt the positions of both the defence and the prosecution. After a long discussion, the Law Commission recommended to the Union Government to enact a law to prevent the media from reporting anything prejudicial to the rights of the accused in criminal cases from the time of arrest, during investigation and trial. The subject was taken up suo motu by the Commission, concerned at the extensive prejudicial coverage of crime and information about suspects and the accused, both in the print and electronic media. Media have no right to trample upon the right of the accused to be heard by a judge unconditioned by media content.

In my opinion the media needed repeatedly to be reminded by non-media persons, academician and institutions that their coverage has prejudicial impact on suspects, accused, witnesses and even judges and in general on the administration of justice. The Law Commission went on to point out that, according to our law, a suspect/accused is entitled to a fair procedure and is presumed to be innocent till proved guilty in a court of law. None can be allowed to prejudge or prejudice his case by the time it goes to trial. The Commission has suggested that the starting point of a criminal case should be from the time of arrest of an accused and not from the time of filing of the charge sheet. In the perception of the Commission such an amendment would prevent the media from prejudging or prejudicing the case.

**Conclusion and Suggestions**

It's pertinent to discuss why anyone should use the press to defend or prosecute persons whose cases a court is already pending with or why should the press allow it to be used for this purpose. In last decade many court cases reopened and discussed by the media and reported for the public opinion i.e. 13 December attack on parliament(2001), Mumbai bomb blast case(1993), Dhanajays capital punishment ending on the day the judgement was to be delivered clearly amounts to setting up a parallel court. In matters of justice, nobody has the right to be heard simultaneously by the courts and the press. All one wants to say could be said before the court takes up a case or after it delivers its verdict. This discipline applies to the common citizen as well as the press. The press cannot encourage a breach of this discipline. It is still free to comment on a judgement or on a miscarriage of justice. In my opinion it is contempt of court law and its misuse of media room to reproduction the process of justice. On behalf of this research paper I would like to submit the following suggestions:

1. Though it is open to a newspaper to report pending judicial proceedings but in a fair, accurate and reasonable manner. So, it shall not publish anything - running commentary or debate, regarding the personal character of the accused standing trial on a charge of committing a crime. Because it may directly or as immediate effect, create a substantial risk of obstructing, impeding or prejudicing seriously the due administration of justice.

2. Newspaper shall not as a matter of caution, publish or comment on evidence collected as a result of investigative journalism.

3. While newspapers may, in the public interest, make reasonable criticism of a judicial act or the judgement of a court for public good; they shall not cast scurrilous aspersions on, or impute improper motives, or personal bias to the judge.

4. Further media must not scandalize the court or the judiciary as a whole, or make personal allegations of lack of ability or integrity against a judge.

5. Newspaper shall, as a matter of caution, avoid unfair and unwarranted criticism which, by innuendo, attributes to a judge ‘s extraneous consideration for performing an act in due course of his/her judicial functions, even if such criticism does not strictly amount to criminal Contempt of Court.

6. News items about court proceedings must be published only after thorough verification. A lot remains to be done to ensure that two of the strongest pillars of our democracy i.e. the judiciary and the media work in tandem to promote the democratic secular principles enshrined in our constitution. In last, Media trials have created a far-reaching effect on the judicial system in the country; media trial not only affected the people but also affected lawyers involved in the case as well as the judiciary. In the wake of current situation media needs to be regulated. There should be a strong judicial system checked by self-imposed code of conduct or by legislature.

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Courts and Environmental Law in India: Triumph and Disappointments

Arindam Basu*1
Rajrupa Sinha Roy**

Abstract

The role of Indian judiciary in saving environmental law has been well acknowledged. However, in spite of the gigantic effort of the courts the overall environmental condition in our country has not improved much. As legislators or administrators share the bulk of the blame the judiciary also can be questioned on various grounds. The paper describes some of the edgy situations that have emerged in Indian environmental law over the period of times because of judiciary’s failure in understanding the difference between sufficient and satisfactory relief while delivering judgments. The time is ripe enough for judiciary to evolve new strategies to address ever changing complex ecological problems.

Introduction

There are reasons to believe that Indian judiciary’s contribution towards the growth of Indian environmental law is remarkable. Supporters of this idea often demand that without the proactive role played by the judiciary Indian environmental law would have been almost non-functional. However, this opinion undermines the fact that Indian Parliament has legislated in last three decades on almost every possible areas of environment and there has been an enormous increase of administrative power too. At the same time, during this period the volume of judgments passed by Indian judiciary on various environmental issues, many of which contain progressive elements, is substantial. In late 1980s and the entire 1990 Indian courts had been flooded with environmental cases. During this period Indian environmental law had been enriched with the incorporation of important principles like polluter pays principle,2 precautionary principle3 and public trust doctrine.4 Right to life protected under Article 21 of the Constitution, an important fundamental right, was given a wider meaning to include right to wholesome environment.5 Enforcement agencies were directed to enforce environmental law strongly6 and government agencies were directed to avoid raising issues like non-availability of funds, inadequacy of staff or other constraints for non-performing their...
This gigantic effort naturally overshadows those cases that judiciary could not adequately resolve or failed to resolve or pushed into the political or administrative domain without any justification. This is surprising because court is hailed for their judicial activism while at times assuming the role of super-legislature and super-administrator in environmental matters. The last decade was an era when courts had deliberately taken pro-developmental stand in quite a few environmental matters and delivered conflicting judgments ignoring or diluting its earlier comprehensive stand.

Why is this trend emerging? Is it something to do with India’s pressing mood for economic development? Is judiciary doing justice to the concept of sustainable development? Are political preferences of judges influencing their decisions?

Commenting on political preferences is certainly a difficult task in India’s multiparty and multicultural political set up. One can only assume in the absence of determinative factors. Proving a case is even more troublesome. However, heavy political bearing often can be seen in the outcome, particularly when it comes to fulfill the aspirations of common people of the country. Therefore, one should not debate on that issue centrally; rather use it as catalyst for discussion.

Indeed, along with the increase of public interest litigation and socio-economic rights adjudication judicial activism has cemented its place in Indian legal jurisprudence. It is simply not possible to discard the concept as futile exercise or waste of resources particularly in the field of environmental law. As we will see in later part of this paper in many of the cases courts had been able to provide significant solutions to complex environmental problems. The glaring example of this is Supreme Court’s efforts to fashion the methods to protect human rights. The court often puts itself in a distinctive activist position that allows it to get involved in case of abuse of these basic rights. In doing this courts sometimes intrude into the area of administration that is saved for specialized enforcement agencies. There is a serious debate about the effectiveness of such approach. In this paper I will not engage myself into that debate. Assuming that judicial activism is essential for environmental protection I will focus on a different question i.e. how far judiciary should go in protecting the environment? As it is not possible to draw the entire scenario in a short paper like this one, I have decided to identify few difficulties that Indian courts have produced while protecting environment in last three decades.

The paper is divided into six chapters. The first chapter gives the introduction and explains the scheme of the paper. The second chapter deals in short the commendable role played by Indian judiciary in last three decades. The third chapter describes the judicial activism overdrive and elucidates whether it has created a barrier to the natural growth of environmental law in India or not. The fourth chapter deals with judiciary’s efforts in describing sustainable development in the context of conservation and economic growth along with the role of technology. The fifth chapter deals with judicial standard setting process in environmental matters. The sixth chapter concludes the paper.

Before opening up the main theme, however, it is always important to know our recent past.

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7 Dr. B.L. Wadhera v. Union of India (Delhi Garbage Case), AIR 1996 SC 2969.
INDIAN JUDICIARY: PROTECTING INDIA’S ENVIRONMENT

There is hardly any area of ecological concern where India doesn’t have any law. Indian legislature is always proactive to enact laws for regulating industrial and development activities. But it falls short when it comes to implementation of such laws. The power of government agencies was increased significantly in mid 1980s and the trend continues throughout 1990s. The idea was to provide quick administrative remedy instead of going to adversarial litigation system. However, because of administrative sloth the fruit of that innovative step had never been realized. The judiciary, a bystander to environmental despoliation, therefore, started assuming the pro-active role of public educator, policy maker, and super administrator.

SUPREME COURT ONCE SAID:

If the mere enactment of laws relating to the protection of environment was to ensure a clean and pollution free environment, then India would, perhaps, be the least polluted country in the world. But that is not so.

To secure compliance judiciary also started entertaining extensively Public Interest Litigation (PIL). Along with Supreme Court, High Courts of several states began to share substantial burden of environmental cases.

In this elaborative structure, on numerous occasions, courts stepped into the shoes of the administrator, marshalling resources, issuing direction to close down factories, requiring the implementation of environmental norms, cutting through bureaucratic gridlock and so on. A remarkable case in this regard is Tarun Bharat Sangh, Alwar v. Union of India, famously known as Sariska Case. In this case Supreme Court intervened to protect the forest wealth and wildlife from the ravages of mining in and around Sariska Sanctuary in Alwar district of Rajasthan. The Court expressed its own constitutional responsibility thus:

This litigation concerns environment. A great American Judge emphasizing the imperative issue of environment said that he placed Government above big business, individual liberty above Government and environment above all. The issues of environment must and shall receive the highest attention from this Court.

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8 The Parliament moved on to provide vast power in the hands of the enforcement agencies. For example, a pollution control board was given power to close down any industrial facility or order to stop water or power supply. Before this a magistrate had the power to enjoin the polluter on the application of the board. This actually helped in providing quick solution to pollution issue. See Shyam Divan, Armin Rosencranz, Environmental Law and Policy in India, (2001), (Oxford University Press: New Delhi), at 2

9 Ibid at 1.

10 Ibid at 4

11 In public interest litigation, subject matter is typically a grievance against the violation of basic human rights of the poor and helpless or about the content or conduct of government policy. The petitioner seeks to champion a public cause for the benefit of all society. Divan et al., Supra n.7 at 133

12 Ibid

13 AIR 1992 SC 514

14 Ibid
Even before this, in *Municipal Council, Ratlam v. Vardichand*, the Supreme Court for the first time considered an ecological crisis differently from usual tort or public nuisance scenarios. A large number of poor people in Ratlam, a small town, were suffering from acute environmental problem. Because of haphazard town planning and direct discharge of untreated pollutants from different sources the drainage facility was completely broken. Municipality raised their hands because of lack of funding and inadequacy of staff. This was a peculiar situation where government agency’s failure was exposed. The court customized the existing public nuisance remedy to provide relief. The judgment explicitly recognizes the impact of a deteriorating urban environment on the poor, and links the provision of basic public health facilities to both human rights and the directive principles of the Constitution. The court commends an activist judiciary to compel municipalities to provide proper sanitation and drainage, thereby enabling the poor to live with dignity.

Supreme Court gave the fundamental right to life and personal liberty guaranteed in Article 21 of the Constitution a novel connotation when it extended its limits to include environmental protection. The first sign of the right to wholesome environment may be traced to *Rural Litigation and Entitlement Kendra, Dehradun v. State of Utter Pradesh*, famously known as *Dehradun Quarrying Case*. After this case, first in *Subhash Kumar v. State of Bihar* the Court held that the right to life includes the right to enjoy unpolluted water and air. If anything endangers or impairs the quality of life in derogation of law, a citizen has a right to move to the Supreme Court under Article 32 of the constitution. Expanding upon this theme in a town planning case, *Virender Gaur v. State of Hariyana* this stand was fully clarified by the Court. It was observed that “Article 21 protects the right to life as fundamental right. Enjoyment of life.....including [right to live] with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation, without which life cannot be enjoyed. Any violation to the environment, ecology, air, water, etc. should be regarded as amounting to violation of Article 21.”

The timing of these judgments is critical. All of them were delivered at the time when world environmental ethics was bolstered by reinforcement of a concept called sustainable development. Indian courts simply paid respect to such concept through these judgments.

During this time only Indian judiciary embraced various facets of sustainable development as the basis of its decision-making in three of its most celebrated decisions e.g. *Indian Council for Enviro-Legal Action v. Union of India* (CRZ Notification Case), *Indian Council for Enviro-Legal

15 AIR 1980 SC 1622
16 Ratlam judgment shows how an activist court can transform an apparently simple legal provision into a powerful directive to protect the environment. See Divan et al., *Supra* n.7 at 119
17 Article 21 of Indian Constitution provides: “No person shall be deprived of his life and personal liberty except according to procedure established by law.”
18 AIR 1985 SC 652
19 In *Subhash Kumar* the Court held that the right to life includes the right to enjoy the unpolluted air and water. If anything endangers or impairs the quality of life in derogation of law, a citizen has a right to move the Supreme Court under Article 32 of the Constitution; See also Divan, Rosencranz, *Supra* n.7, at 50.
20 1995 (2) SCC 577
21 *Ibid*
22 (1996) 5 SCC 281
Action v. Union of India\(^\text{23}\) (The Bichhri Case) and Vellore Citizen’s Welfare Forum v. Union of India\(^\text{24}\). There are other important decisions like Shrimp Culture Case, Taj Trapezium and other M.C. Mehta’s writs but I consider the above three cases more significant because they threat environmental rights separately for the first time beyond any other considerations.

There are some remarkable cases related to rivers. Supreme Court implemented the ‘Doctrine of Public Trust’ in the case of \textit{M.C Mehta v. Kamal Nath}\(^\text{25}\) which is famously known as Span Motel Case. The case concerned with the illegal construction of a motel on the banks of a river, which entailed blockage of the river and diversion of a channel. In \textit{Tehri Bandh Virodhi Sangarsh Samiti v. State of Uttar Pradesh}\(^\text{26}\) it was pointed out that the project was initiated without studying the safety aspects. This case was an eye-opener to India’s acute resource distribution conflicts. \textit{N D Jayal v. Union of India}\(^\text{27}\) produced a hand-off approach to the decisions relating to the simultaneous execution of the construction of dam, and rehabilitation of oustees.

Citing the importance of new emerging environmental law principles long back, Chief Justice Bhagwati in \textit{M.C. Mehta v. Union of India}\(^\text{28}\) declared in unambiguous language:

“We have to evolve new principles and lay down new norms, which would adequately deal with the new problems which arise in highly industrialized economy. We cannot allow our judicial thinking to be constricted by reference to the law as prevailed in England or for that matter in any other country.”

Later \textit{Ganga Pollution Cases} shows how fundamental rights, the accepted notion of standing, and the charisma of the judge and/or petitioner have created a legal pathway toward the definition of public policy and the management of water resources.\(^\text{29}\)

\textbf{Judicial Activism Overdrive: Is it a Barrier to the Natural Growth of Environmental Law in India?}

As the list of the cases is so vast, it is impossible to discuss all of them in this paper. What is common in many of these cases is the court’s ingress into the fields traditionally reserved for the executives. Finding the executive response to be absent or deficient, the Supreme Court has used its interim directions to influence the quality of administration, ‘making it more responsive than before the constitutional ethic and law.\(^\text{30}\) Occasionally, the court has even created its own crude

\begin{itemize}
  \item \textit{Action v. Union of India}, (1996) 3 SCC 212
  \item \textit{Vellore Citizen’s Welfare Forum v. Union of India}, AIR (1996) SC 2715
  \item \textit{M.C Mehta v. Kamal Nath}, (1997) 1 SCC 388
  \item \textit{Tehri Bandh Virodhi Sangarsh Samiti v. State of Uttar Pradesh}, (1992) Supp 1 SCC 44
  \item \textit{N D Jayal v. Union of India}, AIR 2004 SC 1 (Supp) 867
  \item \textit{M.C. Mehta v. Union of India}, AIR 1987 SC 1086 at 1089
  \item Upendra Baxi, \textit{Suffering Seriously: Social Action Litigation in the Supreme Court of India}, 29 The Review (International Commisison of Jurist), (December, 1982), at 37, 42
\end{itemize}
administrative machinery to remove a public hardship.\textsuperscript{31}

Prof. Baxi famously describes this gradual judicial takeover of the direction of administration in a particular arena from the executive as ‘creeping jurisdiction’.\textsuperscript{32} A good illustration is probably the \textit{Dehradoon Quarrying Case}.\textsuperscript{33}

Moreover, few of the petitioners and lawyers mentioned in these cases have been deeply involved with the invocation of fundamental rights. However, the remedies formulated by the courts have not always been related directly to the restoration of these rights. For example, in the \textit{M. C. Mehta} case mentioned above, the court did not make reference to any fundamental right when using Article 32 and ordering a wide range of administrative and monitoring actions.\textsuperscript{34} The mandamus charge is a broad remedy for executive failures as it has been consistently done by the court in \textit{T.N. Godavarman Case}. It certainly can be called a diffuse approach to lawlessness and environmental damage.

In all these environmental cases described here victims have demanded response and action from government agencies, industrial agents, and those involved with policy making and the enforcement of laws. Consequently, courts appointed commissions, reviewed to deliberate water problems and tried to check the practices of government agencies and industrial units. Yet behind the rhetorical and constitutional strength of these orders and directions there appears to be a complete incompetency: orders and directions facilitate platitudes in legal discourse but result in poor implementation on the ground.

Cunningham rightly has written that the relationship between rights and remedy is often stretched to the point of disconnection when the preliminary issuance of interim orders for immediate relief are followed by a long deferral of the final decision.\textsuperscript{35}

The way forward is difficult but also not forbidden by any mandate to not to adopt a different approach. Judicial activism in India, however, has posed a disturbing problem when we consider the role a government should play in a society. It actually has slowed down the natural growth of environmental law in our country. In the last decade, we have hardly seen any innovation or deviation by judiciary from what had been settled in 90s. Majority of the judgments now has become almost paraphrasing of the earlier celebrated decisions. This is surprising because environmental problems are mainly diffused in nature and ever changeable. They require case specific solution. Of course we can draw the larger parameter by sticking to the important principles like sustainable development or polluter pays principle or precautionary principle. But this in no way creates any obstacle for innovation. No surprise that legislatures are happy enough to let judiciary bell the cat in all situations where commercial interests are involved.

\begin{itemize}
\item \textsuperscript{31} Divan et al., \textit{Supra} n.7 at 147.
\item \textsuperscript{32} Baxi, \textit{Supra} n. 32 at 42.
\item \textsuperscript{33} Divan et al., \textit{Supra} n.7 at 147
\item \textsuperscript{34} Kelly D. Alley, \textit{Supra} n. 28 at 817
\end{itemize}
MISUNDERSTANDING ECONOMIC GROWTH IN ACHIEVING SUSTAINABLE DEVELOPMENT AND THE ROLE PLAYED BY TECHNOLOGY

India’s free market structure and incentive intensive system is a lucrative opportunity for many business entities. The country has witnessed massive multinational investments in last twenty years since India’s accession to GATT. This in a sense has added to India’s annual growth which of course goes nicely with its pursuit for global economic equity. For foreign industries the compliance cost is usually less in India which provides profitable set up by public investments in R & D, tax credits, lower interest rates on loans, direct payments etc. In a way these industries have less interest in saving environment and more to making quick profits. This is the scenario not only in India. Almost all the major developing countries are experiencing this dilemma – whether to have stringent environmental norms which may work as a barrier to trade or to have a system to invite foreign investment. Many of them, including India, are trying to develop regime that supports both – an effort to bring two opposing poles to centre. This is nothing but the reflection of the idea, famously known as environmental Kuznets Curve, that economic growth is good for environment in long run.

India’s judiciary it seems has become an avid supporter of this philosophy in last decade by supporting the idea of development in many contested issues. This has been done nicely in the disguise of sustainable development. This is entirely unclear how India will have sustainable future in the presence of executive sloth and environmental law and regulation congestions. India’s increasing population is making the situation worse. This is not any more unknown that population growth is one of the major causes of environmental degradation, if not the only. It is highly ironical that India’s assertive judiciary has never addressed the issue comprehensively in any of its important decisions. The lack of clarity and future planning in any of the legislative mandates is only going to make situation worse. Let us take one example. If someone travels across India, in cities and villages, he can easily witness the expansion of consumer society. This expansion has become possible invariably because of India’s liberal economic policy since 1990. Whatever controversy remains regarding resource distribution conflicts, in general the rise of middle class society is a reality that one cannot deny. Here lies the problem. Today almost everyone, barring of course those who living below the poverty line who are mostly the victims of resource distribution conflicts, has capacity to purchase at least one two wheeler. India’s thousands of small and big cities are log jammed with two wheelers currently. There is no foolproof supervision or monitoring regarding who is buying and riding those vehicles. Majority of them are youngsters who have not attained the age to even to have proper license. The trend is increasing as manufacturers almost every month are launching new models and offering easier way to get them. How many of us are falling prey to that subject to our satisfaction is a matter of extensive field work. Given the huge population of India the number will definitely be a big one. Considering further that the economic growth will continue and so do the population, everyone one day possibly will have at least one car to drive. What impact this may have on our environment? This idea is, of course, hypothetical. There is possibility that with economic growth the society will become greener,\textsuperscript{36} although, the kind of cost that will be attached with safer and greener

\textsuperscript{36} This is, however, is subjected to how far we would be able to minimize resource distribution conflicts. Currently, India’s several poverty alleviation policies are not providing adequate solution. Therefore, important social
technology is extremely difficult to ascertain accurately at any stage. We are only assuming that environment friendly technologies will address all environmental menaces.\(^{37}\) Success is so far very limited considering the kind of demand is there in our society. But the idea certainly is profitable for business houses that prefer to transfer the place of business to a country where cost of operation is lower than their original one, invest in greener technology and create thereby, a green market. This not only will help them to overcome the trade restrictions but also will build faithful consumer society to whom they will send signals of their eco-friendly products.

Let us return to that car situation again. Let us assume that every Indian will have a car that will be environment safe - environment safe in terms of production, usage, scrapping and recycling. What would be the cost to maintain such item? Let us again assume that in distant future average earning in India will be 50000 per month/per person. If a person requires spending 10000 per month behind his car, shall we assume that he will be satisfied with such spending all the time? Or will he try to reduce the maintenance cost thereby, will increase his bank balance? What is the guarantee that he will be satisfied with that car and will not go for another one or higher version? This will only be possible with his earning increasing (therefore, more economic growth possibilities to be created). Can green technology keep pace with this ever increased demand?

In country like India this is even more challenging as there is hardly any control on population growth till date. Technology that may be sufficient in a less populated country may not properly work in India.\(^{38}\) This point needs further clarification. India employs a range of regulatory instruments to preserve and protect its natural resources. A substantial part of such instruments envisage standard-based approach.\(^{39}\) The usefulness of an existing technology directly depends on the fact of how far that technology helps an industrial unit to comply with such standard. In a sense, non-usefulness of a technology indicates towards the gap between the existing technology and the need for further R & D. Government sets abatement standard after considering marginal social benefit and marginal cost simultaneously. At times absence of full information would likely to prevent the government from identifying the marginal social benefit and marginal social cost of abatement. In the absence of perfect information, it is highly probable that government will unknowingly establish the abatement standard at some level other than the allocatively efficient one, even if that was not the legislative intent.\(^{40}\) Even if the law permits a balancing of costs and benefits and even if full information were available,

\(^{37}\) This assumption is neutral to this basic fact that most environmental problems are extremely diffuse in nature, unpredictable and keep on changing with locations.

\(^{38}\) The solution to this is technology transfer and with the help of that developing our own *sui generis* standard to meet the needs.

\(^{39}\) The reality of a standard-based approach is that it does not necessarily set pollution limits to account for the associated benefits and costs. In fact, under U.S. law, many standards are said to be benefit-based, meaning that they are set to improve society’s well-being with no allowance for balancing the associated costs. For example, under the U.S. Clean Air Act, air quality standards are motivated solely by the expected benefits of improved health and welfare. If costs are not accounted for in the standard-setting process, resources likely will be over-allocated to abatement. See Janet M. Thomas, Scott J. Callan, *Environmental Economics*, (Cengage Learning: India Edition), (2007), at 103.

\(^{40}\) *Ibid*
there is a qualifier on the use of efficient level of abetment as a national standard across all polluting sources. Because this optimal level is determined from marginal social benefit and marginal social cost, both of which assume the absence of region-specific abatement benefits and costs.\footnote{Id}

To sum up, these are possibilities that depend on too many contingencies. Therefore, the best possible method to solve the environmental problems is to focus on regulation rather than absolute prohibition. Prohibition in consonance with regulation may be justified but stopping everything cannot be the solution.\footnote{See generally Daniel Bodansky, The Art and Craft of International Environmental Law, Harvard University Press, 2010.} Similarly, allowing industrial activity only to satisfy public demand may prove extremely harmful in distant future. Judiciary should be aware to this fact when it does the ‘nice balancing’ act between conservation and development.

**JUDICIAL STANDARD SETTING THAT AMOUNTS TO DOUBLE TAXATION**

When court decides standard specific issue and deters the polluter it simply gives recognition to the fact that legislature wanted the polluter to remain within certain limit. Therefore, it is not desirable that court sets a different standard to be followed by such polluter. It will be no less than double taxation and quite dissimilar than applying the caveat of polluter pays principle or precautionary principle. What court can say is to whether the polluter should follow the legislative mandate or not. If not then it may suggest appropriate remedy as per law which of course includes polluter pays principle or precautionary principle.

As matter of fact court must not try to balance the two interests. Environmental statutes are beneficent legislation and to be read with Article 48A of the Constitution. It is the duty of the court to adopt an interpretation that will favor the ecological preservation. The court can also adopt such method of interpretation that would further the purpose the legislature had in mind during the enactment of the statute. Having said this we must realize that all the environmental statutes contain specific provisions and guidelines for the administrators. It is the duty of an administrator to follow the guidelines in accordance to the objective of the statute. i.e. of course protection of the environment. Any standard laid down by the statute invariably includes the concept of sustainable development (after considering different aspects of the environment these standards are set) which is to be realized through the decision of an administrator. Interference of any sort at this stage is undesirable. Of course, there is possibility of under, over or non-performance of the duty by an administrator and the duty of the court is to simply strike a balance there but not to freshly determine the parameter of the standard or so to say what is required in the name of sustainable development.

When the adequacy of a standard itself is challenged, then also court should only determine the question of adequacy but not to take the job of setting a new standard in its own hand. If the question is about the right to carry on an industrial activity it should be determined in accordance with the basic tenets of Constitution to safeguard one of the fundamental rights. The only issue to be determined whether upholding such right will degrade the environment or not.

Probably the court acts perfectly when it exercises its writ jurisdiction in reminding the
public authority its duty under any environmental statute. There also the court at times exceeds its authority. The problem is if a lower court does this there is corrective mechanism but in case the Apex Court does the same the only way to change its ruling is fresh legislation. This unnecessary aggravates conflict between legislature and judiciary. The fiasco over Vedanta and Posco is glaring example of this.

**CONCLUSION**

Whatever situation we discussed here is simply the tip of the iceberg. Far more critical issues have been remaining unanswered till date. How far judiciary has been able to understand the purposive nature of environmental statutes? Is too technical interpretation which may be good in other civil or criminal statutes, desirable in case of environmental problems? Why does judiciary avoid indicating towards population growth while explaining sustainable development? In my opinion time has come to see environmental problems differently than regular civil or criminal matters. Special forum, special rules and methods may serve the purpose. Of course Green Tribunal is not the solution as it is carrying the baggage from the past and not as unbiased as some of its supporters claim. True we may end up creating parallel or overlapping situations but that can always be refined which will craft a unique and unprecedented legal system unparallel in the world. As legislature needs to be assertive, judiciary also has to do away its reactionary robe. Rather it should be responsive and forward-looking.

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Interface between International Trade Law and Environmental Protection in the Context of Developing Countries in Asia

Aneesh V. Pillai*

INTRODUCTION:

In the contemporary times the significance of international trade is well established, but its adverse impacts on environment and natural resources cannot be ignored. The object of International Trade Law (ITL) is to promote free trade by eliminating all barriers. The underlying idea is that free trade can increase consumer choice, reduce expense of manufacturing consumer goods and thus lower the price of products and improve their quality. However this object of ITL often comes into conflict with the operation of environmental protection under international and national legal regimes. Most of the environmental damage is due to the increasing rate of global economic activity. In the past few decades though global economic development is increasing, the environmental indicators of the world are rapidly deteriorating and the achievement of Millennium Development Goals remains doubtful. The Millennium Ecosystem Assessment found that in the last 50 years man has altered the world’s ecosystems drastically and nearly 60% of the world’s ecosystem services are being degraded or used unsustainably.

The interface between international trade and environment occurs at various levels: For example, the environment not only supplies the raw materials for trade but also serves as a sink for waste dumping. The trade can also facilitate international movement of those goods that damage the environment, like for example the transboundary movement and dumping of hazardous wastes and toxic materials in developing Asian countries which may not have the technical or administrative capacity to properly dispose them or even assess whether they should be accepted. Moreover, the international trade also makes possible the over-exploitation of species to the point of extinction. All these problems have given rise to an anxiety among developing countries regarding the impact of free international trade on their environment and sovereignty.

For the last two decades environmentalists and trade policy community have debated over environmental consequences of liberalized trade. This debate was fuelled by the negotiations during the Rio-Conference on Environment and Development and the Uruguay round of GATT negotiations. In response, the GATT was modified in 1994 and included environmental provisions. The WTO established the Committee on Trade and Environment. Various Regional and Bilateral Trade Agreements also incorporated similar provisions. It is criticised that the provisions of GATT and other trade agreements are more favourable to the developed countries and do not consider the special needs and requirements of trade and environment of developing Asian countries. The object

1 * B A. LLB(Hons.) LLM (Consumer Law and Human Rights) Faculty of Law, Hidayatullah National Law University, Chhattisgarh.
of this paper is to examine the core principles of ITL and their apparent conflict with environmental protection. It attempts to address the anxieties of developing countries in Asia and their special needs with respect to trade, development and environment. Further it seeks to propose pragmatic solutions for resolving the conflict between international trade and environmental protection in developing Asian Countries.

**LIBERALISATION OF INTERNATIONAL TRADE VIS-A-VIS ENVIRONMENTAL PROTECTION:**

In the last two decades, international trade law has become one of the fastest emerging branches of international law\(^4\) due to increasing globalization and international trade. ITL refers to the rules and customs for handling trade between two or more nations or between private companies across borders. It is a combination of national or domestic law and public international law that pertains to transactions for goods or services that cross national boundaries. Without such international trade, nations would be limited to the goods and services produced within their own borders\(^5\). Liberalisation of trade therefore paves the way for the development of market access and leads to the growth of high economic activity and higher savings for consumers. Liberal trade when associated with correctly priced environmental resources can also lead to the efficient use of natural resources and generate higher incomes which can be utilised for the overall welfare of the people and development of the nation. The supporters of international free trade advocate that wealthier is healthier\(^6^,\) and wealthier is cleaner\(^6^\). According to them free trade contains within it the aspect of sustainability because it gives a competitive advantage to those countries that produce goods and services most efficiently with lesser input of resources. This means that the goods and services would be more economical as they are produced by utilising less raw materials. Thus trade liberalization can have a positive impact on the environment by improving the efficient allocation of resources, promoting economic growth, and generating revenues that can be utilized for environmental improvement\(^7\).

In the present times however, the relationship between international trade and environment has become more intricate and multifaceted. On one hand international trade offers the advantages of generating higher income which can be utilised for improving the living conditions of the people, promoting sustainable development and strengthening the economic stability of the country. On the other hand international trade may result in severe repercussions on the environment in the form of over-exploitation of natural resources and environmental pollution which cannot be ignored. International trade law recognises these implications of international trade on environment and has made an attempt to address this issue.

**INTERNATIONAL TRADE LAW AND ENVIRONMENTAL PROTECTION:**

International law accepts the fact that both international trade and environmental protection

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are essential for the welfare of the mankind. The Agenda 21³, states that, „Environment and trade policies should be mutually supportive. An open multilateral trading system makes possible a more efficient allocation and use of the resources and contributes to an increase in production and incomes and to the lessening of demands on the environment. It thus provides additional resources needed for economic growth and improved environmental protection. A sound environment on the other hand provides the ecological and other resources needed to sustain growth and continuing expansion of trade”⁹. It is pertinent to point out here that the trade liberalisation is centralised within the GATT and WTO¹⁰. The provisions of the GATT clearly show that the WTO organisation has been established mainly for the promotion of international trade and not for protection of environment. However the existing WTO rules are not per se hostile to trade restrictive environmental measures. The Preamble of the Marrakesh Agreement establishing the WTO gives the WTO a sustainable development mission¹¹. Moreover the WTO agreements apply to measures protecting the environment only where and insofar as they have an impact on international trade, and relatively very few environmental measures fall into this category. Also nothing in the WTO agreements requires that free trade be accorded priority over environmental protection. Rather, the Preamble to the WTO agreements acknowledges that expansion of production and trade must allow for the optimal use of world’s resources in accordance with the objectives of sustainable developments. It therefore, seeks both, to protect and preserve the environment and to enhance the means for doing so in a manner consistent with each of the member countries respective needs and their concerns at different levels of economic development¹². More importantly, the specific WTO agreements, GATT in particular contains opportunities for reconciling environmental measures with WTO law. It is mainly Article XX of GATT as interpreted by WTO Dispute Settlement Mechanism, that is important for the relationship between trade and environment. This article allows nations to restrict the import of products from other member nations, so long as these restrictions do not discriminate between foreign and domestic products¹³. Article XX lists the exceptions that justify a deviation from GATT’s general free trade requirements. Among these exceptions are trade restrictions “necessary to protect human, animal, or plant life and health,” and those “relating to the conservation of exhaustible natural resources¹⁴.”

The Committee on Trade and Environment (CTE) is the main forum for discussing trade and

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³ It was adopted at the UN Conference on Environment and Development in 1992. It is non-binding and an 800 page document which gives the blueprint for sustainable development in the 21st century.
¹¹ Ibid., at p. 13.
¹² Ibid, at p.25.
¹³ For instance, under GATT the United States may ban the importation of a dangerous pesticide so long as the use of the pesticide is also banned in the United States.
¹⁴ Conflicts between International Trade Law and International Environmental Protection Efforts, Global Change Instruction Program, Understanding Global Change: Earth Science and Human Impacts, See www.ucar.edu/communications/gcip/m3e-law/m3pdf.pdf (3 March 2011)
environment issues at the WTO\textsuperscript{15}. With its broad based mandate, the CTE has contributed to bring environmental and sustainable development issues into the mainstream of WTO’s work\textsuperscript{16}. 

Although the WTO recognizes a special exception to trade rules under Article XX for resource conservation and environmental protection, its panel rulings have interpreted this narrowly. WTO authorities tend to be suspicious of “green protectionism” – the use of trade barriers to protect domestic industry from competition under the guise of environmental regulation. They are also unsympathetic to efforts by nations to use trade measures to affect environmental policy outside their borders. From the WTO perspective, the responsibility for environmental policy should remain at the national level. As far as possible, decisions on international trade policy should not be complicated with environmental issues. This is consistent with an economic principle known as the \textit{specificity rule}: policy solutions should be targeted directly at the source of the problem. Using trade measures to accomplish environmental policy goals is therefore a second-best solution, which is likely to cause other, undesired effects such as the reduction of gains from trade.

This argument, placing the responsibility for environmental policies on national governments, has been criticized on several grounds. It fails to consider the competitive pressures that may encourage trading nations to reduce environmental protections, as well as the inadequate institutional structures in many developing countries. It is also inadequate for dealing with environmental problems which are truly transboundary or global.

Further there are various international treaties and multi lateral environmental agreements that have been adopted to deal with specific environmental issues. For example, conventions protecting fur seals, migratory birds, polar bears, whales, and endangered species. Transboundary and global environmental issues have been addressed in the \textit{Montreal Protocol on Substances that Deplete the Ozone Layer} (1987), the \textit{Basel Convention on Hazardous Wastes} (1989), the \textit{Antarctica Treaty} (1991), and the \textit{Convention on Straddling and Highly Migratory Fish Stocks} (1995). In 1997 the \textit{Kyoto Protocol} on Climate Change established guidelines for reducing greenhouse gas emissions, including important trade-related measures. So also the \textit{Convention on Biological Diversity}, 1992; \textit{The Cartegena Biosafety Protocol} to the \textit{CBD (Trade in Genetically Modified Organisms)}; \textit{Convention on International Trade in Endangered Species of Wild Fauna and Flora (Trade in Wild life species)}\textsuperscript{17}. These international treaties have addressed the environmental impacts of production

\textsuperscript{15} The CTE was created following the adoption of the 1994 Ministerial Decision on Trade and Environment.
\textsuperscript{16} At the Fourth Ministerial Conference in Doha, Qatar in November 2001, WTO members outlined work areas in the Doha Development Agenda (DDA) dedicated to issues on trade and the environment Ministers instructed the CTE, under Paragraph 32 of the DDA to focus particularly on three issues:
  a) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development; b) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and c) labelling requirements for environmental purposes. See for more \textit{Trade & Environment at the WTO}, Avialable at \url{http://www. www.wto.org/english/ tratop_e/envir_e/envir_e.htm-} (5 March 2011)
methods in ways that individual nations cannot\textsuperscript{18}.

There are also various regional arrangements that deal with this issue. For example the North American Free Trade Agreement (NAFTA) and EU, etc. However, serious questions remain about the compatibility of these MEAs with WTO rules\textsuperscript{19}. In case of conflict between the WTO rules and MEA’s the lex specialis rule of customary international law is applied. According to this rule, if two treaties deal with the same issue, the most specific treaty prevails over the more general treaty.

At this juncture it is necessary to point out that the conflict between liberalisation of trade and environmental protection also conceals the conflicting realationship between the interests of developed and developing countries of the world. It is widely criticised that the WTO rules and MEA’s are favouring the interests of developed countries than developing countries. This has given rise to various anxieties to the developing countries particularly Asian Countries, which are having rich biodiversity and natural resources.

**Major Anxieties:**

1. **Sharing of Benefits:** The major anxiety of an Asian developing nation is the sustainable utilisation of its biological diversity for economic growth. The CBD seeks to protect the biological diversity as well as promote its sustainable utilisation and sharing of benefits arising from its use. It also provides for transfer of technology from developed nation to developing country. But it is seen that the natural resources and biological diversity of developing countries are exploited by the developed nations. In most of the cases the benefits do not go to the developing countries as the biological resource, the traditional knowledge or both may be used and patented by the developed nations.

2. **Waste Disposal:** Increasing trade and economic activity would result in increased generation of waste. This huge amount of waste gives rise to problem of waste disposal and its regulation. There may be circumstances where states may attempt to restrict imports or exports of waste. For example, states may restrict imports of waste in order to protect their environment against the environmental damage created by the disposal of such waste. States may also restrict exports of waste in order to protect their waste-treatment under takings against out-of-state competitors. There is therefore a tension between the free interstate movement of waste and the ability of states to control such movement. Developing nations always have the anxiety that they may be used as dumping grounds for disposal of wastes\textsuperscript{20}.

For example a French naval ship Clemenceau was sent back from Indian coast on the ground that it contained prohibited environmentally hazardous materials like asbestos\textsuperscript{21}.

\textsuperscript{18} See for more details, Trade and the Environment, Available at www.eoearth.org/- Visited on 3.5.2011
\textsuperscript{19} Jonathan M. Harris, *Trade and the Environment*, Global Development and Environment Inst, Available at www.ase.tufts.edu/gdae/about_us/ (5 March 2011)
\textsuperscript{20} DAMIEN GERADIN, TRADE AND THE ENVIRONMENT, A COMPARATIVE STUDY OF EC AND US LAW, (University of Liege, Cambridge University Press 1997), p7
3. **Transboundary Environmental Pollution:** Transboundary pollution is pollution that originates in one country but, by crossing the border through pathways of water or air, is able to cause damage to the environment in another country\(^{22}\). Pollution can be transported across hundreds and even thousands of kilometers. The incredible distances that pollution can spread means that it is not contained within the boundaries of any single nation and can cause damage even to a nation at a far distance\(^{23}\). The increase in international trade and economic activity all around the globe have increased the exposure of countries to transboundary pollution.

The economic activity in one nation may have an impact on the environment and health of individuals in another nations. The transboundary pollution gives rise to various concerns. Firstly, the transboundary pollution such as Ozone Layer depletion, global warming and climate change have their impact not on a single nation but all over the globe. One of the major concern is regarding the responsibility for such transboundary pollution. For example the Koyoto Protocol enshrines the philosophy of common but differentiated responsibilities. It means that the countries all over have a common responsibility to prevent global warming but at the same time the extent of responsibility depends upon whether it is developed or developing nations. This protocol recognises that developed nations have utilised the natural resources since long and contributed greatly to environmental problems and hence have greater responsibility towards protecting the environment. However from Kyoto to Coppenhagen and Cancun there has been a dilution of this principle. The developed nations are putting a pressure on the developing nations to reduce their economic activity and take more responsibility in this regard. This will have an impact on the economic interest of the developing nations.

Further the setting up of huge industries by MNC’s also exposes the nations to the risk of transboundary pollution. The developing nations may not have the required technology and adequate measures to cope up with the impacts of such transboundary environmental pollutions. Another major concern is the introduction of GMO’s into the biosafety and the environment which may adversely affect the developing countries interest.

4. **Extinction of Natural Resources:** The extinction of natural resources is of major concern to the developing Asian countries as they are rich in biodiversity and natural resources. India, particularly is a mega hot-spot biodiversity region. The liberalisation of trade has led to an over-exploitation of the natural resources and particularly selected species of plants and animals for economic gains. This is adversely affecting the biodiversity and many of the species are becoming rare or endangered and some have become extinct. For example the flowering plant *Vinca rosea-* also known as sadabahar plant in India is becoming rare due to exploitation by multinational companies for making anti-cancer drugs, vincristine and vinblastine from the plant\(^{24}\). Similarly the Indian plant *Rauwolfia serpentina* has been exploited for its use in making medicines for blood pressure and mental disorders. The plant is now facing extinction.

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\(^{22}\) Transboundary Pollution, Avialable at www.states.oecd.org/- (5 March 2011)

\(^{23}\) Ibid.

\(^{24}\) www.ecosensorium.org/- (5 March 2011)
5. **Incomplete Information regarding the Environmental Hazardous of Goods:** Another major anxiety of developing nation is the incomplete information given regarding the environmental and health impacts of the goods by another nation or multinational company. In the present times due to the promotion of free trade such instances are increasing in the world. For example with respect to GMOs the benefits are widely advertised by the companies, but the risks to the environment and human health are rarely discussed. Though the labelling and description of the product with respect to its contents and hazards is required by law in most countries, it is not complied with. Moreover the liability for any damage to the environment and health due to such incomplete information or wrongful information is not adequately dealt with under the international trade regime as well as MEAs.

6. **Intrusion to Sovereignty:** The trade liberalisation and increase in international free trade is frequently discussed as a counterpoint to national sovereignty. It can be observed that with the emergence and growth of international institutions like WTO, the States have lost much of their sovereignty and independence over their decision making power with respect to national trade regulations. It is argued that this loss of decision making power is due to the fact that states are constrained by the pressures of international capital markets and international trade law. The international trade agreements under WTO and GATT often compel the signatory nations to change their laws or face sanctions. Worse than that, these trade agreements will cause countries with high standards for the environment safety and to lower their standards in order to avoid sanctions.

So also major concern of developing nation is the impact of international trade law over their sovereign right to utilise their natural resources for development. The fundamental principle of international environmental law is that the states have the sovereign right to exploit their natural resources. For this purposes the states can make appropriate laws and regulations. However the international trade law arrangements like WTO and GATT often put a pressure on the developing nations to compromise and modify their national legislations so as to conform to the international obligations. It is generally argued that these types of provisions are favouring the interest of developed nations and neglecting developing countries. For example the developing countries are advocating for the implementation of TRIPS and CBD in a mutually satisfactory way. India has expressed the view that TRIPS Agreement is in conflict with CBD, because the provisions of the TRIPS regarding private right are having the potential to overrule the sovereign rights recognised by the CBD. Currently under TRIPS Agreements nothing prevents a person from patenting a genetic material, for example a plant originally from another country without having to fulfill some of the basic principles of the CBD, such as benefits sharing, prior informed consent and protection of the traditional knowledge associated with the genetic resources.

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25 **Changing Sovereignty in the light of WTO,** See http://www.legalservicesindia.org/-{(5 March 2011)
26 **Trade Pacts Threaten Sovereignty,** Available at www.boilermakers.org/-{(5 March 2011)
CONCLUSION:

It is an accepted fact that the development of international trade and its liberalisation have helped in economic growth of several countries all over the globe. The backbone of any developed nation is the access to free trade and open market. Hence in the contemporary times it is also necessary for the developing countries to make the required changes for economic growth and participate in international trade. At the same time it is also necessary for the developing nations to protect their environment and safeguard their economic interests. The link between trade liberalisation and environmental protection is well established. The apparent conflict between international trade law and the MEA’s gives rise to various issues which are of great concern to developing countries such as extinction of natural resources, transboundary environmental hazards and state sovereignty issues. Hence it is necessary to strike a balance between the international free trade and environmental protection in favour of developing countries.

SUGGESTIONS:

1. The role of WTO is very significant in balancing the conflict between the interest of developed and developing nations with respect to trade and environment. It should give adequate attention to developing countries by adopting suitable provisions.

2. International agencies such as UNEP and CSD should formulate appropriate plans and measures for environmental protection suiting to needs of developing countries. They should provide assistance to developing countries by providing proper technology for dealing with environmental problems.

3. The regional organisations like ASEAN and OECD should facilitate trade by promoting eco-friendly measures.

4. The developed nations should be transparent in their dealings with the developing nations. The various international and regional bodies regulating trade and environment should ensure that the developed countries are fulfilling their obligations in this regard.

5. Last but not the least there should be proper coordination between various bodies and stakeholders with respect to trade related environmental measures. Thus there is a need for an independant and impartial international body to review the various measures taken for promotion of free trade as well as environmental protection. This will help to avoid any biased decision in favour of either trade or environment. This body should contain adequate representatives from developing countries.

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Protection of Cultural Property
In The Event of Armed Conflict

Dr. Rhishikesh Dave
Dr. Tarkesh Molia

INTRODUCTION

Destruction constitutes an inherent component of armed conflict. No war has been fought without damaging private or public property at least collaterally. In numerous conflicts, however, belligerents have tried to obtain psychological advantage by directly attacking the enemy’s cultural property without justification of military necessity. The various conventions protecting cultural property have evolved over the years in the changing face of armed conflict, sometimes protecting the rich cultural heritage of the world and sometimes failing to do so. The protection of cultural property in the event of armed conflict is a web of the existing rules and their implementation. This has been laid down in the paper.

In numerous conflicts, belligerents have tried to obtain psychological advantage by directly attacking the enemy’s cultural property without the justification of military necessity. These events illuminate the psychology behind the systematic destruction of cultural property. Despite nearly universal agreement that cultural property is an inappropriate object of belligerent destruction, such heritage remains as vulnerable as ever, as recent as armed conflicts in the Persian Gulf.

1. "Associate Professor of Law, Institute of Law, Nirma University, Ahmedabad
2. "Assistant Professor of Law, Institute of Law, Nirma University, Ahmedabad
3. "Such was the case during the conflict in the former Yugoslavia. In the Croatian city of Vukovar, for example, Serb-controlled Federal troops vandalized ancient and medieval sites as well as the eighteenth-century Eltz Castle, which contained a museum. The same troops attacked a complex of Roman villas in Split and inflicted damage on the sixteenth-century Fortress of Stara Gradiška overlooking the Sava River": Karen J. Delting, Eternal Silence: The Destruction of Cultural Property in Yugoslavia, 17 Md. J. Int’l L. & Trade 41, 66–67 (1993)
5. During the Iraqi occupation of Kuwait, the latter’s cultural property suffered great devastation. Almost immediately after the invasion on August 2, 1990, Baghdad’s director of museums arrived and, with several assistants, catalogued the inventory of the National Museum. Bob Drogin, In 7 Months, Iraqis Stole ‘The Very Soul’ of Kuwait , Los Angeles Times, Mar. 11, 1991, at A1. After looting part of the collection, the Iraqis set the museum complex ablaze. Id. Destroyed were irrereplaceable vestiges of ancient Arab culture, including a 3,000 year-old Hellenic column from Faylakah Island and a fourteenth century engraved wooden door from Morocco, one of the museum’s most important pieces. Id. In addition to the National Museum, the Iraqi forces destroyed the planetarium and looted university laboratories. William Gasperini, Kuwait Zoo, Museums Assess Iraqi Damage , Christian Sci. Monitor, Mar. 26, 1991, at 12. Fortunately, a portion of the National Museum’s collection was on tour and located at the Walter’s Art Gallery in Baltimore during the Gulf War. Louise Sweeney, Kuwaiti Art Treasures Beyond Saddam’s Grasp , Christian Sci. Monitor, Jan. 15, 1991, at 13. UNESCO sent a representative to assess the situation and is lending support to rebuild the devastated institutions. Board Notes UNESCO Help to Kuwait, Suggests Further Action, June 12, 1991 (Unesco News press release) (on file with the United Nations Information Center, Washington, D.C.) [hereinafter Help to Kuwait].
destruction of the Buddha statues by the Taliban is the worst example of loss of cultural property due to fundamentalism and of holding cultural property as a means of bargain in international relations while prosecuting an internal conflict.\textsuperscript{6}

Destruction of cultural property is not just aimed at the object in question. When a cultural object is destroyed, it is always people who are the real target. What are the existing legal instruments for protecting cultural property? Why do they continue to be the target in armed conflicts despite the law?

**THE NEED FOR LEGAL FRAMEWORK**

Wars lead to the destruction of monuments, places of worship and works of art. Some of this destruction is accidental. In other cases, belligerents have used the argument of military necessity to justify the destruction of cultural property. That was the argument advanced by the United States for the shelling the famous abbey of Monte Cassino.\textsuperscript{7} But, in most cases, such destruction is deliberate. When monuments, places of worship and works of art are attacked, the aim is to destroy the enemy’s identity, history, culture and faith, to eradicate all trace of its presence and, in some cases, its very existence.

The same fate befell Warsaw at the end of World War II. The Buddhas of Bamiyan were destroyed in March 2001.\textsuperscript{8} In each case, the target was not just the monument, it was also the collective consciousness of the people concerned. The deliberate destruction of monuments, places of worship and works of art is a sign of degeneration into total war. It has also been the other face of genocide.\textsuperscript{9} By inflicting cultural damage on present generations, the enemy seeks to orphan future generations.


\textsuperscript{7} Located on a rocky hilltop dominating the Liri and Rapido rivers, the old monastery of Monte Casino, founded in 529 by St Benedict of Nursia, was at the heart of the German defensive line blocking the Allied advance on Rome in the winter of 1944. Beginning on 18 January of that year, the Allies launched a series of offensives in order to force their way through, but they met with fierce resistance by the Wehrmacht. ERRONEOUSLY believing that the Germans had occupied and fortified the monastery, the Allies bombed and destroyed it on 15 February. The Germans then occupied and fortified the ruins. It was not until 18 May 1944 that the Allies finally broke through German lines. Within a few days, they were able to capture Rome. The monks and the precious collections of books and manuscripts had been evacuated before the bombing. After the war, the monastery was reconstructed with American assistance.

\textsuperscript{8} Under the pretext of eliminating all traces of idolatry, Mullah Muhammad Omar, the spiritual leader of the theocratic Taliban regime that had ruled Afghanistan since September 1996, issued on 26 February 2001 a decree ordering the destruction of all pre-Islamic sculptures, including the two monumental statues of Buddha carved in the cliffs facing Bamiyan. Despite worldwide protest, Taliban troops destroyed the statues on 8 March 2001. Keesing’s Record of World Events, February and March 2001, pp. 44003 and 44053.

\textsuperscript{9} Thus, le Nazi regime ordered the systematic destruction of all synagogues, Jewish schools and cultural centres, monuments and even cemeteries that could testify to the Jewish presence on the territory of the Reich and in
generations and destroy their identity. History has witnessed the poignant fate of many nations and peoples following brutal and intensive cultural mutilation. Some have ceased to exist while others have had their identity deeply and irreversibly altered.  

THE ORIGINS AND DEVELOPMENT OF THE LEGAL PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

**Origin:** History tells us that measures were taken since the very earliest times to spare places of worship and works of art. Ancient Hindu law of armed conflicts, founded on the principle of humanity, echoes these principles. While it did not use the term “cultural property” the principle of affording protection to such property existed. Indeed, the recognized customs and spiritual texts prohibited the attack or destruction of temples and places of worship, which constitute an integral part of cultural heritage. The compendium of legends and religious instructions called *Agni Purana* also enjoined combatants to spare temples and other places of worship. In reality, attempts to draw up rules of law protecting cultural property in war are a comparatively recent phenomenon.

**Development:** Article 17 of the Brussels Declaration of 27 August 1874 stipulated that if a defended town, fortress or village are to be bombarded, all necessary steps must be taken to spare, as far as possible, buildings dedicated to worship, art and science. Similarly, the Hague Convention Respecting the Laws and Customs of War on Land of 18 October 1907 established the principle of immunity for cultural objects, even in case of siege or bombardment. Sadly, these provisions failed to prevent widespread damage to cultural objects during the First World War and, on an even greater scale, the Second World War. The States therefore decided that preventing the recurrence of such destruction demanded a convention specifically directed at the protection of cultural property. A few decades later, the United Nations, recognizing the importance of cultural heritage, adopted the Convention for the Safeguarding of the Intangible Cultural Heritage in 2003, and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005. These conventions have been instrumental in providing a legal framework for the protection of cultural property in armed conflicts.


14 Penza, loc. cit. (note 10), p. 338. Puranas, another source of Hindu Law, are a compendium of legends and religious instructions.

15 AFP 110-34, Commander’s Handbook on the Law of Armed Conflict. (25 July 1980) at para 1.5.1. (AFP 110-34 to become AFI 51-709)
This was the origin of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954.

**CONVENTIONS PROTECTING CULTURAL PROPERTY AND THE PRESENT-DAY SCENARIO**

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which met in Geneva from 1974 to 1977, inserted an article protecting cultural property in the two Protocols additional to the Geneva Conventions.  

Article 53 of Protocol I provides protection to historic and religious sites during wartime: “It is prohibited…to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.”  

Article 16 of AP II, which applies to non-international armed conflicts, also prohibits any acts of hostility directed against cultural property and its use in support of the military effort. Article 3(d) of the ICTY Statute enumerates identical components for cultural property. It is thus primarily through the adoption, on 8 June 1977, of the Protocols additional to the Geneva Conventions of 12 August 1949 that rules governing the conduct of hostilities and the protection of civilians and civilian property against the effects of hostilities were reaffirmed and developed.

Majority of the provisions of AP I regarding the conduct of hostilities are an expression of customary rules that apply to all belligerents, whether or not they are bound by the Protocol and to all armed conflicts, international or non-international. The 1972 Convention for the Protection of the World Cultural and Natural Heritage created a new avenue for protection of immovable property during wartime and reaffirms the internationalist values of the 1954 Hague Convention. Article 6 holds that the member-parties have an obligation to cooperate and must “give their help in the identification, protection, conservation, and presentation” of international cultural and natural heritage.  

Finally, the Statute of the International Criminal Court, adopted in Rome on 17 July 1998, classes as war crimes: “Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, provided they are not military objectives.”

**SPECIFIC APPLICATION TO CULTURAL PROPERTY**

**Cultural property enjoys twofold protection:**

a) It is protected by virtue of being civilian property, and all the provisions regarding the

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16 The article does not mention the prohibition on pillaging cultural property. This is not surprising, however, as the Additional Protocol complements the Geneva Conventions and Article 33 of the Fourth Convention already states: “Pillage is prohibited.” This provision applies to all civilian property, including cultural property.


18 World Heritage Convention, art. 6.

protection of civilian property and objects apply;

b) It is protected more specifically under the provisions on the protection of cultural property in the event of armed conflict.

These two types are not mutually exclusive. Rather, they overlap. Regarding the sources of the protection regime, both Article 53 of Protocol I and Article 16 of Protocol II stipulate that they are without prejudice to the provisions of the Hague Convention of 14 May 1954. The provisions of the Protocols additional to the Geneva Conventions and those of the Hague Convention complement one another.20

As far as principles are concerned, “Damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world…” declares the preamble to the 1954 Convention.21

Hague Conventions for the Protection of Cultural Property in the Event of Armed Conflict

1954 Hague Convention22 accords special protection to cultural properties across the world in peacetime as well as in the time of war. Article 1 of the convention defines cultural property.23 Under the 1954 Convention the obligation to safeguard and respect cultural property is placed on both the Party in whose territory it is situated and upon adverse or occupying powers. As per Article 3 of the Hague Convention: “Parties to the Convention must safe-guard their own cultural property against foreseeable effects of armed conflict. In the latter case, it is to refrain from any act of hostility

22 Art. 27 of the Hague Regulations Respecting the Laws and Customs of War on Land 1907; Rule 47 (d) and (f) of San Remo Manual 1994 regarding protection of ships transporting cultural property; and Art. 25 of Hague Rules of Air Warfare, 1923. See also The Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954; Art 4(1) of API.
23 Art 1: For the purposes of the present Convention, the term “cultural property” shall cover, irrespective of origin or ownership:
(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subparagraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);
(c) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as “centres containing monuments”.

directed against such property. Unlike the 1954 Hague Convention, the Geneva Protocols shift much of the burden for the protection of cultural property to the attacking party.

The 1954 convention was followed by the Second Protocol to the convention adopted at the Hague, 26 March 1999. The second protocol has been enacted to afford a higher level of protection to cultural property that is eluded by the 1954 convention. It greatly strengthens and clarifies cultural protection. It introduces new measures, including the designation of a new category of cultural property under Enhanced Protection. It also establishes an Intergovernmental Committee responsible mainly for supervising the implementation of the Convention and the Second Protocol, and an International Fund for the Protection of Cultural Heritage. The Second Protocol completes the Hague Convention. It is not retrospective, and it does not bind those states that have not adopted it by ratification or accession. Currently, 20 states are parties to it.

The adoption of the Second Protocol has created two levels of protection: the basic level under the Hague Convention for its States Parties and the higher level of protection under the Second Protocol for its States Parties.

Enhanced Protection: The Highest Level Afforded

The second Protocol confers enhanced protection. Under Article 10 of the Protocol, to have enhanced protection, the cultural property should satisfy three conditions: (i) it should be cultural heritage of the greatest importance for humanity; (ii) it is so recognized and protected by adequate legal and administrative measure; and (iii) it is not used for military purpose and the party undertakes not to use it for the same. Furthermore, article 12 clearly forbids from any use of

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28 ISIL Year Book of International Humanitarian and Refugee Law, 2001, Protection Of Cultural Property During Armed Conflict: Recent Developments, Neeru Chadha
30 Ibid Art 10: Cultural property may be placed under enhanced protection provided that it meets the following three conditions:
a. it is cultural heritage of the greatest importance for humanity;
b. it is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection;
c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.
31 Article 12 Immunity of cultural property under enhanced protection
The Parties to a conflict shall ensure the immunity of cultural property under enhanced protection by refraining from
the property or its immediate surroundings in support of military action. The Second Protocol has clarified the law by establishing more clearly when cultural property under enhanced protection loses its protection. Article 13 of the Second Protocol to the Convention, enumerates the conditions under which enhanced protection is lost. If, by its “use,” cultural property is turned into a military objective, it loses the enhanced protection granted to it. A ‘military objective’ is defined in Article 1(f) in terms identical to Article 52(2) Protocol I. It is not permitted to destroy a cultural object whose use does not make any contribution to military action, nor a cultural object which has temporarily served as a refuge for combatants.

During armed conflict, cultural property can be damaged if used to “shield” military hardware or personnel. For instance, the Sumerian temple, which Iraq found as a location for a

making such property the object of attack or from any use of the property or its immediate surroundings in support of military action.

32 Second Protocol, Article 13
1. Cultural property under enhanced protection shall only lose such protection:
   (a) if such protection is suspended or cancelled in accordance with Article 14; or
   (b) if, and for as long as, the property has, by its use, become a military objective.
2. In the circumstances of sub-paragraph 1(b), such property may only be the object of attack if:
   (a) the attack is the only feasible means of terminating the use of the property referred to in sub-paragraph 1(b);
   (b) all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimizing, damage to the cultural property;
   (c) unless circumstances do not permit, due to requirements of immediate self-defence:
      (i) the attack is ordered at the highest operational level of command;
      (ii) effective advance warning is issued to the opposing forces requiring the termination of the use referred to in sub-paragraph 1(b); and
      (iii) reasonable time is given to the opposing forces to redress the situation.


34 Article 1(f) of the Second Protocol defines military objective as an object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.


few of its fighter aircraft, was a legitimate target. Cultural property becomes military objectives if they are being used by enemy troops for shelter. Thus, a civilian object may become a military objective and thereby lose its immunity from deliberate attack through use which provides an effective contribution to the military phase of a Party’s overall war effort. Article 13(2) brings in the three new elements: the decision to attack that must be ordered at the highest operational level of command, the obligation to give advance warning, and reasonable time to the opposition to redress the situation. The three obligations are waived if the circumstances do not permit only “due to requirements of self-defense.”

But the need to invoke necessity as grounds for destroying cultural property is redundant as there have been glaring exceptions to the same. In Operation Desert Storm, the Coalition forces proved that they could adhere to the limits of customary international law and prevail. They did not strike these areas when cultural objects were likely to suffer collateral damage. This remained so despite Iraq’s failure to comport with international law by segregating its military targets from centers of cultural property.

**Military Necessity, The Law of Hague and The Three Levels of Protection**

The Secretariat of UNESCO prepared a definition of the notion of “military necessity” for...
both situations mentioned in the 1954 Convention\(^{44}\). The new definitions were drawn up on the basis of the text and of the commentaries on the 1949 Geneva Conventions, their Additional Protocols of 1977 and other instruments of IHL. The Hague Convention refers to the concept twice; first, with regard to cultural property enjoying general protection it uses the term “imperative military necessity”\(^{45}\) and, second, with respect to cultural property under special protection, it speaks of “unavoidable military necessity.”\(^{46}\) The second protocol invokes a third situation under the concept of enhanced protection.

**General Protection: Imperative military necessity** enables the State party to use cultural property and its immediate surroundings or appliances for military purposes and to conduct hostilities against such property “where military necessity imperatively requires such a waiver”. In view of these not very strict conditions, the scope for invoking the waiver is quite large.

**Special Protection:** The notion of *unavoidable military necessity* has stricter conditions for its application to cultural property placed under special protection. Immunity may be withdrawn “only in exceptional cases of unavoidable military necessity” and “only for such time as that necessity continues.” Such necessity can only be established at a higher command level. Currently, six cultural sites are granted special protection under the 1954 Convention and are registered in the International Register of Cultural Property under Special Protection.\(^{47}\)

**Enhanced protection:** As to the definition of “military necessity” applicable to cultural property under enhanced protection the new definition vests the responsibility to attack cultural property having lost enhanced protection in the highest level of government (Article 15 a) and incorporates the clause of proportionality (Article 15 f). Under Art 13\(^{48}\) the concept of ‘military necessity’ is linked to the concept of ‘military objective’ as cultural property loses its protection from the moment it becomes a military objective. The only justification needed is to terminate the use of the cultural property as a military objective\(^{49}\).

**Prosecuting Mechanism**

The ICPCP grants the enhanced status on the basis of request by the parties and specific

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44 See text in Annex 1.
45 Hague Convention, Art. 4, paragraph 2.
46 Ibid Art 11, paragraph 2.
48 Article 13, which de facto develops the definition of “unavoidable military necessity” under Article 11, para. 2 of the Convention, brings in the two new elements: the decision to attack that must be ordered at the highest operational level of command, and the obligation to give advance warning.
49 Compare id. art. 13 (enhanced protection allowing an attack on cultural property which, by its use, has been made into a military objective where no feasible alternative exists to terminate such use of the property, without consideration of military advantage thereby obtained), with id. art. 6(b) (allowing an attack against cultural property which, by its function, has been made into a military objective where no feasible alternative exists to obtain a similar military advantage).
recommendations by the International Committee of the Blue Shield and other NGOs. This enables wider communitarian participation in the identification of cultural property that requires enhanced protection.50

Under the 1999 protocol51 and the Rome statute52, misuse, destruction and theft of cultural property is an IHL violation53 that also qualifies as a grave breach under Art. 147 of the GCIV.54 The principle of individual responsibility for violations of IHL stemming from the Nuremberg trials is affirmed in Article 28 of the 1954 Hague Convention.55 Destruction of cultural property on lists like the World Heritage list that are under enhanced protection, is a serious violation of the Second Protocol.56

The destruction of cultural property is punishable under IHL and it attracts the elements of war crimes as under Art. 8 of the Rome statute, whereby importing all forms of criminal responsibility.

CONCLUSION: EFFECTIVENESS OF THE PROTECTION AND THE LACK OF ABSOLUTE LAWS

Protection of cultural property is achieved under these instruments by means of two complementary rules, each involving a prohibition. It is prohibited to commit any act of hostility against the protected objects and it is prohibited to use protected objects in support of the military effort.57 In one sense, enhanced protection acts to punish a State Party that has used such important cultural property to achieve a military purpose.58 However, military necessity restricts the absoluteness of these provisions. Toman declares the inclusion of a military necessity exception necessary in order

51 Second Protocl, Art 15, paragraph 2.
52 Rome Statute, Art 8
53 Mads Harlem, Protection of cultural property in armed conflicts, University of Oslo 18 October 2007
54 Geneva Convention related to the Protection of Civilian Person in Time of War, art. 147, Aug. 12, 1949
55 Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215, art. 28( The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention).
57 Judith Gardam, Necessity, Proportionality and the Use of Force by States 1 (2004). For a discussion on the origin of the terms jus ad bellum and jus in bello, see Robert Kolb, Origin of the Twin Terms Jus ad Bellum / Jus in Bello, 320 Int’l Rev. Red Cross 553 (1997). Gardam explains that this ambiguity is also partly because the application of these concepts in jus ad bellum does “incorporate overtly humanitarian consideration,” though not necessarily at the level of the individual.
to ensure that military operations are not so curtailed that they become impossible.59

The doctrine of necessity is subject to the loss of protection. Loss of enhanced protection is conditional on use of the cultural property so that it becomes a military objective. Once the enhanced protection is waived, it falls under the purview of the general protection afforded by the Convention.60 Protection for cultural property under general protection can be waived “only in cases of imperative military necessity.”61 Thus, the threshold for attacking cultural property is double barreled.62 The basic protection is the same: the object cannot be destroyed, captured or neutralized. Once protection is lost, it is lost for good.63 In case of general protection, the holder of the property has the right, if need be, to convert the property into a military objective, by using it for military action. In case of enhanced protection, the holder of the property has absolutely no right ever to convert the property into a military objective by using it for military action.64 No Contracting Party can evade its obligation to protect another Contracting Party’s cultural property simply because the other Contracting Party has failed to properly safeguard its own cultural property.65 The response of the international community to the events in Iraq has also underlined a growing global consensus that cultural property is entitled to protection as a matter of international human rights.66

However, existing legislations have failed to protect cultural property as expected as reflected in the Iraq war. What is essential is absolute prohibition of necessity with regard to attacking cultural property. The loopholes presented in the waiver of necessity in terms such as “use” and “function” under the Hague convention and AP II do nothing but make a mockery of the protection thus afforded. Parties continue to destroy cultural property under guise of necessity. Protecting cultural property extends to much more than protecting heritage and culture. It is preserving the existence of a group; preventing a form of genocide. Thus, for the effective protection of cultural property in the event of armed conflict, the laws need provide for an absolute prohibition against usage and attack. Even in the face of use by a party, the penal provisions must be stringent to eradicate the same. Thus, the only way to protect cultural property is to increase the protection threshold to an absolute and thereby contain other violations of IHL associated to such destruction.

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66 See Draft UNESCO Declaration Concerning the International Destruction of Cultural Heritage, July 17, 2003
Valuation and Analysis of Intellectual Property Assets In Mergers and Acquisitions

Arneet Kaur

INTRODUCTION

Mergers and Acquisitions are an integral part of the new economic paradigm. Liberalization, hyper competitive capitalism and technological change has forced various business entities to restructure themselves by way of merger, demergers and acquisitions. Growth and need to access new markets have dominated the 21st century companies which have resulted in huge scale mergers and acquisitions (M&A’s). Every business uses some form of intellectual property and the buyer of business will typically need to acquire the intellectual property used in the business along with other type of assets. Now, more than ever, there is consensus that intellectual property, a company’s unique and continuing identifier, is often a company’s most significant assets. They embody much of a company’s competitive advantage in the market place.

In fact, the driving force behind a majority of mergers completed during the past decade has been acquirer’s desire to obtain the target’s intellectual property assets. Intellectual property is often the corporation’s biggest asset. Indeed, in the “new economy” brand names—that is trademark, service marks and patents – are often as important as the goods and services in connection with which they are used in creating a competitive advantage. Thus, it should come as no surprise that intellectual property often plays an important role in the sale or purchase of a business. In mergers and acquisitions, value of business to be acquired is usually well in excess of tangible asset value and a major part of this excess is intellectual property. This shows the increasing importance of intellectual property rights in mergers and acquisitions deals.

In view of their immense importance in evolving knowledge economy, there is need to value these assets in many contexts including intellectual property management, mergers and acquisitions, corporate takeovers, joint ventures etc. Often early attention to the due diligence of the intellectual property aspects of a transaction can actually result in the conclusion that the proposed transaction should be structured in a particular way or reconsidered. If a buyer is not thorough in performing the due diligence, disastrous results can ensue after buying the business. Conversely, the seller will want to maximize the terms of the deal by demonstrating the high value of their company’s intellectual property assets and the unlikelihood of any infringement. In this way, both parties to the sale of a business must perform similar due diligence not only on the intellectual property rights of a business at issue itself, but also on those rights of the business’s main competitors in the market place. Moreover, in this era of mergers, acquisitions and restructuring of corporate entities, the management, protection and preservation of intellectual property rights (IPRs) related with patents, trademarks, copyrights and industrial designs have acquired enormous significance and relevance for

1 Senior Research Fellow (UGC), Department of Laws, Guru Nanak Dev University, Amritsar.
Indian business and industry.

But it is a common experience that companies and corporate entities do not give much importance to the portfolio management of their intellectual property rights. Files, certificates, applications, and up-to-date information may not be traceable and organized, and when somebody someday digs out these files, it may be found that precious intellectual property rights have been lost due to failure to renew or non-prosecution of applications and proceedings.³

In the above scenario, valuation of intellectual property rights before mergers and acquisitions acquire great significance. Therefore, this research paper will highlight the role and relevance of intellectual property issues in a merger and acquisition transaction and the need for their valuation and audit in the present scenario.

**MEANING OF THE TERMS**

First of all, let’s understand the meaning of the term Intellectual Property, merger, and acquisition. Intellectual property is “information and original expression which derives its intrinsic value from creative ideas.”⁴ It is the information with commercial value.⁵ In law, particularly, common law jurisdiction intellectual property refers to a legal entitlement which sometimes attaches to the expressed form of an idea or of other intangible subject matter.⁶ The World Intellectual Property Organization defines ‘intellectual property’ as being ‘creations of the mind: inventions, literary and artistic works and symbols, names, images and designs used in commerce’ and divides it into industrial property (patents, trademarks, industrial designs etc.) and copyrights (in literary and artistic works, etc.).⁷ The Government of India’s Department of Policy and Promotion says the notion of intellectual property reflects the ideal that its subject matter is the product of the mind or the intellect. These could be in the form of patents; trademarks; geographical indications; industrial designs; layout-designs (topographies) of integrated circuits; plant variety protection and copyright.⁸ The most well-known form of intellectual property assets are patents, trademarks, copyrights, know-how, trade secrets etc. Most recently included in this category and of ever-increasing importance are mask-works and internet domain names.⁹ To sum up in simple words, most creations resulting from human endeavors in various fields of art, literature, science and technology constitute intellectual

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⁸ *Ibid*.

property whereas a merger can be defined as an arrangement whereby the assets of two (a merger may involve more than two companies) companies become vested in or under the control of one company (which may or may not be one of the original two companies) which has as its shareholders all or substantially all, the shareholders of one or both of the merging companies exchanging their shares (either voluntarily or as the result of legal operation) for shares in the other or a third company. An acquisition may be defined as an act of acquiring effective control by one company over assets or management of another company without combination of companies.

**Scope and Application of Intellectual Property in Mergers and Acquisitions**

We have already defined the term mergers and acquisitions. Still we can further simplify the terms by saying that mergers and acquisitions are the transactions involved in transfer of a business. In case of such transactions, it is essential to note that the entire assets and liabilities vest in the transferor company i.e. the merging company, which include intellectual property rights such as patents, copyrights, trademark and designs and its shareholders become shareholders in the transfer company. If a party acquires intellectual property rights by acquiring a business vis-à-vis sale of assets, it is not unusual for the transfer agreement to specifically mention the intellectual property rights such as copyright, patent, trademark, etc. But, on the other hand, if a business is sold as a going concern, the intent to transfer trademarks and the goodwill associated therewith is presumed, even though not expressly provided for.

An interesting feature of merger and acquisition activity is that it occurs both in boom and bust time. Much of this activity takes place when a company, to obtain the economic benefits of consolidation in a particular industry, goes out and starts buying its competitors. Issues pertaining to merger and acquisition activity are not simply relegated to large, multinational corporations. Small and medium size businesses can add significant value and revenue by exploiting the full potential of their valuable intangible rights. In many instances, this means obtaining the necessary financing to acquire established properties and intellectual property rights in order to expand their business or to simply improve their performance and competitiveness. In the alternative, divesting certain intangible assets for a premium at the right time can yield significant financial returns for small or medium size businesses. Finally, intellectual property rights have enabled small or medium size businesses to achieve large entity status and enormous capital values in relatively few years, such as Microsoft and Sun Microsystems.

The dominating presence of intellectual property in mergers and acquisitions coincides with the emergence of several new intellectual property-oriented merger and acquisition considerations. First, merger and acquisition activity was originally dominated by the United States. This circumstance, particularly during the 1990s changed with the sweeping globalization of intellectual

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13 *Supra* note 2, p. 82.
property-oriented mergers. For example, in 1999 the U.S. merger volume rose to a record 1.7 trillion dollars while Europe’s merger volume more than doubled from the prior year to 1.23 trillion dollars. Indeed, the largest hostile takeover ever, and for intellectual property assets at that, did not occur in the United States but rather in Europe with British Vodafone’s acquisition of Hannesmann of Germany for 183 billion dollars. In recent times, these intellectual property oriented mergers have started taking place in developing countries like India also. Second, because of the difference between tangible assets (such as inventory and factories) in contrast to intangible intellectual property assets, methods ordinarily used to value mergers involving tangible assets do not work well when applied to acquisitions of intellectual property. Despite the fact that mergers and acquisitions involving intellectual property have dominated the merger scene for several years, mergers participants are still failing to apply appropriate merger and acquisition valuation procedures.

In an increasing fashion, the value and importance of intangible assets are the driving force behind national and international mergers and are playing a greater role than ever before in terms of assets received through mergers, acquisition and takeovers. In the event of a merger or other type of corporate restructuring, the acquiring party should obtain equitable and record ownership of these intangible assets or at the very least, acquire the appropriate license to use such intellectual property.

In the above scenario, the due diligence and audit of intellectual property rights, before merger and acquisitions acquire great significance.

**Importance of Intellectual Property as a Business Asset in Mergers and Acquisitions**

It is worth noting that intellectual capital has become critical to the industry and its growth. Successful multinational companies give tremendous value to their intellectual property. The value of intangible capital of General Electric is estimated at 324 billion dollars. In the information technology sector, IBM and Verizon are estimated to have intangible capital of 134 billion and 105 billion dollars respectively. This demonstrates the immense value and critical nature of intangible assets for effective participation in the evolving knowledge economy. Mainstream companies controlling a large part of the market often merge with the smaller companies which have specialist research and development cells. The implications of this is predicted that in the future the market may see large companies with large market command merge with smaller companies with core research cells. The market command of one will fully utilize the intellectual property assets of the other.

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15 Ibid.
19 Supra note 2, p. 83.
Intellectual property is often the corporation’s biggest asset. Indeed, in the “new economy” brand names—that is trademarks, service marks and patents—are often as important as the goods and services in connection with which they are used in creating a competitive advantage. Sounds, smells, colours and product shape can all enjoy trademark protection. The patents which embody the inventions incorporated in a company’s products are also critical in protecting the patents holder rights to exclude others from marketing a particular product.\textsuperscript{20} Additionally even for businesses not in the entertainment, information or other traditional “copyright” industries, copyright can be an important tool for protecting marketing materials, advertising campaigns, websites, databases, software and any original expression distributed digitally. Thus, it should come as no surprise that intellectual property often plays an important role in the sale or purchase of a business. In mergers and acquisitions, value of business to be acquired is usually well in excess of tangible asset value and a major part of this excess is intellectual property. In the case of mergers and acquisitions, sales and joint ventures intangible asset valuation is necessary to determine the value of a company for a buyer or seller and the value of partners contribution to collaborative undertaking. Even, success or failure of any merger or acquisition transaction depends on the proper valuation and audit of Intellectual Property rights. If some rights are lost due to failure to renew or non-prosecution of applications, then acquiring or the merged company will not be able to take benefits of expected synergies from the mergers. To sum up, the importance of IP assets can be summed up in following points:

- Its creation is both time and cost intensive
- It requires an assembled trained workforce for its creation
- It requires building of goodwill through advertising programs
- It generates customer loyalty
- It adds to commercial value of organization
- Its exploitation brings consistent additional profits to an organization.

Thus the importance of intangible assets has created an urgent need to value these assets in many contexts including intellectual property management, mergers and acquisitions, sales, corporate takeovers, joint ventures and licensing\textsuperscript{21}.

**Financial Valuation Of Intellectual Property Rights For Mergers And Acquisitions**

The value of intellectual property rights is an essential aspect of any merger or acquisition transaction. In such transactions, it may be extremely detrimental to ignore the specific value of industrial property rights. Such a valuation must be the starting point of effective and highly profitable management. Intellectual property rights (patents, trademarks, designs and models, copyrights, software, etc.) are now a critical asset for enterprises, whether recently formed or already mature,


whether they are small ventures or multinational enterprises, and whether they belong to high-tech or mainstream industries. In order to prepare a financial valuation of industrial property rights, it is essential to assess their legal validity.

As the valuation covers rights, it is crucial that such rights be fully identified, as regards their scope, contents and holders. A mere economic valuation that would disregard the intrinsic features of the relevant rights would generally prove to be a cause of bitter disappointment. In mergers, spin-offs to subsidiaries or business-line contributions, it is no longer possible to ignore the importance of the value of industrial property rights or to include them merely in goodwill. Valuations made in respect of these assets have become more frequent since certain companies that have gained leadership in this area have started publishing, in their annual reports, the results of their industrial property management (IBM, TMM, etc.) It has become obvious that, for shareholders, the creation of value involves the use of these new practices and measuring tools.

**Various Approaches to the Financial Valuation of Intellectual Property Rights**

Legal doctrine makes a distinction among three approaches forming the bases of the Intellectual Property Rights valuation techniques. These approaches are directly derived from micro-economic research.

1. **The cost-based approach** (economic principles: substitution and price equilibrium) seeks to define value by starting from the principle that an investor will not pay more for any given investment than for another investment producing the same level of usefulness or functionality.

2. **The market-based approach** (competition and price equilibrium principles) seeks to define value by starting from the principle that, in a free market, supply and demand will lead the price of any asset to its equilibrium point. The identification and analysis of the equilibrium prices of substitutable assets will provide an empirical confirmation of the valued asset’s value. Value means here the price that the assets may secure on its market. However, each intangible assets is unique, and any transactions covering similar assets must be made comparable by applying comparability adjustments.

3. **The income-based approach** (economic principle: anticipation) seeks to define the value of an asset by measuring the present value of future economic flows generated by the possession of the asset. The investor bases his expectations on the revenues anticipated from the asset.

Now the question arises as to how these methods are used or implemented during the corporate transactions involved in Mergers and acquisitions. It is a pragmatic step wise methodical procedure.

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Risk Assessment

One of the essential steps of these methods consists in taking into account the legal risks likely to affect the economic potential of an Intellectual Property asset. The quantification of these risks leads to an objective and relevant weighing of the financial analyses’ results. Ignoring these risks would lead to an overvaluation of the assets. This might prove extremely damaging as was shown when the latest financial bubble bursted. The nature of these risks wholly depends on the intangible nature of the valued rights. This is why these risks may only be assessed by specialists.25

Valuing a patent, without considering its legal and technical aspects, which may alone provide the basis for a fair value assessment of the intrinsic contents of the relevant asset and its security, will lead to catastrophic errors. It is also, for this same reason, that intellectual property rights are often overvalued.26

Valuing a software, without considering the risks associated with its protection, leads to the same consequences. It is essential to introduce the protection criteria in the financial valuation, because the valuation always covers a monopoly. Any risk threatening such monopoly unavoidably reduces the economic value of the rights.

Valuing the brand without considering the legal risks (validity, scope, priority and freedom to use) may lead to an investment that will never generate any return, because economic data and results specifically depend on the intellectual property rights’ validity and security.

The Use of these techniques depends on each specific situation

We must use each technique according to the specific situation and on the basis of two essential criteria:27

(1) Maturity of the development or exploitation of the rights.

(2) Maturity of the markets on which the rights are to be exploited.

Any financial valuation of intellectual property rights must imperatively be preceded by a legal or technical assessment in order to be relevant. If this is not done, the valuation will be contradicted by factual evidence. This essential lesson must be learned by any investor in or buyer of intellectual property rights.

Need Of Intellectual Property Valuation In Mergers And Acquisitions

Intellectual Property should be valued as it provides a host of intangible and tangible benefits which can be categorized under two heads:

1) Intangible benefits: Financial valuation of intellectual property will result in enhanced confidence and credibility to the real worth and help in strategy development for the company.28

25 Supra note 2, pp. 83-84.
26 Ibid.
27 Supra note 11
2) **Tangible benefits:** A balance sheet which incorporates brand value provides a more realistic picture of the company’s financial position and most important of all, we need intellectual property for entering into merger and acquisition transactions. Intellectual property valuation is of critical importance for an acquirer as well as a vendor to understand and evaluate the real worth for negotiating the correct price and for the success of merger and acquisition deal. As the valuation report does not only indicates value, the report also shows as to how the value has been worked out elaborating all assumptions which provides the real insight and would be of great value to the acquirer. But intellectual property as well as its valuation is always ignored in merger and acquisition transaction due to various reasons.

1. Lack of awareness
2. Under estimation of its importance
3. Myth that IPR’s can’t be valued
4. Problems in enforcement of IPR’s

**CONDUCTING DUE DILIGENCE**

Intellectual property is often the corporation’s biggest asset. As we have studied the importance of intellectual property in mergers and acquisition deals, “due diligence” of all the intellectual property assets of a business is also critical in a number of respects. Due diligence of intellectual property assets is assessment and consideration of the intellectual property assets of a business. IP due diligence is the process of investigating a party’s ownership, right to use, and right to stop others from using the IP rights involved in sale or merger-the nature of transaction and the rights being acquired will determine the extent and focus of the due diligence review. The increased profile, frequency, and value of intellectual property related transactions have elevated the need for all legal and financial professionals and IP owner to have thorough understanding of the assessment and the valuation of these assets, and their role in commercial transaction. Intellectual property due diligence generally provides vital information specific to future benefits, economic life and ownership rights and the limitations of the assets all of which affects final value. Therefore due diligence is prerequisite to the valuation process, regardless of the methodology used. Often early attention to the due diligence of the intellectual property aspects of a transaction can actually results in the conclusion that the proposed transaction should be structured in a particular way or reconsidered. If a buyer fails to exercise due-diligence in buying of intellectual property, it may result in disastrous results for it. Conversely, the seller will want to maximize the terms of the deal by demonstrating the high value of their company’s intellectual property assets and the unlikelihood of any infringement. Therefore, both parties to the sale of a business must perform similar due diligence not only on the intellectual property rights of a business at issue itself, but also on those rights of the business’s main competitors in the market place.

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29 Ibid.
The process of IP due diligence in M&A’s reveals the following aspects:

• The owners of the rights
• The validity, transferability and enforceability of the rights
• Any agreement or restriction that prevents the party from granting rights to another
• The registration of intellectual property
• Past or potential litigation
• Unenforceability of IPR’s due to misuse of IP assets
• Any encumbrances on IPR’s
• Evaluating agreement material to the company’s business that may be affected by change of control, agreements that may vest rights in intangibles and company policies and practices.

A company contemplating a merger or acquisition where intellectual property is one of the assets being transferred, should consider a number of aspects during the due diligence process. As a starting point, a company should take early stock of its intellectual property and assure that it can transfer the rights it wishes to transfer. Then it should evaluate whether there are any limitations on its ability to transfer those rights. This can entail evaluating the likelihood of success of potential or actual claims and litigation. The litigation not brought by the opponent may be as important as the litigation that is brought since intellectual property rights can be lost from lack of enforcement. It should also evaluate agreements material to the company’s business that may be affected by change of control, agreement that may vest rights in intangibles, and company policies and practices.

The types of agreements that a typical corporation may need to have reviewed with respect to intellectual property can be quite far-reaching. A partial list might include not only agreement granting rights under patents, trademark and copyright, such as transfers and licenses, but joint venture agreements, employment consulting, independent contractor, supply, vendor, service and non-disclosure agreements. All of these agreements have the potential to touch upon intellectual property owned or licensed by the company. Thus all these aspects regarding intellectual property rights should be taken care by a company contemplating merger and acquisition transaction.

**INDIAN SCENARIO**

In this era of mergers, acquisitions and reconstruction of corporate entities, the management, protection and preservation of Intellectual Property Rights related with patents, trade marks, copyrights and industrial designs have acquired enormous significance. This has become relevant for Indian Business and Industry. In an increasing fashion value and importance of Intellectual Property Rights are the driving force behind national and international mergers in India.

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31 Ibid.
33 Ibid.
It is a common experience, that companies and corporate entities do not give much importance to the portfolio management of their Intellectual Property Rights. It has been seen that even change of one principal officer of a company, puts its entire Intellectual Property Rights in a chaotic situation. Files, certificates, applications and up to date information may not be traceable and organized, and when some body some day digs out these files, it is found that precious Intellectual Property Rights have been lost due to failure to renew or non-prosecution of applications or proceedings.  

Care should be taken to prepare the list and assess the impact of Oppositions and Rectifications filed by and the against the company, List of Civil and Criminal Intellectual Property Right Litigations by and against the company with their present status, quantum of damages, if any involved, the likely results and chances of these litigations, going in favour or against the company, and potential effect of these decisions on the Intellectual Property Rights of the company. It should also be evaluated that in case of any adverse decision against the company in Intellectual Property Right matters what would be its impact on the Intellectual Property Rights and financial impact on the future of the company. Attention should also be given to Intellectual Property Right Litigations which have been decided/ compromised and their impact.

In the above scenario, due diligence and audit of Intellectual Property Rights, before Merger and Acquisitions, acquire great significance and particularly when there is merger and acquisition of companies, also resulting in transfer and realignment of Intellectual Property of these companies. Intellectual Property Rights is a very valuable asset. It affects the valuation of the assets of the Merging Companies and the companies which are being acquired. Here arises the need of Intellectual Property Rights due Diligence and Audit. In the process of Intellectual Property Rights Due Diligence, it is imperative to find out the Status of the Intellectual Property Rights of the Company.

**Impact of Foreign Laws**

It is not uncommon in present day acquisitions for rights in intellectual property to arise in various jurisdictions. Therefore, acquirer should begin with the presumption that the laws in those jurisdictions will be different to Indian Law on intellectual property issues fundamental to the acquisition. Adopting such an approach means that issues are more likely to be dealt with on their merits, and as a consequence, this lessons the risk profile for the acquirer.

These are some of the major issues regarding intellectual property which the companies in India going for mergers and acquisition have to keep in mind.

**Tax Benefits**

Where in amalgamation, patents or copyrights are transferred, the amalgamated company is entitled to tax benefits under section 35A(6) of the *Income Tax Act, 1961*. The expenditure on patents and copyrights not written off shall be allowed as deduction to the amalgamated company.

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35 *Id.*, p. 4.

Similarly, expenditure on know-how by amalgamating company is also allowed as deduction to the amalgamated company under section 35AB(3) of the *Income Tax, 1961*. Thus, transfer of intellectual property rights in merger or amalgamation makes the amalgamated company entitled to many tax benefits.

**CONCLUSION**

As the global economy races towards an information-based economy, the value of the intellectual property will continue to play an increasing role as the driving force behind future merger and acquisition activity. Indeed, it is anticipated that intellectual property will be the dominant force in future commercial transactions comprising tomorrow’s mergers and acquisitions. Intellectual property rights with patents, trade marks, copy rights and industrial design have acquired enormous significance in mergers and acquisition in Indian business and industry. Therefore, a company undergoing mergers and acquisition should give the required importance to due diligence and audit of intellectual property rights, otherwise precious intellectual property rights are lost due to failure to renew or non-prosecution of applications or proceedings. Companies need to think over their policies towards acquiring the intellectual property assets of the target company before going for the merger or acquisition as they form a key part of such transactions. They need to consider the positive as well as the negative aspect of each and every intellectual property that the target company possesses and perform necessary due diligence in advance and ask for representations from the target company, in order to avoid any future disputes and litigation. Further, the companies need to acquire all the necessary documents regarding the intellectual property assets of a target company as well as acquire licenses of all those intellectual property assets on which the target company has acquired licenses from others. This will prevent any kind of future problems arising out of lack of licenses regarding using of intellectual property.

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Offline Contract To Online Contract: An Overview

Dr Golak Prasad Sahoo

“We need courage to through away old garments which have had their day and no longer fit the requirements of the new generation”.

Fridtjot Nansen

INTRODUCTION

Social advances and changes in technology are not a new phenomenon. The invention and innovation of computer\textsuperscript{2}, computer system\textsuperscript{3} and the Internet\textsuperscript{4} by the ingenious mind of human beings has emerged the concept of new-economy\textsuperscript{5}. The burgeoning expansion of e-commerce\textsuperscript{6} which is the heart of third world country has also affected the legal relationship between buyers and sellers, lenders and borrowers, purchaser of goods and services, financing of assets and projects, issuance and transfer of stocks and bonds, payment and repayment of principal money as it has enhanced the capacity of these offering goods, products and services to a wider audience than the terrestrial world.

\textsuperscript{1} Assistant Professor, Law School, Banaras Hindu University, Varanasi 221005.

\textsuperscript{2} Section 2(i) of the Information Technology Act, 2000, Computer means any electronic, magnetic, optical or other high speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer, computer system computer network”.

\textsuperscript{3} Ibid, Section 2(l) Computer system means a device or collection of devices including input and output support devices and excluding calculators, which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data and output data and out data that performs logic, arithmetic, data storage and retrieval communication control and other functions.

\textsuperscript{4} Association of Civil Liberties Union v. Reno, 521 US 844 explains the nature of the Internet or Cyber Space: anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. Thus, methods are constantly evolving and difficult to categories precisely. But as presently constituted, those mostly relevant to this case are electronic mail (e-mail), automatic mailing list services, news groups, chatrooms and the World Wide Wave. All these methods can be used to transmits text: most can transmit sound, pictures and moving video images. Taken together, these tools constitute a unique medium known to its users as cyberspace: located in no particular geographical location but available to anyone, anywhere in the world with access to the Internet. Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks.

\textsuperscript{5} The term used in the late 1990s and 2000 to describe the e-commerce sector and the digital economy in which firms mostly trade online rather than in bricks and mortal of physical premises. In other words, an economy that is characterized by entensive use of the Internet and information technology. Available at http://www.qfinace com/search?q==e= & serch futer=dictionary accessed on 29.07.2012.

\textsuperscript{6} E-commerce means buying and selling of goods and services on the Internet, especially the World Wide Web.
When cyber space was invented, the early thinking was of an ideal libertarian society— a society where freedom would be the law and the presence of law, rules and regulation crippling of this freedom. Notwithstanding those facts, the expanding horizon of technological advancement has necessitated the legal system adapting to change, order and harmony are preserved and more particularly that commerce and industry are augmented with full legal sanction. The need for the legal system to adapt to technology is imperative for inspiring confident amongst entrepreneur that their transactions are legally enforceable.

With the exponential growth of electronic commerce, contract law has to adapt new information technologies. For instance, with an air electronic ticket, the passenger receives no such written documents. Is the traveler bound by the airline’s limitation of liability for personal injury or loss of luggage? The legal system to bridge the gap from paper-based world to paperless world has to adjust quickly to the rapid expansion of the information technologies. In India, an important step in this direction is that where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose. The prime thrust of contractual law provides the basic premise in which legally enforceable agreements form the edifice of all commercial activities.

Before addressing the jurisprudence of electronic contract, several complex issues pertaining to the formation of electronic contract crop up in the mind of legal community than answers in arriving at effective mechanism to ensure reality of contract entered through Electronic Data Interchange System.

Firstly, in formation of traditional contract, the respective parties are generally known to each other, so that they could easily determine the legitimate requirements in respect of age and mental capacity which are the basic parameters of valid contracts. However, in electronic contract, how does one determine that the other person who is making the commitment through the internet does have the legal capacity?

Secondly, in electronic contract not only are contracting parties not necessarily situated within the jurisdiction of the court of a single geographical area but in some situation there may be no way to determine exactly where one or more the parties are situated. How does one determine that an electronic record shall be attributed to the originator and valid acknowledgement.

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7 Section 2(t) of the Information Technology Act, 2000 and its (Amendment) Act, 2008.
8 Ibid, Section 10A.
9 Article 2(b) of the United Nations Commission on International Trade Law, 1997 Electronic Data Interchange System means electronic transfer from computer to computer of information using an agreed Standard to structure the information.
10 Section 10 of the India Contract Act, 1872, “All agreements are contracts if they are made by the free consent of parties competent to contract for lawful consideration and with a lawful object, and are not hereby express declared to void”.
has been given by the addressee?

Thirdly, the drafts are exchanged through the internet, electronic mail, telex, telephonic conversation and perhaps other means securing the terms and conditions of the parties. How does one determine, at what stage the contract has been concluded and which of the set of electronic mail constitute the final terms?

Fourthly, the Internet world not only defeats the geographical boundaries of the country but also legal boundaries of a particular country. There are certain activities which would be legal in some countries, but are contrary to public policy in other i.e. gambling is one which may be deemed to extend to the holding of raffles, sweepstakes, or lotteries. In countries such as Monaco, Macau and even some States of the United Stated America such as Nevada, all forms of gambling are legal, while in others such as Indonesia, any gambling is prohibited. In this connection how does one determine what law will be applicable to that agreement and which courts shall have jurisdiction try the suit in case of breach of electronic contract?

Fifthly, in the administration of justice, the proof is the result of evidence and evidence is means of proof. Therefore, an elephantine onus would lie on the trial courts to answer question inter alia of the admissibility of relevance of proof and probative value of computer generated evidence and the manner of proving electronic signature before deciding disputes arising directly or indirectly of or in connection with computers and the internet. Considering these facts, this paper answers the questions what is the scope and scale of authenticity or admissibility of electronic evidence or electronic signature?

**Origin and Development of Electronic Data Interchange**

To address the formation of electronic contract using computer, computer system and the Internet, it would be interesting to understand the origin and history of Electronic Data Interchange System. It is fallacy to say that Electronic Data Interchange System started after the introduction of the Information Technology Act, 2000. In 1960, in first time the Electronic Data Interchange System was adopted by airlines, shipping and railroad corporations. It led to development of standard which was treated as their proprietary rights of that system so that it was felt impractical to introduce at the universal level. Thereafter, in 1968, a group of railroad companies to improve the quality of Electronic Data Interchange System formed organization called Transportation Data Coordinating Committee. The end result was the publication of the Transportation of Electronic Data Interchange Standards. And also in 1970 has seen the development of a shared of Electronic Data Interchange System by the Pharmaceutical industry. In 1979, the American National Standards Institute authorized a committee called

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11 Section 2(ta) Electronic Signature means authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes Digital Signature and Section 2(p) Digital Signature means authentication of electronic record by a subscriber by means of an electronic method or procedure in accordance with the provision of section 3 which defines any subscriber may authenticate an electronic record by affixing his digital signature and the authentication crypto system and hash function which envelop and transform the initial electronic record into and the electronic record.
the Accredited Standards Committee consisting of government, transportation, and computer manufactures to develop a standard between trading partners. Finally, under the aegis of United Nations Organizations from different sectors developed and standardized using sector specific Electronic Data Interchange System—United Nations Electronic Data Interchange for Administration, Commerce and Transport. It should be noted that in India the Information Technology Act, 2000 and its (Amendment) Act, 2008 gives the legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communications which involve the use of alternatives to paper-based methods of communication.12

**Perception, Definition and Classification of Electronic Contract**

A major problem for the study of the electronic contract is that absence of consistent, concurrent and co-herent definitions of electronic contract even if including the Information Technology Act, 2000 in India whereby it gives a legal recognition of electronic contract executed by means of the Internet. As it is being dynamic nature and involving technical intricacies, it is necessary to discuss the meaning and definitions of electronic contract for an analysis of the plausible principles that govern online contracts.

In common parlance, electronic contract is a process by which agreements are negotiated and enter into through electronic medium. It involves two parties agreeing to bind themselves into legally enforceable commitments by utilizing advanced media of communication. According to Vasudha Tamrakar and Pratibha Pal as electronic contract is a contract modeled, specified, executed and deployed by a software system.14 It is conceptually very similar to traditional paper based commercial contracts. Vendors present their products, prices and terms to prospective buyers. Buyers consider their options, negotiate prices and terms, place orders and make payments by means of information communication technologies. Then, the vendors deliver the purchased products.

A working definition offered by L. Kidd Donnie and H. Daughtery, who conceptualize that electronic contracts are legally enforceable promises or set of promise that concluded using electronic medium.15 Furthermore, the United Nations Commission on International Trade Law defines as Electronic Commerce or electronic contract a contract can be made by exchanging data message and when a data message is used in the formation of contract, the validity of such contract should not be denied.16 The Uniform Computer Information Transaction Act, 1999 electronic contract is a transaction formed by electronic messages in which the messages of one

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13 Section 2(e) of the Indian Contract Act, 872, “Every promise and every set of promises forming the consideration for each other is an agreement.”
16 Article 11 of the UNCITRAL Model Law, 1997 on electronic Commerce titled formation and validity of contracts.
or both parties will not be reviewed by an individual as routine step in forming the contract. Instead of defining electronic contract, it discusses the methods of forming governance and basic terms of an electronic contract, and also contemplates the traditional contract principles and remedies applicable to electronic contract.

An electronic contract may take the form of electronic mail contracts or web contracts. In the former, the sender of an offer or acceptance using addresses sends it to the recipient as it is done in an offline environment. The difference in electronic mail related contract is that the electronic mail requires the technical assistance of a third party that is called as Internet Service Provider. In web contracts the supplier will place an electronic catalogue, the customer then has to tick a box to select particular item. The purchaser has to provide the credit card number and click pay or I Accept. Another contract in the realm of web contract is shrink wrap contract wherein a few companies offer their software in online and such software can be downloaded and the licenses of such software are granted through online. When software is licensed, it is packed in a way that a note is attached at the top of the packing which will contain the terms and conditions for the use of the software. Once the package is opened by the user, the user is deemed to have read such conditions and he will be done by them.

**Formation of Electronic Contract**

Like wise terrestrial contract formation, an electronic contract requires that there should be a communication of proposal and communication of acceptance. A contract happens to be valid, there must be a communication of proposal and communication of acceptance. The ratio decidendi of communication of proposal and communication acceptance in terrestrial world is founded upon the principle of postal or telegraphed rule. The principle of postal or telegraphed rule proves to be inapplicable where instantaneous communication is concerned. If an offer is made to a man by telephone and in the middle of his reply the line goes dead, so that the offerer does not hear his words of acceptance there is no contract. In *Entores, Ltd. v. Miles Far East Corporation*, Denning L.J. expressed his views: “when a contract is made by post it is clear law throughout the common law countries that the acceptance is complete as soon as

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18 Internet Service Provider is a company which provides other companies or individuals with access to, or presence on the Internet.

19 Section 2(a) of the Indian Contract Act, 1872, “when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal: and Section 4 states that the communication of proposal is complete when it becomes to the knowledge of the person to whom it is made.

20 *Ibid.* Section 4: as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor and against the acceptor, when it comes to the knowledge of the proposer.

21 Contract through post/correspondence is complete at the place where acceptance is made and it is the acceptance that gives rise to the cause of action and not merely the making the offer.

the letter is put into the post box, and that is the place where the contract is made. But there is no clear rule about contracts made by telephone or by telex. Communication by these means is virtually instantaneous stand on a different footing”. He concluded stating “that the rule about instantaneous communications between the parties is different from the rule about the post office rule or telegraphed rule. The contract is only complete when the acceptance is received by the offeror and the contract is made at the place where the acceptance is received”.

In India this receipt rule has been affirmed by the Supreme Court in Bhagwandas v. Giridhari Lal & Co.,23 wherein the material facts outline as the plaintiff had by a message through telephone offered to buy cotton case seed and the defendant accepted that offer at Khamgaon, and prices were also to be paid at Khamgaon and hence the defendant city court alone had jurisdiction and that since no part of the cause of action for suit had arisen within the territorial jurisdiction of the city civil court of Ahmedbad, it had no jurisdiction in respect of any breach of contract. In the other hand, the plaintiff contended that the cause of action arose at Ahmedabad because the defendants offered to sell cotton case seed which offer was accepted by the plaintiff at Ahmedabad. Thus, the question before the court was as to when and where the contract is complete, when acceptance is made by telephone. The trial court observed that the contract was made a place where acceptance was received that Ahmedabad. A revision application by the defendants against the said order was rejected by the Gujarat High Court. Against the order of the Gujarat High Court with special leave petition was referred to Supreme Court. The Supreme Court observed that in case of contract through telephonic conversation, the rule regarding acceptance through post or telegraph will not apply24”.

The Information Technology Act, 2000 taking the sprit of functional equivalence principle25 from the Model Law 1997 substituted the Indian Contract Act, 1872. This Act grants legal recognition to communication process involving computer, computer system and computer network by identifying attribution, acknowledgement and despatch of electronic records. In the click world, the electronic data interchange system is based upon three tier system of parties: the

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24 In Carrow Towing Co. v. The Ed. Mc Williams 46 D.L.R. 506, in Canada, where a contract is proposed and accepted over the telephone, the place where the acceptance takes place constitutes the place where the contract is made. Acceptance over the telephone is of the same effect as if the person accepting had done so by posting a letter, or by sending of a telegram from that place.
25 Functional Approach Model relies on a new paradigm shift which is based on an analysis of the purposes and functions of the traditional paper-based requirements with a view to determining how those purposes or functional could be fulfilled through electronic commerce techniques. For example, among the functions served by a paper document are the following to provide that a document would be legible by all, to provide that a document would remain unaltered over time, to allow for the reproduction of a document so that each party would hold a copy of the same data, to allow for the authentication of data by means of a signature: and to provide that a document would be in a form acceptable to public authorities and courts. It should be noted that in respect of all of the above mentioned functions of paper, electronic records can provide the same level of security as paper as  in most cases, a much higher degree of reliability and speed, especially with respect to the identification of the source and content of the data, provided that a number of technical and legal requirements are met.
originator\(^{26}\), the intermediary\(^{27}\) and the addressee\(^{28}\). Originator sends, generates, stores or transmits any electronic message, whereas, intermediary is a facilitator who on behalf’s of another person receives, stores or transmits or provides any service with respect to that message and addressee is the recipient of that message. It is not out of place to say that the Information Technology Act has incorporated exact verbatim the rules of the UNCITRAL Model Law to determine the time for receipt of electronic records\(^{29}\) as follow:

1. Despatch of an electronic record occurs when it enters a computer resource outside the control of the originator and
2. receipt of an electronic record occurs at the time when:
   a. it enters the computer resource designated by the addressee;
   b. it is retrieved by the addressee where an electronic record is sent to a computer resource which is not the one designated by the addressee,
   c. it enters the computer resource of the addressee where no computer resource had been designated.

On the basis of the presumption\(^{30}\) of the Indian Evidence Act, 1872, the omnibus provisions of the Information Technology Act, provides who is the originator of the Electronic Data Interchange System as: (i) if it was sent by the originator himself; (ii) by a person who had the authority to act on behalf of the originator in respect of that electronic record; or (ii) by an information system programmed by or on behalf of the originator to operate automatically\(^{31}\).

Section 12\(^{32}\) makes provisions for the acknowledgment of receipt of communication and time at which such commutation is received. Accordingly, it provides that where the originator of a commutation has not agreed with the addressee of such communication, the acknowledgement for receipt of such commutation may be given by the addressee by an automatic or other commutation or by the conduct of the addressee which is sufficient to indicate to the originator that such commutation has in fact been received. However this rule operated only in the absence of any contract between the originator and addressee. The parties are also at liberty to specify the time limit within which such acknowledgement of communication has to been made if such acknowledgement is not communicated within a reasonably time the originator of the message which has not received the acknowledgement is also at liberty to treat the communication as

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\(^{26}\) Section 2(za) of the Information Technology Act, 2000 and it’s (Amendment) Act, 2008, means a person who sends, generates, stores or transmits any electronic message, or causes any electronic message to be sent, generated, stored, or transmitted to any other person but does not include an intermediary.

\(^{27}\) Ibid, Section 2(w) intermediary with respect to any particular electronic records, means any person who on behalf of another person receives, stores, or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.

\(^{28}\) Ibid, Section 2(b) addressee means a person who is intended by the originator to receive the electronic record but does not include any intermediary.

\(^{29}\) Article 15 of Model Law, 1997.

\(^{30}\) Sections 79, 82, 84 and 90 of the Indian Evidence Act, 1872.

\(^{31}\) Section 11 of the Information Technology Act, 2000.

\(^{32}\) Ibid.
never having been sent.

Section 13\(^{33}\) of the Information Technology Act provides in the absence of an agreement to the contrary, the acceptance is despatched when such acceptance enters a computer resource outside the control of the originator. The marked difference in case of contract governed by section 13 is that the point at which the acceptance is binding *qua* the offer is not when it leaves his computer system and it is outside this control but the point at which acceptance enters the computer resource beyond his control. Sub-section 2 of the Section 13 contains certain significant provisions which also provide for specific cases in which acceptance is actually communicated and those provisions go a long way in determining this point of conclusion of contact. If the event of the offeror not designating any particular computer resource for this purpose the contract is concluded when offeror retrieves such message from his computer system. Sub-Section 3 and sub-section 4 of section 13 also provide for determining the place of conclusion of a contract after receipt of acceptance by the offeror in the absence of agreement to the contract\(^{34}\). Moreover, if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business: if the originator or the addressee does not have a place of business his unusual place of residence shall be deemed to be the place of business; usual place of residence in relation to a body corporate, means the place where it is registered.

And also, to maintain confidentiality and privacy of electronic contract, section 72-A\(^{35}\) provides criminal liabilities including service provider and an intermediary that any person who has secured access to any material containing personal information about another person with intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses without the consent of the person concerned or breach of lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees or with both.

**Revocation of Offer and Acceptance**

Section 4 of the Indian Contract Act provides that the communication of offer is complete when it comes into the knowledge of the offeree. The question is - when the communication of an offer made by electronic means is complete? Is it when the offer enters into the computer resource outside the control of the originator\(^{36}\) or when the offeror receives acknowledgement\(^{37}\). On close examination of sections 12 and 13 of the Information Technology Act, it

33 Ibid.
34 P. R. Transport Agency v. Union of India and other, A.I.R. 2006 All. 23.
35 Substituted by Act No. 10 of 2009, Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.
36 Section 13(3) of the Information Technology Act, 2000.
37 Ibid, Section 12.
becomes clear that the communication of offer is complete when the acknowledgement is received by the offeree, notwithstanding the fact that the acknowledgement has been sent by the automated process. The rules relating to revocation offer provided in section 5 of the Indian Contract Act apply *mutatis mutandis* to offers made electrically. The offeror will be free to recover his offer at any time before its communication of acceptance is complete and this legal position provided in section 5 of the Indian Contract Act has not been changed with introduction the Information Technology Act.

The rules provided in section 4 of the Indian Contract Act for communication of acceptance have been rendered inapplicable by implication of cases where acceptance is communication electronically and it can now be said that the communication of acceptance is complete at the time when its acknowledgement is received by the acceptor in the sense as provided in section 12 of the Information Technology Act and, quite naturally, the time when communication of acceptance is complete will vary depending upon the given situation, but not in the sense as provided in section 4 of the Indian Contract Act. The communication of acceptance is complete against the acceptor as well as the offeror at the time when the acknowledgement enters into the designated computer resource or where no computer resource has been designated, the computer resource of the addressee. There will be no time lag, in these cases, between dispatch and receipt of the acceptance. Both despatch and receipt will be simultaneous and a complete contract arises when acknowledge enters in the computer resource.

**Probative Value of Electronic Record**

Every netizens of the cyber space whether he is an originator or addressee, is always concerned about the legal security, integrity\(^38\) and non-repudiation\(^39\) of the electronic record\(^40\). The message sent through an electronic mail or the Internet or cyber space is prone to forgery as it can be moderated, changed or made to appear as if it were coming from a known party, with that party’s knowledge or consent. Thus, there is a genuine desire of the each party that the other party may not repudiate that party’s action. To maintain authenticity, integrity and non-repudiation which are three cardinal principles of an electronic record to form legal basis of a claim, it can be achieved by different methods of encryption\(^41\) or decryption\(^42\). Keeping in view, the Information Technology Act amends the Indian Penal Code-1860\(^43\), the Indian Evidence Act-

\(^{38}\) It is a service which addresses the unauthorized alteration of data. To assure data integrity, one must have the ability to detect data manipulation by unauthorized parties.

\(^{39}\) It is a service which prevents an entity from denying from denying previous commitments or action. When a dispute arises due to an entity denying that certain actions were taken, a means to resolve the situation is necessary. A procedure involving a trusted third is needed to resolve the dispute.

\(^{40}\) Section 2(t) of the Information Technology Act, 2000 means data, record, or data generated, image or sound stored, received or sent in an electronic form or micro films or computer, generated micro fiche.

\(^{41}\) It could be understood as system of a secure key pair consisting of a private key for creating a digital signature and a public key to verify the digital signature.

\(^{42}\) *Ibid*.

\(^{43}\) Sections 29A, 167, 172, 173, 175, 192, 204, 463, 464, 466, 468, 469, 470, 471, 474,476 and 477A.
According to section 4 electronic data should not be discriminated against paper documents. For the sake of legal recognition and evidentiary value where any law in force in India requires information to be typed, printed or written form then such information to be in electronic form deemed to have been satisfied. However, there is a conflict between the Information Technology Law and the previous enforced law, the former will have overriding effect over later. To create a legal status, relation, rights or liability documents need to be attested or authenticated to certify the genuineness of the contents in the document. The executor of the document authenticated by affixing his seal or signature himself or by an agent or solicitor to do so on his behalf in the presence of two witnesses. Section 5 also provides where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of electronic signature affixed in such manner as may be prescribed by Central government. On the same footing, Section 6 identifies use of electronic records and digital signatures in the filling of any form, application or any other document with any official authority, body or agency owned or controlled by the appropriate Government, the use or grant of any license, permit, sanction or approval, the receipt or payment of money effected by means of electronic form. Such recognition is acceptable under the laws of the many states with respect to conventional paper commutation usually with some rules of law providing legal safeguard.

45 Sections 2(3) (8).
46 Section 58(2)(P).
47 The Information Technology Act, 2000.
48 Section 46 of the Companies Act provides the contract made by the company must be in writing. Section 54 of the Transfer of Property Act requires the sale of immovable property to be written. Section 59 of the Act requires the mortgage to be written. Similarly, Sections 107 and 123 of the Transfer of Property Act require the lease and gift respectively to be in writing. Section 5 of the Indian Trusts Act, requires a trust to be created in writing and section 5 of the Copyright Act requires the contract to be in writing. Section 19 of the Limited Act requires the agreement for the extension of limitation period to be written. Arbitration agreements under the Arbitration Act are also required to be in writing. Besides, the Indian Registration Act requires certain documents to be registered. Article 299(1) of the Constitution of India provides that all contracts in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President or by the Governor of the State, as the case may be, and all such contacts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as may be directed or authorized. The word executed indicates that a contract with the government under Article 299 will be valid only when it is in writing.
49 Section 81 of the Information Technology Act, 2000.
50 Ibid, Section 5.
51 Ibid, Section 6.
Concluding Observations

The 21st Century witnesses the electronic commerce is gaining a dominant position across the globe as it has facilitated commercial transactions in efficient manner. It should not be forgotten that every adoption of new technology and new process would pose new cost and risks so that it may or may not be successful. If the adoption is successful, it becomes as established business practice in no time; if the adoption is unsuccessful then it is likely that process of adoption may take some time as the learning process is not still over.

Cyber world is a virtual world but it has an existence of material reality. The hosting of a web portal or website is akin to opening a showroom or shop like universal nature from offline world to online world. To provide legal recognition in formation of electronic contract and transactions carried out by means of information communication technologies, it is a salutary steep by the Indian Govt. to introduce the Information Technology Act, 2000 and its (amendment) 2008. Though the Information Technology (Amendment) Act, 2008 has resolved many grey areas by incorporating new provisions, many delicate issues like formation of contract, communication of proposal and acceptance and jurisdiction of courts have been experienced but resultant position is unsatisfactory.
Notes & Comments

**Gaar: A Review With Special Reference To The Introduction of Direct Tax Code In India**

Dr. Nilansu Bhattacharyya

**INTRODUCTION**

Countries need to attract foreign investment with a view to facilitating cross-border business\(^2\). India is not an exception. It is also true that tax minimization is very much a part of taxpayer culture\(^3\). In 1983, India and Mauritius executed Double Tax Avoidance Treaty. The Central Board of Direct Taxes was liberal; India signed the treaty. The Organization for Economic Co-operation and Development model was accepted, as per which, capital gains arising on transfer of shares and movable properties are taxable in the Country of Residence and not in the Country of Source. As per the treaty, if a Mauritian resident were to invest in India and earn capital gains; India as Country of Source, would not levy any tax on the capital gains. It would be for Mauritius – as Country of Residence, to levy, or not to levy income-tax on the capital gains earned by its resident. In total contravention of the duty of implementing the treaty in good faith as imposed by Article 26 of the Vienna Convention on the Law of Treaties, the Government of Mauritius went ahead and amended its laws with the specific intent to permit treaty shopping by non-residents of Mauritius. This was clearly a “Treaty Override” - absolute violation of Articles 26, 27 & 31 of the Vienna Convention\(^4\).

The Vienna Convention on the Law of Treaties provides established principles of international law. Every treaty in force is binding upon the parties to it and must be performed by them in good faith. In addition to this, “pacta sunt servanda” (agreements must be kept) principle provides that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” In case of conflict between the provisions of treaties and those of domestic law, the provisions of treaties must prevail. Thus, if the application of domestic legislative or judicial anti-avoidance rules had the effect of increasing the tax liability of a taxpayer beyond what is allowed by a tax treaty, this would conflict with the provisions of the treaty and these provisions should prevail under public international law\(^5\).

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1 Reader, Jogesh Chandra Chaudhuri Law College, Kolkata (University of Calcutta) and Visiting Faculty, MBA (Finance), Deptt. of Commerce, University of Calcutta
4 Rashmin Sanghvi, Treaty Override, International Taxation I Vol. 1 April 2010, pp.705-06
5 United Nations Economic and Social Council (E/C.18/2005/2), Abuse of tax treaties and treaty shopping, p.
Notes & Comments

**Changing Perception of ‘Avoidance’**

Lord Tomlin, in IRC v. Duke of Westminster⁶, said “Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow tax gatherers may be of his ingenuity, he cannot be compelled to pay an increased tax”. Avoidance of tax liability is the attempt to reduce such liability through legal means⁷, such as forming a company to sell goods, paying 30% tax on it to avoid 40% tax liability by selling the same as an individual. The attitude of the courts towards avoidance of tax perceptibly changed and hardened after the World War II and the huge profiteering and racketeering, something which still persisting on a much larger scale. Lord Greene, M.R., dealing with the construction of an anti-avoidance section⁸, said in Lord Howard de Walden v. IRC⁹, “For years a battle of manoeuvre has been waged between the legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. In that battle, the Legislature has often been worsted by the skill, determination and resourcefulness of its opponents, of whom the present appellant has not been the least successful. It would not shock us in the least to find that the Legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers.” Lord Simon, expressing the same sentiment and dissertating on the moral aspects of tax avoidance¹⁰, said in Latilla v. IRC¹¹: “My Lords, of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income, without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are ‘entitled’ to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is, of course, to increase pro tanto the load of tax on the shoulders of the great body of good citizens who do not desire or do not know how, to adopt these manoeuvres”.

**Impermissible Tax Avoidance**

Under the proposed GAAR (General Anti-avoidance Rule), an “impermissible avoidance

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⁶ 19 TC 490 at 520
⁷ Deloitte Haskins & Sells, AMCHAM India, The General Anti-Avoidance Rules, p.2
⁸ McDowell and Co. Ltd.v. Commercial tax Officer AIR 1986 SC 649 at 651
⁹ [1942] 1 KB 389; 25 TC 131 at 134
¹⁰ Supra note 8
¹¹ 25 TC 107 at 117
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“arrangement” is an arrangement where the main purpose, or one of its main purposes, is to obtain a tax benefit and it satisfies at least one of the following tests:

- It results in the abuse of the provisions of the tax laws;
- It lacks / deemed to lack commercial substance;
- It creates rights and obligations, not normally created between parties dealing at arm’s length; or
- It is carried out in a manner, normally not employed for bonafide reasons\(^\text{12}\).

Section 123 of the proposed Direct Tax Code stands as follows:

(1) Any arrangement entered into by a person may be declared as an impermissible avoidance arrangement and the consequences, under this Code, of the arrangement may be determined by—

(a) disregarding, combining or recharacterising any step in, or a part or whole of, the impermissible avoidance arrangement;

(b) treating the impermissible avoidance arrangement—

(i) as if it had not been entered into or carried out; or

(ii) in such other manner as in the circumstances of the case, the Commissioner deems appropriate for the prevention or diminution of the relevant tax benefit;

(c) disregarding any accommodating party or treating any accommodating party and any other party as one and the same person;

(d) deeming persons who are connected persons in relation to each other to be one and the same person;

(e) reallocating, amongst the parties to the arrangement—

(i) any accrual, or receipt, of a capital or revenue nature; or

(ii) any expenditure, deduction, relief or rebate; or

(f) recharacterising—

(i) any equity into debt or vice versa;

\(^{12}\) Deloitte, World Tax Advisor, 23 March 2012, pp.2-3
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(ii) any accrual, or receipt, of a capital or revenue nature; or

(iii) any expenditure, deduction, relief or rebate.

(2) The provisions of sub-section (1) may be applied in the alternative for, or in addition to, any other basis for determination of tax liability in accordance with such guidelines as may be prescribed.

(3) The provisions of this section shall apply subject to such conditions and in the manner as may be prescribed.

General Anti-avoidance Rule (GAAR) empowers the Revenue Authorities in a country to deny the tax benefits of transactions or arrangements which do not have any commercial substance or consideration other than achieving the tax benefit.

 COURTS ON IMPERMISSIBLE TAX AVOIDING MECHANISM

The Courts in different countries have laid down the principles regarding what constitutes an impermissible tax avoiding mechanism with a series of decisions starting from the Duke of Westminster’s case.

In CIT v. Sakarlal Balabhai, Bhagwati, C.J. said “Tax avoidance postulates that the assessee is in receipt of amount which is really and in truth his income liable to tax but on which he avoids payment of tax by some artifice or device. Such artifice or device may apparently show the income as accruing to another person, at the same time making it available for use and enjoyment to the assessee as in a case falling within section 44D or mask the true character of the income by disguising it as a capital receipt as in a case falling within section 44E or assume diverse other forms ... But there must be some artifice or device enabling the assessee to avoid payment of tax on what is really and in truth his income. If the assessee parts with his income producing asset, so that the right to receive income arising from the asset which, theretofore, belonged to the assessee is transferred to and vested in some other person, there is no avoidance of tax liability: no part of the income from the asset goes into the hands of the assessee in the shape of income or under any guise.”

Ranganath Mishra J. in McDowell and Co. Ltd.v. Commercial tax Officer, said “Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honour...”
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able to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.”

Ruma Pal J and B Srikrishnain J, in Union Of India And Anr vs Azadi Bachao Andolan And Anr, said that the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether a provision should be construed literally or liberally nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it.

Denial of tax benefits by the Revenue Authorities in different countries, often by disregarding the form of the transaction, has been a matter of conflict between the Revenue Authorities and the taxpayers. In India also, the ruling of the Supreme Court in McDowell’s case was a watershed. This ruling itself has been interpreted by different courts including the Supreme Court in various subsequent decisions. In its recent ruling in the famous Vodafone case, the Supreme Court has stated that GAAR is not a new concept in India as the country already has a judicial anti-avoidance history.

GAAR AS AN INTEGRAL PART OF THE DIRECT TAX CODE IN INDIA

After the introduction of the much talked about and much awaited Direct Tax Code, replacing the age old Income Tax Act, the GAAR provisions in India would apply where a taxpayer has entered into an arrangement, the main purpose of which is to obtain a tax benefit and such arrangement is entered or carried on in a manner not normally employed for bona-fide business purposes or is not at arm’s length or abuses the provisions of the DTC or lacks economic substance. The Assessing Officer in accordance with the directions of the CIT may in such cases determine the tax consequences for the assessee by disregarding the arrangement.

Under the proposed Direct Tax Code, the power to invoke GAAR is bestowed upon the CIT. The proposed Code would empower him to call for such information as may be necessary. He would also be required to follow the principles of natural justice before declaring an arrangement as an impermissible avoidance arrangement. He would determine the tax consequences of such impermissible avoidance arrangement and issue necessary directions to the Assessing Officer for making appropriate adjustments.

CONCLUSION

The content of a target-effective behavioral prohibition differs from existing GAARs

17 [2003] 263 ITR 706
18 Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Revised Discussion Paper On The Direct Taxes Code, June 2010, p.34
19 ibid
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(at least as they have been interpreted by the judiciary), as well as judicial anti-avoidance doctrines. A GAAR cannot fill the gaps left by poor policy making. Rather, the difference in content requires the use of a GAAR by tax policymakers. It is much hopeless to leave it to the judiciary to articulate a behavioral prohibition that is neither under-inclusive nor over-inclusive in its identification of prohibited transactions. Trained as lawyers, and not public policy analysts, judges (and the lawyers appearing before them) simply do not have the institutional competence to execute this important task.

The GAAR provision would be sweeping in nature and would be invoked by the Assessing Officer in a routine manner. Avoidance is claimed by some jurists to be somewhere between evasion and mitigation, as to them mitigation is reducing one’s tax in ways that a governing statute clearly encourages or permits. There is no distinction between tax mitigation and tax avoidance as any arrangement to obtain a tax benefit may be considered as an impermissible avoidance arrangement. It has been represented that to avoid arbitrary application of the provisions, further legislative and administrative safeguards be provided. Besides suitable threshold limits for invoking GAAR should be considered. The following aspects need to be carefully considered before finalising the GAAR for India:

- The provisions to deter tax avoidance should not have room for penalising taxpayers who have genuine reasons for entering into bonafide transactions.
- To avoid frivolous cases, a threshold need to be prescribed under the rules.
- A threshold limit for specific amount of tax need to be prescribed for application of GAAR.
- GAAR provisions need to be prospective in applicability
- Taxpayers need to be permitted to obtain an Advance Ruling to determine applicability of GAAR.
- Uncertainties regarding applicability of tax treaty provisions need to be removed to keep India’s credibility as a reliable treaty partner unaffected.

Child Labour In India : An Overview

Dr S. Vijayalakshmi¹*

Children are universally recognized as the most important asset of any nation. They are the future of our society and our economy. The future of a society depends directly on how the successive generations are reared and brought up. If children are deprived of their childhood—socially, economically, physically and mentally the nation gets deprived of the potential human resources for social progress, economic empowerment, peace and order, social stability and good citizenry.

EXTENT OF CHILD LABOUR IN INDIA

With the many competing demands on their resources, the developing societies particularly are often unable to do every thing that is necessary to give the children their rightful place in the community. The result is that many children in their tender age are often exploited for work in pitiable conditions. According to UNICEF report there are 158 million child labour world wide excluding child domestic labour and India is the largest producer of child labour.² A quarter of the world’s total number of child labourers are in India and every third household in the country has a child at work.³ It is estimated that over twenty percent of the country’s Gross National Product is contributed by child labour⁴.

Children are found in almost all economic activities which are hazardous for their physical growth and mental development both in rural as well as urban areas. Children work under extremely poor and indeed exploitative conditions for low wages and for excessively long hours under hazardous and unsafe working conditions that effects their physical and mental well being. The incidence of child labour is high among Scheduled Castes and Scheduled Tribes and agricultural labourers⁵.

CAUSES OF CHILD LABOUR

Poverty and unemployment are the main reasons for the prevalence and perpetuation of child labour. Unemployment, underemployment, migration to urban areas, precarious income, low living standard, insufficient opportunities for education and training, traditional beliefs, illiteracy and ignorance are its underlying causes. Employers generally prefer children over the

¹ Principal, Dr B.R.Ambedkar Law College, Hyderabad.
² http://en.wikipedia.org/wiki/child_labor/p.1
³ www/oikonomia.it/Introducing child labour in India/p.3
⁴ Ibid
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adults because of cheap labour, unorganized and easy to control without fear of protest. Child labour is not an economic compulsion of all poor families but it is the consequence of extreme social and economic exploitation.

INTERNATIONAL EFFORTS TO PREVENT CHILD LABOUR

The problem of child labour is in existence in different parts of the world. Efforts were made by the international community from time to time to prevent child labour. The United Nations Organisation has been playing an important role to regulate and abolish the socio-economic problem of child labour and codified the rights of a child. Art 25(2) of the Universal Declaration of Human Rights provides that motherhood and childhood are entitled to special care and assistance and children whether born in or out of wedlock shall enjoy the same social protection. Art 26 also provides that every child has the right to education and the same provisions have been incorporated in the International Covenant on Economic, Social and Cultural Rights imposing an obligation on the states parties to recognise the right of everyone to education.

UNO also adopted the Convention on the Rights of the Child 1989 for the protection of the rights of child and India ratified this Convention. This Convention draws attention to four sets of civil, political, economic and cultural rights of every child. They are right to survival, right to protection, the right to development and right to participation.

International Labour Organisation also has been playing an effective role in the process of gradual elimination of child labour and to protect the children from industrial exploitation throughout the world. So far, the ILO has adopted 18 Conventions relating to child labour. It has focused on five main issues-prohibition of child labour, protecting child labour work, attacking the basic cause of child labour, helping children to adopt to future work and protecting the children of working parents. UNICEF is also playing an important role to eliminate child labour and its goal is to promote compulsory primary education as a fundamental strategy for elimination and prevention of child labour by enrolling and retaining children in schools.

NATIONAL EFFORTS TO PREVENT CHILD LABOUR

At national level also several efforts were made to eradicate child labour.

1. CONSTITUTIONAL SAFEGUARDS

Preamble of the Indian Constitution declares that India is a welfare state which aims to secure socio-economic justice to all the people including children. To promote the welfare of children and to eradicate the child labour several provisions relating to children have been incorporated in Fundamental Rights and Directive Principles of State Policy.
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**Fundamental Rights Relating to Prohibition of Child Labour**

Article 24 of the Constitution provides that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment. This Article does not create an absolute bar to the employment of children. Their employment is prohibited only in a factory or mine or in any other hazardous employment. According to Article 21A the state shall provide free and compulsory education to all children of the age of 6 to 14 years. But for the effective enforcement of this provision there must be an absolute bar on the employment of all children below 14 years of age.

**Directive Principles and Child Welfare**

The aims and objectives of a welfare state are laid down in the Directive Principles of State Policy. The State shall prevent abuse of the tender age of children and the children must be given opportunities and facilities to develop in healthy manner and in conditions of freedom and dignity and that childhood must be protected against exploitation. “Art.45 provides for early childhood care and education to children below the age of 6 years.

**II. Legislations to Prevent Child Labour**

In many legislations like the Factories Act, 1948, the Mines Act, 1952, the Employment of Children Act, 1938 etc provisions prohibiting and regulating employment of children below a particular age in factories and establishments have been enacted. But there is no uniformity as to the age of the child and they are piecemeal. To bring uniformity in the definition of the child in various laws relating to child labour, to prohibit the employment of children in certain occupations and processes and to regulate the conditions of work in certain permissible occupations the Child Labour (Prohibition and Regulation) Act, 1986 was enacted by the parliament.

**Child Labour (Prohibition & Regulation) Act 1986**

The Act under Section 3 prohibits the employment of children who have not completed their 14th year in specified occupations and processes mentioned in part A and part B of the schedule of the Act. Part III of the Act provides for the protection of working children employed in permissible occupations. It sets limits on the number of hours children can work continuously according to which a child can work 6 hours in a day with an interval for rest of at least one hour after 3 hours of work. The Act also restricts the time of work, i.e. no child shall be permitted to work between 7 p.m. and 8 a.m. Section 14 of the Act provides punishment for violation of the provisions of the Act.

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7  Article 39(e)

8  Article 39(f)
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However, as with the earlier Acts, this Act also operated within regulatory framework with the belief that child labour could not be abolished as long as poverty existed. As a consequence, the law has revealed several legal and procedural loopholes. By this Act Indian government had legalised child labour in certain permissible occupations. The Act imposes no age limit on the employment of children in permissible occupations. So a child as young as 4 or 5 years could be employed in any permissible occupations. However, the Act covered only 10 percent of the total working children in India. Children working in unorganized sector are not protected by the Act. The Act does not ban child labour if the processes carried on by the occupier with the aid of his family or any schools established by or receiving assistance from the government. Once the occupations or processes have been identified as hazardous for the employment of children any exemption made there of is to the detriment of the children and there is no justification for such exemption.

According to the report of second National Commission of Labour the only way to prevent child labour is to recognize the rightful place of children is in school not in the work place or in the house. A child outside the school is a child labour, So the first step is to ensure compulsory primary education for all children. The child’s welfare and the child’s future should be central to our programmes and to our laws. The commission also pointed out many loopholes in the law relating to child labour and proposed an indicative law on child labour which would replace the existing Child Labour (Prohibition and Regulation)Act, 1986 as it is limited in scope.

The Right of Children to Free and Compulsory Education Act, 2009 the recent legislation which was enacted to provide free and compulsory education to children of the age of six to fourteen years is a significant legislation the effective implementation of which prevents the child labour.

Judiciary in Regulating Child Labour In India

The judiciary also has been playing an important role to protect the poor children from economic exploitation, to safeguard their basic rights and to prevent the child labour by accepting their cases by way of public interest litigation and by liberally interpreting the Constitutional and legislative provisions relating to children.

In Asiad workers case when the respondents contended that Article 24 of the Indian Constitution and the Employment of Children Act, 1938 was not applicable to the construction work, as construction industry is not a process specified in the schedule the Apex Court rejected this contention and held that the construction work is a hazardous employment and therefore under Art.24 no child below the age of 14 years can be employed in the construction work even

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11 People’s Union for Democratic Rights v. Union of India, AIR 1982 SC 1473
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if construction industry is not specified in the schedule to Employment of Children Act.

The Child labour issue again came before the Supreme Court in labourers working on Salal Hydro Project v. State of Jammu and Kashmir\textsuperscript{12} by way of public interest litigation and the court has reiterated the principle that the construction work is a hazardous employment and children below 14 cannot be employed in this work. The supreme court also suggested that whenever the Central Government undertakes a construction project which is likely to last for some time, the Central Government should provide facilities for schooling to the children of construction workers who are living at or near the project site

In \textit{M.C.Mehta v. State of Tamil Nadu}\textsuperscript{13} When M.C. Mehta raised the issue of employment of thousands of children below 14 years of age in match factories and fireworks industry in Sivakasi the Supreme court directed the State of Tamil Nadu to create Child Labour Rehabilitation Welfare Fund to which the registered match factories have to contribute so that the consolidated money would be available for implementing welfare schemes for children.

In \textit{Bandhuva Mukti Morcha v. Union of India}\textsuperscript{14} the Supreme Court directed the State Government to prepare schemes for the welfare and rehabilitation of children working in the carpet industry.

Although the Supreme Court made laudable directions and suggestions in many instances to protect the poor children, unfortunately these directions and suggestions are not followed by the Government machinery.

Inspite of the protective legislations and judicial pronouncements the socio-economic problem of child labour remains a pressing problem in India. An important measure to prevent child labour is to recognize as the rightful place of children is in school, not in the workplace or in the house. So the first step is to ensure compulsory primary education for all children by effectively implementing Article 21A of the Constitution and the provisions of Right to Education Act, 2009.

At the same time a set of complementary measures has to be taken. As poverty is the root cause for the continued existence of the problem of child labour poverty eradicated programmes, has to be adopted by the Government and effective steps must be taken for proper implementation of these programmes. To strengthen the economic position of the working parents minimum wages must be revised regularly and there must be effective implementation of the Minimum Wages Act. There is also a need to strengthen the enforcement machinery for the effective implementation of the Child Labour (Prohibition & Regulation) Act, 1986.

\textsuperscript{12} AIR 1984 SC 177
\textsuperscript{13} AIR 1984 SC 699
\textsuperscript{14} AIR 1984 SC 2218
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As the Child Labour (Prohibition and Regulation) Act, 1986 is limited in scope there is a need to bring a new law on the subject of child labour to substitute the provisions of the existing law to the benefit of children and to abolish the child labour. The child’s welfare and the child’s future should be central to our programmes and to our laws as children are the future of our society and our economy.

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BOOK REVIEW

General Principles of Contract by Dr. Nilansu Bhattacharyya

Pages – 356 Published by:- New Central Book Agency (P) Ltd. Kolkata

Price – Rs. 185.00

General Principles of Contract written by Dr. Nilansu Bhattacharyya is one of the best book which talks about contract. The text book takes a fresh approach to Contract Law; it reflects the subject of the 21st century more accurately than other texts. Comprehensively and scholarly it maps the curriculum perfectly but detailed reference and reading section encourage students to explore the subject further. The book is not intended to give comprehensive coverage of contract of law but it intended to give students a good feel for the topic. The book will try and show the students that contract law is not about having a good memory but rather being able to grasp the legal principles and apply them to different situations. This book is as far as possible use examples that would be familiar with it every day situation. It will not go into complex contract situations. This book has been authored to cater the needs of those students who are studying law. The author does not claim it to be a scholarly piece. He has kept the language of the book simple and straight so that the student could easily grasp it. He has taken up a subject over which already there is plethora of books. This book deals with only the general principle or provision of Indian Contract Act that is from Section 1 to 75 and Specific Relief Act one thing which will be Immense help to the student is that full text of the land mark cases of Indian Contract Act are given at one place in this book. The book which is reviewed by us consist Seven Chapters, Three Hundred Fifty six pages including Bibliography, Index and Appendix. In this book the commentaries on the related provisions of Indian Contract are not elaborated and less discussed but the provision of Indian Contract Act has been discussed with sufficient illustration which will help the student to understand in a better ways. Which will give the students an insight to the General Principles of Contract in an elaborate ways? The text book takes an innovative approach to case law: breaking down and discussing individual elements of cases independently and with confidence. This book has both positive as well as the negative aspects according to us. Case laws are less though they are appropriate which helps the legal fraternity and legal world in their day to day proceedings. The book will explain how Contract Law is the fundamental business legal subject. An examination of the historical and theoretical foundations of the subject and a concluding chapter tracking emerging fields ensure the broadest possible perspective.

Books deals with the General Principles of Contract Section 1-75& Specific Relief Act. It also talks about the Formation of Contract, Consideration, Capacity to Contract, Discharge of Contract and Remedies of Breach of Contract etc. It can be said as “mother law”. One thing is quite clear in this global era the Contract Law is needed very much by the jurist, judges, advocates and academicians in understanding the contract and helping the society through their interpretation and it is also fulfilling the needs of the students in their academic carrier
and several competitive examination. It is paving a path in a straight forward way for several communities of legal field. Last but not the least the book is helpful for everyone to understand the simple meaning of Indian Contract Act, 1872.

The author has failed to discuss the standard form of contract which has developed after the enactment of Information Technology Act, 2000. As far as my opinion in concerned I would like to suggest the Author to incorporate recent case laws in their respective chapters and sections. The case laws should be comprehensive for easy understanding of the students. He should also put light on those aspects where English Case Laws are different from those of Indian Case Laws.

The book has good collection of information regarding law of contract. The book has good get-up. Overall the author has done a remarkable job. After reading this book I would conclude that after incorporating the above mentioned suggestions this book can be a masterpiece.

Utsav Kiran

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1 Asst. Professor, ChotaNagpur Law College, Ranchi University, Ranchi E-mail :- utsavkiran7@gmail.com
Prof. B.P. Dwivedi

(A Distinguished Member of Chotanagpur Law Journal Advisory Board)

Prof. B.P. Dwivedi obtained Masters Degree from Banaras Law School, and is presently a Professor in Department of Law, University of North Bengal, Darjeeling. He did his Ph.D in the year 1996 from Banaras Hindu University. He has Guided 45 LL.M. Dissertation and 18 candidates have been enrolled for Ph.D. degree under his supervision and eight candidates have been awarded with Ph.D degree. He has done various research projects like


3. (c) Project on Elected Women Representatives in Panchayat: With Special Reference to Siliguri Mahakuma Parishad, CWS, N.B.U. February 2005- August 2005

He is the author of the book titled The Changing Dimension of Personal Liberty in India and has also been the chief editor in various Law Journals. With over 19 articles published he is also the member of the editorial advisory board of various law journal like Chotanagpur Law Journal, Patna University Journal of Law, Indian Human Rights Law Review, etc.

He has played many roles in the field of Educational Administration. He was twice the Head, of Department of Law, University of North Bengal (January 2003- January 2005, December 2009- December 2011). He has been awarded with many Awards / Medals/ Prizes/ Honours like National Scholarship, U. G. C. Scholarship, B. H. U. Merit Scholarship Award and B. H. U. Research Fellowship

His Contribution in Teaching Method/ Development of New Course and Curricula/ Reform in Examination System and Evaluation Method have been remarkable. He Introduced LL. B. (Hons.) Five years integrated course and prepared new syllabus including the project work and class performance since 2003-2004. He has organised many seminars and other events. He has delivered lectures in different universities all over India. He has been Associated With the Rehabilitation Project for the Prostitution with Rotary International at Siliguri and also been the organiser of the programmes for the Welfare of the Children of Prostitute at Siliguri with the District Legal Aid Forum. It can be well concluded that he is a true scholar in the field of Legal Education..

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