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**Sd/-**

**Date: July, 31, 2017** **Dr. Pradeep Kumar**

# Child Trafficking in India: A Study on Forced Labour

*"Global supply chains have transformed many lives for the better - but not always without costs. Clothes, food, smart phones, jewellery and other consumer goods may bear, wittingly or unwittingly, the traces of exploitation. Gleaming new skyscrapers may owe some of their shine to the sweat of bonded laborers."*

*Antonio Guterres,*
*United Nations Secretary General*

***Salma Begum Laskar***[1]
***Dr. Umesh Kumar***[2]

## Introduction

Whenever a state moves toward development some pulls and pushes are experienced by it. Some problems emerge while some accentuate. Indian democracy is one of them. Among some of the pressing social problems faced by our nation, the problem of trafficking of children deserves a special mention.

Children are most important assets of any nation because they, as future citizen, shape the destiny of the nation. Childhood is the most precious stage of a person's life. The required human resource development will take place only if children are given required opportunity for proper growth and development and if they are protected against abuse and exploitation. Children due to their tender age are most vulnerable to abuse and exploitation which ultimately hampers the development of any nation.

Trafficking of human beings is one of the most despicable forms of violation of human rights. Trafficking clearly violates the fundamental right to life with dignity. It also violates right to health, right to liberty and security of person, right to freedom from torture, violence, cruelty or degrading treatment. In its widest sense, trafficking not just includes exploitation of others or forms of sexual exploitation, but it also includes forced labour or services, slavery or practices similar to slavery or trade in human beings for removal of human organs. At different points of time and place, multiple abuse and abusers are located constituting the organized crime of trafficking.

Children are trafficked for various purposes and are being exploited by the ruthless traffickers. Problem of human trafficking (especially Child) has been emphasized since the decades and has become third international lucrative criminal trade next to arms and drugs. With no freedom of choice and options for a life with dignity, these helpless children are trafficked and exploited forcing them to lead a life crippled with indignity, social stigma, debt bondage and a host of ailments including HIV/AIDS[3].

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[2] ***Assistant Professor, Department of Law, Assam University, Silchar-788011.***
[3] Mamta Rao, *Law relating to Women and Children,* Eastern Book Company, Lucknow (2010).

The problem in dealing with the very complex phenomenon of child trafficking begins with its very definition of child. There is no static definition of child and it has become very difficult to tackle the issues related to child trafficking. The definition of child varies with different legislations. After going through various legislations and conventions, child can be defined as a person, whether boy or girl, under eighteen years of age and is unable to understand the nature and consequences of the act.

Child trafficking is a multifaceted phenomenon and exists in different forms like sexual exploitation, illegal activities, forced labour, entertainment, adoption and marriage. In contemporary times, child trafficking has become one of the most visible, rampant and complex problems of our society and it will continue to be more acute in future also till its total elimination. Participation of child in work is not a new concept particular to this modern era. It has existed in different forms in every society throughout the human history. Employment of child cuts across the geographic, social, national and religious frontiers and has become an established practice in all countries. It is really shameful for human civilization that even in the 21st century one group of children play in computer and surf internet while another group of children work as labour against their will.

Gabrial Mistral, the Nobel Laureate said, "We are guilty of many errors and faults, but our worst crime is abandoning the children, neglecting the foundation of life. Many of the things we need can wait. The child cannot, right now is the time his bones are being formed, his blood is being made and the senses are being developed. To him we cannot answer 'tomorrow'. His name is today".[4]

The UN estimates that around four million people a year are traded against their will to work in some form of slavery like earlier as domestic servant or to work in construction sites or begging and/or to work as child prostitute. Prostitution has become a very profitable trade and there is a global market for the same which involves million of children, particularly girls, and which generates billions of dollar profit for the trafficker involved. Children are also trafficked to work market stalls or as shop assistant.

Due to its criminal and covert nature, the extent of measuring the practice of child trafficking is difficult to obtain. It often takes year to gather and compile estimate regarding child trafficking and as a result data can be seen both inadequate and outdated. The process of gathering data is only complicated by the fact that very few countries publish national estimates of child trafficking. As a result, the available statistics are widely thought to underestimate the actual scope of the problem. It is done in organized manner by organized syndicate or by individual and sometimes by informal group and also sometimes relatives and parents are part of this. In the absence of common understanding, it becomes difficult to design policies, guidelines or even intervention to take the issue. It is difficult to assess the magnitude of child trafficking because:

1. Most cases go unreported.

[4] Cited by Justice Shivaraj Patil, "Children-Supreme Asset of the Nation" AIR 2000 Journal 49.

2. There is no uniform law to address this evil practice.
3. Even if there are legal provisions addressing different forms of child trafficking, data is not always compiled in terms of cases that are reported.
4. No special provisions available to protect child's right in the course of legal proceeding.

**Definition of Child**

At the outset, it needs to be clarified that at present, there is no one clear legal definition of the child. The legal definition varies with the specific legislations and conventions. The Child Marriage Restraint Act, 1929, as amended in 1978, child means a person who if a male is under 21 years of age and if a female is under 18 years of age.[5] The Factories Act, 1948, child[6] is a person who has not completed his fifteen years of age and young person[7] mean a person who is either a child or an adolescent. The Immoral Traffic Prevention Act, 1956 a child is a person who has not completed eighteen years of age.[8]The Child Labour (Prohibition and Regulation) Act, 1986, child means a person who has not completed fourteen years of age.[9] The Juvenile Justice (Care and Protection) Act, 2000, juvenile or child means a person who has not completed eighteen years of age.[10]

The United Nation's Convention on the Rights of the Child (UNCRC)[11], a child means every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier.[12] The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, child means a person who has not attained the age of eighteen years.[13] The UN Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children, 2000 under the Convention against Transnational Organized Crime (UNTOC), child means any person under the age of eighteen years.[14] The Protection of Children from Sexual Offence Act (POSCO), 2012, child means a person under the age of eighteen year As per the definitions given under different laws it can be concluded that child means a person who has not completed the age of eighteen years.

**Definition of Trafficking**

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5 Section 6 of the Child Marriage Restraint Act, 1929.
6 Section 2(b) of the Factories Act, 1948.
7 Section 2(d) *Ibid*.
8 Section 2(aa) of the Immoral Traffic Prevention Act, 1956.
9 Section 2(ii) of the Child Labour (Prohibition and Regulation) Act, 1986.
10 Section 2(k) of the Juvenile Justice (Care and Protection) Act, 2000.
11 UNCRC adopted by the UN General Assembly in 1990 is the widely accepted UN instrument ratified by the most of the developed as well as developing countries including India. It provides the standard to be adhered to by all state parties in securing the interest of child.
12 Article 1 of the United Nation's Convention on the Rights of the Child.
13 Article 1(1) of the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.
14 Article 3(d) of the UN Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children, 2000.

The Oxford English Dictionary defines traffic as 'trade, especially illegal (as in drugs)'. It has been described as 'the transportation of goods, the coming and going of people or goods by road, rail, air, sea, etc. The word trafficked or trafficking is described as 'dealing in something, especially illegally (as in the case of trafficking narcotics)'.

The UN Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children, 2000 under Article 3 (a) trafficking in person shall mean 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 giving or of receiving of payments or benefits to achieve the consent of a person having control over another persons, 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 services, slavery or practices similar to slavery, servitude or the removal of organs;

According to the UN Commission on Human Rights (29th February 2000[15]definition, "Trafficking in person means the recruitment, transportation, purchase, sale, transfer, harbouring or receipt of a person (i) by threat or use of violence, abduction, fraud, deception or coercion (including the abuse of authority) or debt bondage for the purpose of and (ii) placing or holding such a person, whether for pay or not, in forced labour or slavery of like practices, in a community other than the one in which such person lived at the time of the original act described in (i).

**Definition of Child Trafficking**

The Goa Children's Act, 2003, is the only Indian statute which gives a legal definition of trafficking. Though child-specific, it nevertheless provides the following comprehensive definition in Section 2 (z)[16].

**International Conventions and Child Trafficking**

Slavery has a history dating back thousands of years. It existed in prehistoric hunting societies and has persisted throughout the history of the mankind as a universal institution. Even though slaves have always been subject to physical and sexual exploitation, the discussion of human trafficking from the point of view of exploitation has a much shorter history.

There are number of international instruments under the categories of UN Conventions in general and International Labour Organization Convention bearing on trafficking. The

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[15] K.P Yadav, *Trafficking: An Emerging Social Problems*, (Adhyayan Publisher & Distributors, New Delhi, 2006), p. 47.

[16] Child trafficking means the procurement, recruitment, transportation, transfer, harbouring or receipt of persons, legally or illegally, within or across borders, by means of 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 giving or receiving payments or benefits to achieve the consent of a person having control over another person, for monitory gain or otherwise.

Constitution of India states that the State shall endeavour to foster respect for international law and treaty obligation in the dealings of organized people with one another.[17] Therefore, in India the international laws and conventions are not very effective unless they have been translated into domestic laws, regardless of them having been signed and ratified by Indian Government. Despite this limitation, it is useful to look at the international law regime that exists because law enforcement agencies should make reference to these provisions where they deal with trafficking across borders. There are wide ranges of conventions which are discussed in details in the coming chapters, which have direct bearing on the issue of child trafficking for the purpose of forced labour or other form of abuse and exploitations[18].

**International Agreement for the Suppression of White Slave Traffic, 1904**

This is the first international treaty to address trafficking in human beings. The international trafficking in human beings particularly women and children also referred to as the white slave trade first gained international recognition in 1904 when the above international agreement for the suppression of white slave traffic was signed. The term "traffic" was first used to refer to the so - called 'white slave trade' in women around 1900.

**International Convention for the Suppression of the White Slave Trade, 1910**

In 1910, 13 countries signed the International Convention for the Suppression of the White Slave Trade (United Nations 1951). While the 1904 Agreement addressed the migration side of the issue, the 1910 Convention focused on the criminalization of trafficking. After the signing of the 1910 Convention, National Committees for the suppression of traffic were established in many European countries.

**International Labour Organization, 1919**

The International Labour Organization (ILO) was created in 1919, as a part of the Treaty of Versailles that ended World War I, to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice. The driving forces for ILO's creation arose from security, humanitarian, political and economic consideration. There was keen appreciation of the importance of social justice in securing peace, against background of exploitation of workers in the industrializing nation of that time. The ILO has made contributions to the world of work from its early day.

**International Convention for the Suppression of the Traffic of the Women and Children, 1921**

The treaty prohibits the enticing or leading away of a woman or girl for immoral purposes, to be carried out in another country. The 1921 Convention ensure that protection from trafficking and sexual exploitation on the international level.

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[17] Article 51(c) of the Constitution of India, 1950.

[18] S.C. Singh, *Child Sexual Abuse and Exploitation in India Perspective, Frontiers & Legal Protection*, Serials Publications, New Delhi (2011).

**The Slavery Convention, 1926**

Under the auspices of the League of Nation, the Convention to Suppress the Slave Trade and Slavery or the 1926 Slavery Convention was created. The Convention was first signed on 25th September, 1926. It was registered in League of Nation Treaty Series on 9th March, 1927 and on the same day it went into effect. The objective of the Convention was to confirm and advance the suppression of slavery and slave trade. The State parties to Slavery Convention are enjoined to discourage all forms of forced labour.

**The Forced Labour Convention of the International Labour Organization, 1930 (also known as C29)**

The UN specialized agency, International Labour Organization, seeks to promote social justice and internationally recognized human and labour rights. The Fourteenth Session was held on 10th June 1930 for deciding upon the adoption of certain proposals with regard to forced or compulsory labour. It was adopted on 28th day of June, 1930 and came into force on 1st day of May, 1932. The ILO forced labour Convention requires signatories to "suppress the use of force or compulsory labour in all its forms in the shortest period possible."

**Universal Declaration of Human Rights, 1948**

The Declaration provides all human being are born free and equal in dignity and rights.[19] It also provides that everyone is entitled to all the rights and freedom set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, natural or social origin, property, birth or other status.[20] Everyone has the right to life, liberty and security of person.[21] It provides that no one shall be held in slavery and servitude, slavery and the slave shall be prohibited in all forms.[22] No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.[23] Everyone has the right to work, to free choice of employment, to just and favourable condition of work and to protection against unemployment.[24]

**The International Covenant on Civil and Political Rights, 1966**

The International Covenant on Civil and Political Rights is a multilateral treaty, unanimously adopted by United Nation General Assembly on December 16, 1966. The Covenant was opened for signature on December 19, 1966 and required 35 ratification or accession before coming into force. Therefore, on March 23rd 1976, after having received the requisite number of ratifications, the International Covenant on Civil and Political Rights came into force. As of April 2014, the Covenant has 74 signatories and 168 parties. The Covenant deals with 53 Articles divided into IV parts. The Covenant lays down every child without any discrimination and has the right to protection.

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[19] Article 1 of the Universal Declaration of Human Rights, 1948.
[20] Article 2.
[21] Article 3.
[22] Article 4.
[23] Article 5.
[24] Article 23(1).

**The International Covenant on Economic, Social, and Cultural Rights, 1966**

The International Covenant on Economic, Social, and Cultural Rights, 1966 is also a multilateral treaty adopted by the United Nation General Assembly on 16 December 1966, and in force from 3rd January 1976. It commits its parties to work toward the granting of economic, social and cultural rights to the non-self-governing and trust-territories and individual including the labour right and the right to health and adequate standard of living. As of 2014 the Covenant had 162 parties. The adoption of International Covenant on Economic, Social and Cultural Right is another significant achievement in the field of international law on human rights.

**The Convention on Elimination of all Forms of Discrimination against Women, 1979**

The Convention on Elimination of all Forms of Discrimination against Women (CEDAW) was adopted in 1979 and came into force on 3rd September 1981. The Convention calls upon the State parties to "take all appropriate measures to suppress all forms of traffic in women and the exploitation of prostitution.

**The Convention on the Rights of the Child, 1989**

The Convention draws attention to four sets of civil, political, social, economic and cultural rights of every child. These are:

**The Right to Survival**

This right includes the right to life, the highest attainable standards of health, nutrition and adequate standards of living. It also includes right to name and a nationality.

**The Right to Protection**

This includes freedom from all forms of exploitation, abuse, inhuman and degrading treatment and neglect, including the right to special protection in situations of emergency and armed conflicts.

**The Right to Development**

It contains the right to education, support for early childhood development and care, social security, and the right to leisure, recreation and cultural activities.

**The Right to Participation**

It includes respect for the views of the child, freedom of expression, access to appropriate information, and freedom of thought, conscience and religion.

**The Vienna Declaration and Programme of Action, 1993**

The Vienna Declaration and Programme of Action on the Elimination of Violence, 1993 addresses the issue of trafficking as a form of gender-based violence and called for its elimination through international cooperation in such fields as economic, social development and through national legislation.

**The Convention on the Worst form of Child Labour, 1999 (commonly referred as C182)**

The Article which deals with force or compulsory labour are:
Each member who ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst form of child labour as a matter of urgency.[25] Child shall apply to all person under the age of 18.[26]

**U.N. Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children (Palermo), 2000**

The most relevant among various Protocols for child protection is the Protocol to Prevent, Suppress and Punish Traffickers in Persons, Especially Women and Children.[27] The U.N Protocol is the first globally legally binding instrument with an urgent definition on trafficking in person. The intention behind this definition was to facilitate States parties in national approaches with regards to the establishment of domestic agencies that would support efficient international cooperation in investing and prosecuting trafficking in person cases. An additional objective of the Protocol was to protect and assist the victims of trafficking in persons with full respect for their human rights.

**National Legislations to Protect Children from Trafficking**

While framing the Constitution, framers were very much influenced by the concept of Human Rights. In the Constitution of India, a number of Articles has been spelled out in Part III and Part IV which speaks about paramount interest of child regarding physical, educational and cultural rights. These are inserted in Article15 (3), 21-A, 23, 24, 39 (e) and (f), 45, 51-A (k). India is the largest democracy in the world with a comprehensive charter of rights for the best interest of child. The Constitution of India guarantees equality before law, and in promotion of this precept affirms the jurisprudence of compensatory discrimination taking into consideration the socio-historical perspective of vulnerable groups. But the wishful and optimistic provisions enumerated in the Constitution look shallow and no more than rigmarole, when we encounter the reality of abuse and exploitation of child.

Apart from Constitution of India, there are also several laws on child protection in various contexts. The Indian Penal Code 1860[28] altered Section 370 [29]which gives a clear picture of

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[25] Article 1.
[26] Article 2.
[27] The Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children adopted by United Nations General Assembly and came into force on 25th December 2003.
[28] The Criminal Law (Amendment) Act 2013.
[29] Trafficking of persons – (1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c)harbours, (d) transfers, or (e) receives, a person or persons, by –
Firstly - using threats, or
Secondly – using force, or any other form of coercion, or
Thirdly – by abduction, or
Fourthly – by practicing fraud or deception, or
Fifthly – by abuse of power, or
Sixthly – by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received commits the offence of trafficking.

trafficking in person and also inserted Section 370A[30] which deals with exploitation of trafficked person. The Protection of Children from Sexual Offences Act 2012 also substituted two new Sections 42[31] and 42A[32] by the Criminal Law Amendment Act, 2013.

It is the obligation of every generation to bring up children, citizens of tomorrow, in a proper way.[33] It has been rightly said that "child is the father of man". To enable fathering of valiant and vibrant man, the child must be groomed well in the formative years of his life. The national legal framework suffers from inadequate fulfillment of promise made. Crime, corruption, collusion, commercial profit and complacency have obstructed the implementation process and protection of children's right. Thus, organized crime, corrupt judicial systems, incomplete or complex laws and lack of child protection system make children extremely vulnerable.

**Forced Child Labour**

Forced child labour means employment of children in any work that deprives children of their childhood, interferes with their ability to attend regular school, and that is mentally, physically, socially or morally dangerous and harmful. International Labour Organization (ILO) suggests that poverty is the greatest single cause behind child labour[34]. For impoverished households, income from a child's work is usually crucial for his or her own survival or for that of the household. Child labour, no doubt, a socio-economic problem. A national survey had shown that more than 16 million children between eight to fourteen years are largely appointed in hotels and boarding houses, in tea-shops, restaurants, in commercial firms, in factories and fisheries.

As a result, they are also deprived of primary education, without which chance of success in life is remote. Bonded child labour is hidden phenomenon as majority of them are found in informal sector. Bonded labour means the employment of a person against a loan or debt or social obligation by the family of the child or family as a whole. It is a form of slavery. Children who are bonded with their family or inherit debt from their parents are often found in agriculture sector or assisting their families in brick kilns, and stone quarries. Individual pledging of children is a growing occurrence that usually leads to trafficking of children to urban areas for employment and have children working in small production houses versus

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[30] Exploitation of a trafficked person

[31] Alternate punishment – When an act or omission constitutes an offence punishable under this Act and also under sections 166A,354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

[32] Act not in derogation of any other law – The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overridden effect on the provisions of any such law to the extent of the inconsistency.

[33] As stated by Justice P.N. Bhagwati and *R.N. Pathak in Sheela Bharse v. Secretary, Children Aid Society*, AIR 1987 SC 656.

[34] Government of India, Planning Commission, Working Group for Social inclusion of Vulnerable Group like Child Labour and Bonded and Migrant Labour in the 12th Five Year Plan (2012-17).

factories. Bonded labourers in India are mostly migrant workers, which open them up to more exploitation. So, they mostly come from low caste groups. Bonded labourers are at very high risk for physical and sexual abuse and neglect sometimes leading to death. Government has accordingly been taking proactive steps to tackle this problem through strict enforcement of legislative provisions along with simultaneous rehabilitative measures.

State Governments, which are the appropriate implementing authorities, have been conducting regular inspections and raids to detect cases of violations. Since poverty is the root cause of this problem, and enforcement alone cannot help solve it, government has been laying a lot of emphasis on the rehabilitation of these children and on improving the economic conditions of their families. The Supreme Court in *M.C. Mehta v. State of Tamil Nadu and Others,*[35] popularly known as '*Child Labour Abolition Case*' held that the children below the age of 14 years cannot be employed in any hazardous industry, mines or other work.

The Supreme Court replaced the liberal concept of Article 21 taken in *Maneka Gandhi v. Union of India,*[36] and *Francis Coralie Mullin v. Union Territory of Delhi,*[37] and also in *N. Bhageerathan v. State,*[38]

**Judicial Approach and Forced Child Labour**

The judiciary took up the cudgel against the exploitation of child with a collage of constitutional and legislative provisions and gave full protection to the child whenever called upon in consonance with the international commitments which India has made. The sole of judiciary is interpretation. With the innovative and inspiring judgments, the judiciary has been bedrock of social justice. If required protection could not be provided to child, the future of any nation and the concept of social justice would remain a myth. When we have statute which provides prior interest to child, then every phrase and clause of that statute has to be interpreted in a manner which protects full realization of the best interest of the child. The Supreme Court and the other higher courts have inherent powers for protecting the best interest of child which is given to them by law.

Some of the glorious judgments of Supreme Court and other courts are as follows:
*Anil Kumar Agarwal v. Asst. Labour Commissioner, Mathura,* [39] *Bachpan Bachao Andolan v. Union of India and Others,*[40]*Bandhua Mukti Morcha v. Union of India and others (II)*[41]*,*

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[35] (1991) 1 SCC 283.

[36] AIR, 1978, SC 597; 1978 ( I SCC 248).

[37] (1981) I SCC p. 608. held that Article 21 included protection of health and strength of workers, men, women and tender age of children against abuse.

[38] 1999 Cr L J 632 (Mad). it was held that if an accused or employer is unable to prove that children employed were not below 14 years, he can be convicted for the offence of employing child labour.

[39] 1999 (81) FIR 43 (All), the Allahabad High Court observed that the Child Labour (Prohibition and Regulation) Act 1986 imposes a criminal liability upon the employer who engaged a child labour in contravention of the provisions of the Act.

[40] (2011) 5 SCC 1, under Article 32, a petition was filed in the wake of serious violations and abuse of children who are forcefully detained in circuses. The Supreme Court held that in order to implement the fundamental right

*Hayat Khan v. Deputy Labour Commissioner, Regional Office, Belgaum and others*[42], *Neeraja Choudhary v. State of M. P.*[43], In *Peoples Union for Democratic Rights v. Union of India*[44], In *Unni Krishnan v. State of A. P.*[45], In *M.C. Mehta v. State of Tamil Nadu*[46]

## Conclusion

Childhood is the most precious stage of a person's life. Therefore, the guardian of children including the government must fulfill the constitutional obligation of ensuring right to life for them. The right to health, nutrition, education and life among others are legitimate expectations for any human being, particularly children. Children who would have been progeny of future civilization are at risk of being miserable in their adulthood. Some pragmatic, realistic and constructive steps and actions are required to be taken to enable to the child to enjoy their childhood and develop their personality. Child requires guidance and support. They do not know the technicalities of life. It is for the citizens to take their hand and show them the right way.

Therefore, all other states should come forward and take effective steps to combat trafficking of children in form of forced labour especially because they are the best gifts which the nature has given in this world. It's not that the world is beautiful; it's beautiful because children are world's best gift which the creator has bestowed in this world, whose smiles adds life to earth.

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of the children under Article 21 A it is imperative that the Central Government must issue suitable notifications prohibiting the employment of children in circuses.

[41] (1997) 10 SCC 549, public interest litigation was filed alleging employment of children aged below 14 in the Carpet Industry in the State of Uttar Pradesh. It was held by the Court that the State is obliged to render socio-economic justice to the child and provide facilitates and opportunities for proper development of his personality.

[42] Labour law Journal 2008, January, p. 284, (W.A.No. 3812/2005) (L- WC) dated: June 22.2007, the court observed, offending employer must be asked to pay compensation of Rs.20, 000/- for every child employed in contravention of the Child Labour Act.

[43] AIR 1984 SC 1099, the Court said that 'it is not enough merely to identify and release bonded labourers, but it is equally, perhaps more important that, after identification and release, they must be rehabilitated, because without rehabilitation, they would be driven by poverty, helplessness and despair into serfdom once again. Not only, that, 'the Bonded Labour System (Abolition) Act, 1976 has been enacted pursuant to the Directive Principles of State Policy with a view to ensuring basic human dignity to the bonded labourers and any failure of action on the part of the State Government in implementing the provisions of this legislation would be the clearest violation of Article 21, apart from Article 23 of the Constitution" and, therefore the Apex Court directed the State Government to provide rehabilitative assistance to these freed bonded labourers within one month from the date of giving the decision.

[44] AIR 1982 SC 1943, the Supreme Court considered the scope and ambit of Article 23 and held that Article 23 is wide and unlimited and strikes at "traffic in human being" and "beggar and other form of forced labour" wherever they are found.

[45] AIR 1993 SC 2178, 1993 AIR SCW 863; (1993) I SCC 645, JT 1993(I) SC 474, the Supreme Court while dealing with education as a fundamental right has emphasized the importance of education by stating that; "The fundamental purpose of education is the same at all times and in all places; it is to transfigure the human personality into a pattern of perfection through a synthetic process of the development of the body, the enrichment of the mind, the sublimation of the emotion and the illumination of the spirit. Education is a preparation for a living and for life, here and hereafter".

[46] As per Hansaria, J., AIR 1997 SC 701, the court held 'every child must receive education; acquire knowledge of man and materials and blossom in such an atmosphere that on reaching maturity he is found to be a man with a mission, a man who matters so far as society is concerned'

Therefore, to eradicate the problem of trafficking for forced labour of children, there must be work done from grass root level. It is not only the bounden duty of government to enact legislations and policies in the best interest of children but also it is the duty of common people everywhere to fight against all these form of exploitation in children. Children should not be hired instead they should be educated because they are the assets of nations. Irrefutable is the fact that trafficking in children represents the ultimate violation of human rights and child rights. Although there are number of legislations, conventions and protocols prohibiting activities associated with trafficking, trafficking continues to fester year after year and be seemingly unabated.

# Use of Computer and Information Technology in Legal Research

***Dr. Pradeep Kumar***[1]
***Dr. Kabindra Singh Brijwal***[2]

## Introduction

Computer and use of information technology is the most emerging tool in the research process. Computer and information technology plays a major role in the field of legal researches. The invention of computers and information technology is one such development. Computer and information technology revolution has influenced all walks of life. These little machines have substantially changed the life style of most individuals and especially of professionals throughout the world.[3]

The use of computer and information technology in the legal research has the following two main reasons. First, the ever growing voluminous and diversified data and case laws, and secondly, the efficiency requirement and time saving functions through adopting more sophisticated technology. Almost all fields of research are relied upon computer and information technology for simplifying, automation, for better understanding aspects of their research work. Various programs, software and applications have eased our way into computing our research process.

Computers primarily help by saving labour associated with analysing data manually. Their application in handling complicated statistical and mathematical procedures, word processing, displaying and graphic presentation of the analysed data saves time and increase speed. The object of this paper is to highlights the Characteristics and significance of computer and information technology in the legal research. And also, emphasis to how important is the use of computer and information technology in the field of legal research.

## Meaning and Definition of Research, Legal Research, Computer and Information Technology

### Research

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[3] Gurjeet Singh, Use of Computers in Legal Profession, *Journal of the Indian Law Institute*, Vol. 39, No. 2/4 (April-December 1997), p. 312.

Research means an act of searching into a matter carefully and closely. The term research consists of two words, '*Re*' & '*Search*'. "Re" means again and again and "Search" means to find out something.[4] Research is a scientific undertaking, aiming to discover new facts or verify old facts, analyse their sequences, interrelationship and causal explanations derived within an appropriate theoretical frame of reference, develop new scientific tools, concept and theory which would facilitate reliable valid study of human behavior. It is done by means of logical and systematised techniques.[5]

**Legal Research**

Legal research is indeed society and determines the economic, social and political development of a nation. Legal research is one of the aspects of study of human behavior, their interactions and attitudes leading to any law under the research study. Legal Research means research is that branch of knowledge which deals with the principle of law and legal institution. Legal research usually refers to any systematic study of legal rules, principles, concepts, theories, doctrines, case laws, legal institutions, legal problems, issues or questions or a combination of some or all of them.[6]

**Computer**

The word compute is derived from the Latin word 'computer', was meaning "arithmetic, accounting". The computer meaning is the digital device that stores information in memory using input devices and manipulate information to produce output according to given instructions.[7]

Technically, a computer is a programmable machine. This means it can execute a programmed list of instructions and respond to new instructions that it is given. Today, however, the term is most often used to refer to the desktop and laptop computers that most people use. When referring to a desktop model, the term "computer" technically only refers to the computer itself not the monitor, keyboard, and mouse. Still, it is acceptable to refer to everything together as the computer.

If you want to be really technical, the box that holds the computer is called the "system unit". Some of the major parts of a personal computer (or PC) include the motherboard, CPU, memory (or RAM), hard drive and video card. While personal computers are by far the most common type of computers today, there are several other types of computers.

Computer is an electronic device for storing and processing data, typically in binary form, according to instructions given to it in a variable program. It is an electronic machine that

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[4] Dr. Pradeep Kumar, Legal Research Methodology & its Importance, *Journal of Legal Studies*, Vol. 3, Issue 2, July 2015, p. 166.
[5] Dr. V. Pauline Young, Scientific Social Surveys and Research, 3rd ed., (New York: Prentice-Hall, 1960).
[6] *Supra Note 4* pp. 167-168.
[7] Available on https://ecomputernotes.com/fundamental/introduction-to-computer/definition-of-computer accessed on 16th June, 2017 at 02:12 pm.

calculates data very quickly, used for storing, writing, organizing, and sharing information electronically or for controlling other machines.

**Information Technology**

The use of computer systems to store, retrieve, send and analysis of data or other information's become essential part of research work. Information technology is the use of computers to store, retrieve, transmit and manipulate data or information by any software.

According to Merriam Webster Information Technology means "The technology involving the development, maintenance, and use of computer systems, software, and networks for the processing and distribution of data".[8]

**Characteristics of Computer**

A computer has three basic components. First inputs device (Keyboard & Mouse), Second a Central Processing Unit (CPU) and third an output device (monitor, Printer Scanner, webcam etc. The important characteristics of a computer are given below:

- Accuracy
- Automatic
- Binary digits
- Diligence
- No Feelings
- No IQ
- Power of remembering
- Speed
- Versatility

**Accuracy**

The computer's accuracy is consistently high. Errors in the machinery can occur but, due to increased efficiency in error-detecting techniques, these seldom lead to false results. Almost without exception, the errors in computing are due to human rather than to technological weaknesses, i.e., due to imprecise thinking by the programmer or due to inaccurate data or due to poorly designed systems.

**Automatic**

Once a programme is in the computer's memory, all that is needed is the individual instructions to it which are transferred one after the other, to the control unit for execution. The CPU follows these instructions until it meets a last instruction which says 'stop programme execution'.

**Binary digits**

[8] Available on https://www.merriam-webster.com/dictionary/information%20technology accessed on 25th June 2017 at 08:30 am.

Computers use only the binary number system (a system in which all the numbers are represented by a combination of two digits—one and zero) and thus operates to the base of two, compared to the ordinary decimal arithmetic which operates on a base of ten. Computers use binary system because the electrical devices can understand only 'on' (1) or 'off' (0).

**Diligence**

Being a machine, a computer does not suffer from the human traits of tiredness and lack of concentration. If two million calculations have to be performed, it will perform the two million with exactly the same accuracy and speed as the first.

**No Feelings**

Computers can never give rise to sensations; they work solely on digital input. A computer could really behave like a terminator because it has no sensations. Computers can not have feelings, because they don't think independently. They don't think at all. They only implement procedures which thinking beings, as we told them to perform it.

**No IQ**

Computers are dumb devices with zero intelligence quotients (IQ). They cannot visualize and thinking what exactly to do under a particular situation, unless they have been programmed to tackle that situation. It doesn't have their own decision-making ability; they don't know how to react in any unfavorable condition. Computer works only according to their programs that are why they have zero IQ.

**Power of Remembering**

A computer can store and recall any amount of information because of its secondary memory/storage every piece of information can write as long as desired by the user and can be recall as and when required even after several years.

**Speed**

Computers can perform calculations in just a few seconds that human beings would need weeks to do by hand. This has led to many scientific projects which were previously impossible.

**Versatility**

Versatility refers to the capability of a computer to perform different kinds of works with same accuracy and efficiency. Computers are versatile machines and are capable of performing any task as long as it can be broken down into a series of logical steps. The presence of computers can be seen in almost every sphere of life like, Educational Institutions, Medical, Railway/Air reservation, Banks, Hotels, Weather forecasting and many more.

**Use of Computers and Information Technology in Legal Research**

Computers have a very important role to play in legal research. For instance, law schools have to generate a variety of written materials for students as well as for other academic purposes,

such as for conferences, meetings, moot-courts, seminars and workshops, etc. Computer assisted legal research or computer based legal research is a mode of legal research that uses databases of court opinions, statutes, court documents, and secondary material. Electronic databases make large bodies of case laws easily available.

The information in fast moving subjects, such as law, management, business, science, social science and technology will become rapidly obsolete, but in the humanities older publications can have lasting value. There will be a wide range of electronic resources and search facilities provided backed up by training sessions and leaflets in the use of these. Being adept at making searches will save you lots of time and frustration, as well as ensuring that you get hold of all the latest information you need. Here are some of the facilities you should investigate by the use of computer and information technology.[9]

**Electronic Catalogue**
Most libraries now have an electronic catalogue accessed through their computer terminals, often accessible online from elsewhere too via the Intra- and/or Internet.

**E-Journals**
These are often catalogued and stored separately to the books and may be available online E-journals like SSC online, Manupatra, west law, jestore etc.

**Electronic databases**
These are computer-based lists of publications, on CD-ROM or on the university Intranet or the Internet. They contain huge numbers of sources, usually searched by using keywords. Some provide only titles, publication details and abstracts, others provide the full text. Citation indexes list the publications in which certain books, articles, have been used as a reference.[10]

The computer programs provide easy to illustrate the measures. The most basic is a summary table of descriptive statistics which gives figures for all of the measures. However, the use of graphical options makes comparisons between variables clearer, some of the simpler being:

**Bar Chat/Graph**
A bar chart or bar graph is a chart or graph that presents categorical data with rectangular bars with heights or lengths proportional to the values that they represent. Bar Chat/Graph shows the distribution of nominal and ordinal variables. The categories of the variables are along the horizontal axis (x axis), the values on the vertical axis (y axis). The bars should not touch each other.

**Line Chart**

[9] Nicholas Walliman, *Research Methods The Basics* (New York: Routledge Publication, 2011) p. 53.
[10] *Ibid* pp. 53-54.

A line chart is a graphical representation of an asset's historical price action that connects a series of data points with a continuous line. This is the most basic type of chart used in finance and typically only depicts a security's closing prices over time.

**Pie Chart**

Shows the values of a variable as a section of the total cases (like slices of a pie). The percentages are also usually given.

**Standard Deviation Error Bar**

This shows the mean value as a point and a bar above and below that indicates the extent of one standard deviation. Charts and diagrams are far easier to understand quickly by the no expert than are results presented as numbers.[11]

The use of computers and information technology are also being considered as valuable tools in law teaching and research. Thus, as a matter of fact, there are so many ways in which computers can be of great help and utility in legal research. For example, every researcher working for a post-graduate degree, an M. Phil/LL.M. dissertation or Ph.D. thesis has to prepare a synopsis/ research proposal, project, bibliography etc.

In almost all the cases, a post-graduate student writing dissertation for LL.M. or a doctoral scholar writing a thesis for Ph.D. has to periodically hand over the written chapter drafts to his/her supervisor for any comments, corrections and suggestions, etc. A research scholar has to write the entire draft and submit to his/her supervisor. If the supervisor suggests substantial modifications and asks for the revised draft, the scholar has to submit the same, too. This is obviously quite taxing as well as time-consuming for a researcher.[12]

However, if a researcher has access to computer facilities even in an institution, it can make a lot of difference. For example, once the text of the chapter is typed in the computer, it is stored there in its memory. One may make any number of modifications in such text and it stays there. One can print the text as many times as one desires.[13] The corrections in research documents can be carried out very easily and, of course, very frequently.

Another point which deserves mention here is that research supervisor work on the same computer in the institution own PCs respectively, as most academics do in countries researcher need not even print out the entire chapter draft. Transferred on a small computer disk/floppy and handed would in turn insert the same floppy in his/her computer, corrections and return the floppy to the researcher. On the computer, the researcher can note down the comments made carry out the necessary corrections in the text. This saves money.

There is another benefit of computer-assisted legal research and that is, a researcher can exchange the floppies, CD DVD/pen drive or via email id with his/her counterparts and

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[11] *Ibid* p. 118.
[12] *Supra note* 3 at p. 314.
[13] *Ibid.*

contemporaries, too.[14] That way it facilitates the flow of information amongst the researchers working in the same field or on related topics of research. This also leads to division of labour. One research scholar can work on one topic and another can work on another and they can exchange the information collected by them respectively. This applies to preparation of bibliographies also. Such exercises save half the time and serve double the purpose.[15]

In the normal practice, when a Ph.D. scholar is awarded a degree, she/he has to make substantial modifications in the text mostly on the lines suggested by the examiners and later on by the publishers. Once again, this is a very time consuming and taxing problem for the scholars who are apparently too much exhausted after three to four years of intensive work for their thesis.[16]

Therefore, most scholars are no more interested in undertaking such an exercise. As a result thereof, sometimes a work of an exceptionally good quality and high standard, which could have easily been published as well as accepted and appreciated by the academic world and the later researchers, continues to gather dust in the libraries. On the other hand, if the text of the work is already there on the computer, no such problem arises.[17]

Computer and Information Technology save labour, time and money on composing and typesetting the entire manuscript. Obviously, the Article, book, research can be published in much less time than it would otherwise have been possible.[18]

**Some Important Legal Software Tools**

Numbers of software are now available to perform the mathematical or statically part of the research process. The researchers using various statistical methods software like CaseBox, Casemaker, CiviCRM, Jarvis Legal, Legal Suite, NCSC, Questia, SPSS, and STATA, etc. are some of the widely used.

**CaseBox**

CaseBox is an open-source, self-hosted document management, records management, and collaboration software solution.

**Casemaker**

Casemaker is a research tool available for free to all members of bar associations who join the Casemaker Consortium. After each bar association pays a license fee, there are no additional costs. No individual subscriptions are currently available.

**CiviCRM**

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[14] *Supra note* 3 at p. 315.
[15] *Supra note* 3 at p. 315
[16] *Supra note* 3 at p. 315.
[17] *Supra note* 3 at p. 315.
[18] *Supra note* 3 at p. 315.

It's a modern replacement to the (formerly listed) open-source Legal Case Management System, which was more than ten years out of date and in need of a serious update.

**Jarvis Legal**

Jarvis Legal is another LPMS that offers an unlimited free version. The free version's only caps are their case and data caps. You can have up to five simultaneous cases and use up to 5 GB of storage space. And 5 GB of data isn't too shabby in terms of storage.

**Legal Suite**

Looking for full, comprehensive law practice management software on an open-source platform? Legal Suite offers case management, document management, time tracking, and legal billing.

**NCSC (National Computer Security Center)**

The National Computer Security Center (NCSC) is a U.S. government organization within the National Security Agency (NSA) that evaluates computing equipment for high security applications to ensure that facilities processing classified or other sensitive material are using trusted computer systems and components.

**Questia**

Offering more than 10 million articles from thousands of publishers, Questia is a research tool which provides services for a much smaller fee than the larger databases. Check out the specific books and journals that Questia offers to see if they have the ones you need. If so, you can often save a lot of money accessing them here.

**SPSS (Statistical Package for the Social Sciences)**

SPSS Statistics is a software package used for interactive or batched, statistical analysis. SPSS is a widely used program for statistical analysis in social science. It is also used by market researchers, health researchers, survey companies, government, education researchers, marketing organizations, and others.

**STATA**

Fast, accurate, easy to use, it is a complete, integrated software package that provides all your data science needs data manipulation, visualization, statistics, and automated reporting. STATA is a general-purpose statistical software package created in 1985 by Stata Corp.

**Conclusion**

To conclude, computer and information technology are useful tools that make the research process easier and faster with accuracy and greater reliability and fewer errors. Computer is useful not only for statistical analyses, but also to monitor the accuracy and completeness of the data as they are collected. Now in 21$^{st}$ century almost all fields of research are relied upon computer and information technology for simplifying, automation, for better understanding aspects of their research work. Use of computer in research in law is so extensive that it is difficult to conceive today legal research without computer. Many research studies cannot be

carried out without use of computer particularly those involving complex computations, data analysis and sampling.

The information and data stored in computer by the researcher can be reutilized for the purposes of publication of research papers also. For instance, there are six or seven chapters of a thesis and these are contained in six or seven files. If the researcher so desires, he can modify certain things and each chapter of the dissertation or thesis can turn into a full-research paper. The researcher does not need to re-type the paper. Already a typed one and a copy can be made separately.

All new developments, new case laws etc., can be inserted in the paper to make it absolutely up to date. Similarly, the research scholars in these countries are permitted and rather encouraged to get some part of their research work published in the form of articles and research papers in journals even before the final submission of an essay/dissertation/thesis. The computer does not think; it can only execute the instructions of a users. If poor data or faulty programs are introduced into the computer, the data analysis would not be worthwhile. Thus, computers and information technology play a very significant role in legal research.

# Justifying IPR: Exclusive Private Rights Versus Public Interest

***Dr. Shiv Shankar Singh***[1]

## Abstract

*Intellectual property is a form of knowledge to which societies have decided that it can be assigned like specific property rights. Intellectual property rights have come to occupy an increasingly important place in the world today. Intellectual property is a set of principles and rules that is differential intangible assets susceptible of being used in commerce. Inventions often extend the boundaries of human knowledge. Patents have direct impacts on accessibility and affordability for the development of new drugs. Problems of poor people "pay-per-use" society at a time of near zero cost to disseminate knowledge. Copyright is form of intellectual property protection. Copyright protects works from being copied without permission. Challenge to ensure that the laws of copyright adapt to the new technological environment. It is important to treat "copyright-and-the-Internet" not as a merely a legal issue, but also as a social one. Right of copyright owners to equitable remuneration should always be balanced with the interests of society at large. Biological diversity was considered to be an intellectual property. The local communities, farmers, fisher folk and indigenous people have retained traditional knowledge in managing their biological resources and these people have dependent on biodiversity and biological resources for their survival and livelihoods, it is clear on how local indigenous communities will benefits from biodiversity.*

**Keywords:** IPR, Private Rights, Public Interest, pay-per-use, Copyright, Biological diversity.

## Introduction

Intellectual property is a form of knowledge to which societies have decided that it can be assigned like specific property rights. Intellectual property is widely perceived as a key policy tool to promote public interest, innovation and technological progress. A patent is an exclusive right awarded to an inventor to prevent others from making, selling, distributing, importing or using the invention, without license or authorisation, for a fixed period of time (India stipulates 20 years minimum from filing date). Patents are granted to encourage inventions and to secure that the inventions are worked on a commercial scale and to the fullest extent.

The digitalisation of creative content poses a more serious challenge to copyright law than did earlier episodes of technological advance. Copyrighted works in digital form can be flawlessly and inexpensively reproduced and instantaneously distributed worldwide. Material on the Internet like music, videos and photographs may be protected by copyright. Material is freely available. Copyright protections have changed over time in response to internal and external economic and technological contexts. The technological possessed by millions of citizens has capacities for reproduction and distribution that were once reserved for the giants of industry. The fact that material is available to be viewed on a website, or is accessible using P2P

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software or networks over the internet does not, by itself, mean that you can use it as you wish. If the material is an infringing copy, or the person hosting the site was not in a position to give permission on behalf of the copyright owner. The evolution of copyright has been closely linked to technological development. Digital technology has made copyright enforcement difficult to achieve. It is necessary to balance between easy infringement and expensive enforcement.

Intellectual property and its impact on economic and social development will continue to be an arena of contested s social policy. This paper highlights how private rights versus public interest have going to affect the access to life saving patented medicines which are priced beyond the reach of most people in developing countries and also highlight the copyright challenges brought about by the Internet, the legal instruments that are available to address them today. This paper also discussed on the key issues and debates in biological diversity and intellectual property rights mechanisms in India and protecting rights over biological resources and associated traditional knowledge. It also assesses, the potential challenges and the fate of access to genetic resources and benefit sharing (ABS). The ramifications of intellectual property, viz. traditional knowledge, access to genetic resources and benefit sharing, public interest and other like issues are discussed.

**Concept of Intellectual Property Rights**

Intellectual property (IP) is legal property rights over creations of the mind, both artistic and commercial, and the corresponding fields of law.[2] Intellectual Property is a critical component of our present and future success in the global economy. Intellectual property rights have come to occupy an increasingly important place in the world today. The expression 'intellectual property' itself connotes a string of rights available for the protection and exploitation of technology.

Intellectual property is intangible property that is the result of creativity (such as patents or trademarks or copyrights). Intellectual property is any intangible asset that consists of human knowledge and ideas. Some examples are patent, copyrights, trademarks, geographical indication and biological diversity. Most such assets cannot be recongized on a balance sheet when internally generated, since it is very difficult to objectively value intellectual property assets. They can, however, be included in a balance sheet if acquired, which allows a more accurate valuation for the asset (that is, the acquisition cost.[3]

IP is widely perceived as a key policy tool to promote public interest, innovation and technological progress. IP is very important for all countries in creating a positive environment for social, economic and cultural development. IPRs have been designed to benefit society by providing incentives to introduce new inventions and creations. Therefore, their purpose is not the exclusive benefit of individuals/corporations but of the public community at large. Finding the right balance between the interests of creators, users and the

[2] Available on en.wikipedia.org/wiki/Intellectual_Property_Rights
[3] Available on http://www.investorwords.com/2526/intellectual_property.html

public is difficult. It is particularly difficult for countries where some industries may benefit from high levels of IP protection, but others may not.

Intellectual property is product of the intellect that has commercial value, including copyrighted property such as literary or artistic works, and ideational property, such as patents, appellations of origin, business methods, and industrial processes.[4] Intellectual property shall include rights relating to:- 'literary, artistic and scientific works, performances of performing artists, phonograms and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.'[5] In *ICAI Accounting Research Foundation & Anr. v. Director General of Income Tax (Exemptions) & Ors.*,[6] the court held the industry based on high research and knowledge content gives rise to various types of intangible assets like patents, trademark, designs, intellectual property rights, technical know-how and human resources.

The Bombay High Court held that[7] manage the endorsements, events, public appearances, social/charity events, entertainment event, sports management and marketing, internet marketing, radio interviews, brand, all intellectual property rights, public relations activities, broadband publicity, worldwide merchandising rights, legal rights. In *Time Warner Entertainment Co., L. P. & Ors. v. RPG Netcom & etc.*,[8] court held if the object of copyright is not to create any legal or intellectual property rights in the idea but in the final object or the work which is created as a result of the effort made.... It is a remedy for invasion of right to property in form of business reputation and goodwill. Goodwill and business reputation is a proprietary right capable of protection.

Countries generally have laws to protect intellectual property for two main reasons. One is to give statutory expression to the moral and economic rights of creators in their creations and to the rights of the public in accessing those creations. The second is to promote creativity, and the dissemination and application of its results, and to encourage fair trade, which would contribute to economic and social development.[9]Intellectual property which gives legal protection is referred to as IPRs. When we speak of IP rights, we refer to controlling the way IP is used, accessed or distributed. The goal of IPRs protecting and rewarding in inventions, technologies, artworks, music and literature art, industry etc. while allowing consumers to enjoy the resultant products and services. While these continue to play an important role in business, resource-intensive growth is being replaced by economic development based on

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[4] Available on http://www.thefreedictionary.com/intellectual+property.
[5]The World Intellectual Property Organization (WIPO), concluded in Stockholm on July 14, 1967 Article 2(viii), http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch7.pdf.
[6] 2010 TAX. L. R. 88 (Delhi High Court).
[7] *Percept Talent Management Pvt. Ltd. and Anr. v. Yuvraj Singh and Anr.*, 2008 (4) AIR Bom.85.
[8] AIR 2007 Delhi 226.
[9] Available on http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html.

knowledge, innovation and creativity. Further, at the level of the individual, the digital age has exponentially increased the number of people who can become innovators and creators.

**Private Rights versus Public Interest**

The public interest is an old but dynamic concept which has changed in meaning overtime and has different dimensions. Aristotle, said that "even supposing that it were best for the community to have the greatest degree of unity, this unity is by no means proved to follow from the fact 'of all men saying "mine" and "not mine" at the same instant of time,' which, according to Socrates, is the sign of perfect unity in a state. . . That which is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest. . . Everybody is more inclined to neglect the duty which he expects another to fulfill. . ."[10]

The public interest motives of actors could be examined from a community, national or international perspective. The public interest is such as education and culture and as a driver of economic growth and an instrument for promoting social cohesion. Public interest is promotes human rights and corporate governance including in the IP industry.

Intellectual property is at the core of partnerships and will become increasingly important in the management of the knowledge commons. Institutions working for the "public good" operate at the nexus of public and private and should take IP management more seriously as a critical component in any strategy aimed at directing innovation to the poor.

In the age of the knowledge economy, the efficient and creative use of knowledge is a key determinant of international competitiveness, wealth creation and improved social welfare. "An effective IP system embedded within a national strategy which anchors IP considerations firmly within the policy-making process will help a nation to promote and protect its intellectual assets, thereby driving economic growth and wealth creation."[11]

Art. 7 of the TRIPS Agreement provides that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

Different views within countries and among groups of countries. Balancing the interests is not a purely economic calculation. It is an inherently political exercise which has important social implications. Art. 27.1 of the TRIPS provides that patents shall be available and patent rights enjoyable without discrimination as to the field of technology); and Art.7 the protection and enforcement of IPRs should contribute to the promotion of technological innovation and users

[10] *Aristotle, Politics, II.*
[11] Kamil Idris, WIPO Director General.

of technological knowledge and in a manner conducive to social and economic welfare, and to the balance of rights and obligations.

Members have right to adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development. Measures may be needed to prevent the abuse of intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement.[12]

TRIPS can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and promote access to medicines for all (par. 4) Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted (par. 5.b). Each Member has the right to determine what constitutes national emergency or other circumstances of extreme urgency (par. 5.c).[13]

The goal of an IP is the creation, ownership and management of IP assets to meet national needs and to increase economic growth. An IP is a set of measures formulated and implemented by a government to encourage and facilitate effective creation, development and management of intellectual property. It outlines how to develop infrastructures and capacities to support inventors of IP to protect, develop and exploit their inventions. An IP may also be defined as a comprehensive national document which outlines how all the policy developments and implementation take place in a coordinated manner within a national framework.

The development of economy, the restriction of such factors as energy, water, minerals, land, transportation, environment protection and ecology on the development of economy and society has become more and more prominent.

**Patent and Public Interest**

Intellectual property is a form of knowledge to which societies have decided that it can be assigned like specific property rights. Inventions often extend the boundaries of human knowledge. Patents have direct impacts on accessibility and affordability for the development of new drugs. Problems of poor people "pay-per-use" society at a time of near zero cost to disseminate knowledge.

A patent is an intellectual property, which if properly utilized, is an asset that reaps monetary benefits for its assignee for the next twenty years from the date of filing the application. The property right provided in a patent is quite different from what we typically think of when we own property. What is granted is not the right to make, use, offer for sale, sell or import, but the right to stop others from making, using, offering for sale, selling or importing the invention.

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[12] Article 8 of the TRIPS Agreement, 1994.

[13] Separate Doha Declaration on public health- adopted on 14/12/2001; https://www.wto.org/english/res_e/booksp_e/ddec_e.pdf.

A patent is a set of exclusive rights granted by a state (national government) to an inventor or their assignee for a limited period of time in exchange for a public disclosure of an invention and protect an invention by ensuring that no other person may make, use, distribute or sell any commodity which uses this product or process. The Court of England, too, in *Chiron Corporation v. Organon Technika Ltd*[14] has justified the patent system in pragmatic words stating: 'it is generally accepted that the opportunity of acquiring monopoly rights in an invention stimulates technical progress in at least four ways. First it encourages research and invention; secondly, it induces an inventor to disclose his discoveries instead of keeping them a secret; thirdly, it offers a reward for the expense of developing inventions to the state at which they are commercially practical and, fourthly, it provides an inducement to invest capital in new lines of production which might not appear profitable if many competing producers embark on them simultaneously' In *Bishawanath Prasad Radhey Shyam v. Hindustan Metal Industries*,[15] the Supreme Court said that 'the object of patent law is to encourage scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or the product patented for a limited period stimulates new inventions of commercial utility. The price of the grant of monopoly is the disclosure of the invention at the Patent Office, which after expiry of the fixed period of monopoly, passes into the public domain.'

WTO's Trade-Related Intellectual Property Rights (TRIPS) agreement provides that "this requirement may be waived by a Member in the case of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly."[16] Compulsory licenses and public non-commercial use licenses issued pursuant to Art. 31 can be granted for local production or for importation. Right to import generics is illusory because products produced pursuant to a compulsory license must be "predominantly for domestic use"[17]. Alternatively, it might means that production has to predominantly benefit local consumption. The only exception to this rule arises when licenses are issued to remedy anti-competitive practices.

The TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. "We affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all. [18] We recognize that WTO Members with

[14] (29 [1995] FSR).
[15] (1979) 2 SCC, 511.
[16] Article 31(b) of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, 1994.
[17] *Ibid* Art. 31(f).
[18] Article 4 of the Doha Declaration on the TRIPS Agreement and Public Health, Doha, Qatar Nov. 14, 2001.

insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002."[19] According to section 92A (1) of the Patent (Amendment) Act 2005 in India the government has option to issue a compulsory licence on life saving drug which could bring down its price. Compulsory licence shall be available for manufacture and export of patent pharmaceutical products to any country having insufficient or no manufacturing capacity in the pharmaceutical sector for the concerned product to address public health problems, provided compulsory licence has been granted by such country.

Drug innovation is expensive and the inordinately long drawn out approval process must be compensated through market mechanisms to allow pharma companies to recoup such investments. Compulsory licensing and government use of a patent without the authorization of its owner can only be done under a number of conditions aimed at protecting the legitimate interests of the patent holder. If a compulsory licence is issued, adequate remuneration must still be paid to the patent holder. Compulsory licensing … must usually be granted mainly to supply the domestic market.

Compulsory licensing as a policy mechanism can be used to address a number of situations in the context of public health including: high prices of medicines, anti-competitive practices by pharmaceutical companies, failure by pharmaceutical patent holders to sufficiently supply the market with needed medicines, emergency public health situations, and, the needs for establishing a pharmaceutical industrial base.

In *F. Hoffman-La Roche Ltd., v. Cipla Ltd*.[20] the Court, rejecting the application from Roche for a temporary injunction preventing Cipla from manufacturing and selling at very low price the generic version of the cancer drug erlotinib, the Court observed: that is of the opinion that as between the two competing public interests, that is, the public interest in granting injunction to affirm a patent during the pendency of an infringement action. However, the injury to the public which would be deprived of the defendant's product which may lead to shortening of lives of several unknown persons, who are not parties to the suit, and which damage cannot be resituated in monetary terms, is not only uncompensatable, it is irreparable.

In *Bayer Corporation, United States of America v. Union of India and others*,[21] the court held that the section 84 of the Act are in public interest is in view of the fact that the entire basis of grant of compulsory licence is based on the objective that patented article is made available to the society in adequate numbers and at a reasonable price. These are matters of public interest. The law of patent is a compromise between interest of the inventor and the public. In this case, we are concerned with patented drug i.e. medicines to heal patients suffering from Cancer.

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[19] *Ibid* Art. 6.
[20] 2008 (37) PTC 71 (Del.).
[21] AIR 2014 Bom. 178.

Pharmaceutical industry was largely restricted to exorbitantly priced life-saving drugs for cancer and HIV. India, France, Germany, Thailand, Mexico and Chile have local laws that allow their patent offices and anti-trust courts to waive patent rights and let cheaper versions of the medicine be manufactured on payment of royalty. India, Brazil, S. Korea, and China – can produce base ingredients and finished products at a fraction of US prices.

Pharmaceutical companies are for-profit institutions. It is a reminder to pharma industries of their responsibility towards non-wealthy patients. The question is should a drug be described as "blockbuster" by a billion dollar label or a billon patients label? But the question is how much should this return on investment be?[22] Patents have direct impacts on accessibility and affordability. They have the potential to improve access by providing incentives for the development of new drugs as well as to restrict access because of the comparatively higher prices of patented drugs.[23] Problems of poor people "pay-per-use" society at a time of near zero cost to disseminate knowledge.

Actually, they, the US and EU, ought to learn from us. They are advised to change their patent laws along the lines of the Indian one because patents should be seen as monopolies, to be given sparingly only for genuine innovations where the public benefit clearly exceed the monopoly cost. This means setting a high bar for innovation. High standards are desirable for patents, as for everything else. India's patent law has been hailed as one of the most progressive for safeguarding public interest.

**Copyright and Public Interest**

Copyright owners have exclusive rights to make copies, create derivate works, distribute, display and perform works publicly. Copyright law protects the owner of property rights against those who copy or otherwise take and use the form in which the original work was expressed by the author. Copyright is a legal device that provides the creator of a work of art or literature, or a work that conveys information or ideas, the right to control how the work is used.[24] Copyright law protects only the form of expression of ideas and not ideas themselves. The ideas in the work do not need to be original but the form of expression must be an original creation of the author. Copyright holder has some basic rights such as the right to reproduce, distribute, display, perform, and create derivative works. Copyright law serves to provide protection and financial incentives for creations or discoveries in science and useful art forms including the visual, aural, and visual arts.

After the advent of printing and multimedia technology for storage and communication, the concept of copyright has changed and become more complex and important. There is a growing chorus of criticism of the current copyright law and IP system that it fails to benefit

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[22] Fight Medical Apartheid, Kiran Mazumdar Shah, the Times of India, Lucknow, May 30, 2014.

[23] Philippe Cullet, Human Rights and Intellectual Property Protection in the TRIPS Era, available - http://www.ielrc.org/content/a0702.pdf.

[24] *Stephen Fishman, Esq.The WIPO Copyright Handbook, 1996.*

artists and creators sufficiently, while it provides disproportionate benefits to the large corporations that dominate the music industry i.e. the major record companies.

USA Copyright Acts of 1976 provides that "©" the word "Copyright," or the abbreviation "Copr.", year of publication, and name of the copyright owner. "©" insures that the person who created something … whether a book or a piece of music… is reimbursed for his intellectual work. If there were no copyright protection, there would be no economic incentive to create these works. A copyright is a set of legal rights that an author has over his work for a limited period of time. Copyright covers everything from using images or sound files from the web to photocopying.

Copyright laws are currently tailored to printed books. Electronic publishing brings up new questions in relation to copyright. Electronic publishing may be more collaborative, often involving more than one author, and more accessible, since it is published online. This opens up more doors for plagiarism or theft.[25] Web publishing is technological safeguards on unauthorized copying. Does third party site have terms of use prohibiting unauthorized use of digital content purchased?

Computing or networking is a distributed application architecture that partitions tasks or workloads between peers. Peers are equally privileged, equipotent participants in the application. They are said to form a peer-to-peer network of nodes. Peer-2-Peer Internet technology is largely used for unlawful file-sharing, widespread sharing of files, music etc.

P-2-P file sharing, the most remarkable recent technological innovation, has enabled the global community to build the greatest library of recorded music in the history of the world, and major innovation. Unauthorized file swapping, posing major challenge to established music industry and artists / creators who wish to be fairly compensated for their creativity. Unauthorized use has had a major disruptive impact on industry. P-2-P has potential to generate significant new value in industry if unauthorized use can be reduced and artists get paid.

Internet presents numerous fascinating conceptual issues. For example, the act of browsing the Internet itself necessitates the copying of copyrighted material. In *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry*,[26] the court found that browsing an unauthorized copy of a document posted on the Internet was in itself an infringement.

In *UMG Recordings, Inc. v. MP3, Inc.*,[27] the case concerned MP3.com's unauthorized duplication of essentially every music CD ever made for the purposes of launching a service entitled My.MP3.com, which allowed users to access their private music collections online from anywhere in the world. MP3.com defended, in part, that consumer protection concepts

[25] Available on http://en.wikipedia.org/wiki/Electronic_publishing.
[26] 53 U.S.P.Q.2d 1425 (D. Utah 1999).
[27] 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

supported MP3.com's unauthorized use of the intellectual property of the major record labels and music publishers. The court held that "stripped to its essence, defendant's 'consumer protection' argument amounts to nothing more than a bald claim that (the) defendant should be able to misappropriate the plaintiff's property simply because there is a consumer demand for it."

Perhaps the most high-profile example of copyright issues on the Internet is the Napster file-sharing case. Napster was a piece of software that enabled subscribers to locate files on the hard drives of other subscribers and download them. Those files were almost always copyright protected audio files of popular music. This was the first major case to address the application of copyright laws to peer-to-peer file-sharing. In *A&M Records, Inc. v. Napster Inc*.,[28] 9th Circuit Court of Appeals held that the file sharing activities of Napster users was a copyright infringement and that Napster was liable for contributory infringement for enabling and encouraging such infringement. Enforcement of copyrights on the internet requires service providers to post copyright material and may reveal the identity of a user who posts material which infringes a copyright.

In *Re Aimster Copyright Litig.*[29], this case appears to be yet another Napster-esque case, where the recording industry sued the provider of free music downloading software controlled by a centralized computer server. The court noted that software providers that utilize a centralized server maintain a (limited) relationship with their users. The court held that "to the recording industry, a single known infringing use brands the facilitator as a contributory infringer." The court found another peer to peer file sharing network secondarily liable.

In *Metro Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.,*[30] the Court held that defendant P2P file sharing companies Grokster and Streamcast (maker of Morpheus) could be sued for inducing copyright infringement for acts taken in the course of marketing file sharing software. The case has been called the most important intellectual property case in decades. The absence of any central control over how users used the P2P systems in question meant that, unlike Napster, there was no liability on the suppliers for vicarious or contributory infringement of copyright. Court farther held that one who distributes a device with the object of promoting its use to infringe copyright, as shown by the clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." It has to be shown that the distributors of the program have advertised and/or otherwise induced its use for copyright infringement; if this intent can be shown, additional contributory aspects may be relevant.

Grokster announced that it would no longer offer its peer-to-peer file sharing service. The notice on their website said, "The United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion picture

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[28] 239 F.3d 1004 (2001): *284 F.3d 1091 (9th Cir. 2002).*
[29] 334 F.3d 643 (7th Cir. 2003).
[30] 125 S. Ct. 2764 (2005).

and music files using unauthorized P2P services is illegal and is prosecuted by copyright owners." Grokster was forced to pay $50 million to the music and recording industries for damage by P2P networks.

License for file-sharing would ensure that artists and other copyright owners get compensated more fairly and on a regular basis. But the issue of fairly compensating holders of music-related rights will likely be resolved in an industry-specific manner (as it has been in the past), rather than resulting in a wholesale overhaul of copyright law.

Around the world in 2006, an estimated five billion songs, equating to approximately 38,000 years in music were swapped on peer-to-peer websites, while 509 million songs were purchased online. The same study which estimated these findings also found that artists that had an online presence ended up retaining more of the profits rather than the music companies.[31]

In November 2009, the U.S. House of Representatives introduced the Secure Federal File Sharing Act, which would, if enacted, prohibit the use of peer-to-peer file-sharing software by U.S. government employees and contractors on computers used for federal government work. The bill has died with the adjournment of 111th Congress.[32]

According to DMCA a service provider shall be liable for monetary relief, or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system; the storage at the direction of a user of material that resides on a system; the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, or network controlled or operated by or for the service provider. A service provider shall not be liable for injunctive. These are following:[33]-

a) the material is made available online by a person other than the service provider;
b) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
c) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
d) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
e) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
f) Does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.

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[31] Available on http://en.wikipedia.org/wiki/Legal_aspects_of_file_sharing
[32] *Ibid.*.
[33] 17 U.S. Code 512.

In *Lenz v. Universal Music Corp.,*[34] plaintiff posted video on YouTube of child dancing to Prince's "Let's Go Crazy." Universal Music sent notice and YouTube removed it, but plaintiff sent counter notice asserting fair use and YouTube reposted the video. Plaintiff sued Universal for misrepresentation under 512(f) because defendant should have known that the video was not infringing, and the court agreed. If ISPs comply with these conditions, they will not be liable for any monetary relief, and will have limited liability on injunctive relief. Court will consider the burden on the parties, the magnitude of the harm if no injunctive relief, whether injunction is technically feasible or effective, and whether there are other less burdensome means of preventing access to the materials.

In *Viacom International, Inc. v. YouTube, Inc.*,[35] a video-sharing site owned by Google, alleging that YouTube had engaged in "brazen" and "massive" copyright infringement by allowing users to upload and view hundreds of thousands of videos owned by Viacom without permission. The court held that the DMC Act's "safe harbour" provisions shielded Google from Viacom's copyright infringement claims. In 2012, on appeal to the United States Court of Appeals for the Second Circuit, it was overturned in part. On 2013, District Judge Stanton again granted judgment in favor of defendant YouTube. An appeal was begun, but the parties settled in March 2014.

Indian judiciary seems to be shifting the burden of identifying infringement on ISPs which essentially is the obligation of the copyright owner ignoring the fact that ISPs lack both the institutional and logistical capacity to assimilate information of infringement across millions of Uniform Resource Locator (*URLs*) that can be accessed through their networks.[36] In *Kamlesh Vaswani v. Union of India*[37] the Apex Court held that without adequate legal support from the government or judiciary, ISPs cannot ban websites. Though the issue did not involve copyright infringement, however, the argument of the ISPs that ″they cannot be made liable for what people do on their networks just like telecom companies are not liable for peoples' conversation″ seems well founded and applicable even in instances where they are not only held responsible for copyright infringement but also obligated to identify it.

Anyone with access to Internet and scanner can now copy a work and make it available to millions of users for download and print. The unauthorized copying of analog signals posed a modest threat to copyright owners because *copies-of-copies-of-copies*… degrade rapidly. The ability to copy digital material perfectly means that a copy is as good as an original. The World Intellectual Property Organization (WIPO) allows the fair use of material in a digital environment and provides a balance between the rights of authors and education and research. The Digital Millennium Copyright Act (DMCA) "prohibits gaining unauthorized access to a

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[34] 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008).
[35] No. 07 Civ. 2103.
[36] Indian Regulatory Framework For Internet Service Providers: Onerous Yet Inadequate, http://www.mondaq.com/india/x/337668/Copyright/Indian+Regulatory.
[37] (2014)6SCC 70.

work by circumventing a technological protection measure put in place by the copyright owner …".

Copyright owners have exclusive rights to make copies, create derivate works, distribute, display and perform works publicly. If you want to use a protected work, you either need permission or coverage under one of the law's exemptions such as fair use. Under the fair use limited portions of a work for purposes such as commentary, criticism, news reporting, teaching and scholarly reports is carried. There are no specific rules about the number of words, the number of musical notes, or the percentage of a work. But fair use is a legal defence, not a right. Fair use exemption created by 17 U.S. Code Section 107 of the Copyright Law these is four factor test for "fair use": (1) purpose and character of use; (2) nature of work; (3) amount and substantiality of portion used; (4) effect on marketplace value. As per Article 13 of the TRIPS agreement, these exceptions must confine to "special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder".

Section 14 of the Copyright Act, 1957, grants a bundle of exclusive rights such as the right to reproduction on copyright owners for commercial exploitation of the work. Copyright's basic rationale is that there should be promotion of creativity through sufficient protection; and at the same time it also caters for dissemination of knowledge and access to copyright material through the doctrine of fair dealing. Section 14 has constituted infringement unless it is listed under Section 52 as an act not constituting infringement. The Indian copyright law uses the term 'fair deal' whereas the U.S.'s copyright law adopts 'fair use'. Since the term 'fair dealing' is not defined in the Act, the judiciary determines its scope on a case by case basis. The principle behind such statutory exceptions to infringement is one of fair dealing or fair use of the copyrighted work, which provides balance between the copyright owner's exclusive rights, and the wider public interest. The fair use is to be determined by considering whether the part reproduced or copied is substantial and amounts to plagiarism.[38]

Section 52 of Indian Copyright (Amendment) Act, 2012 has fair use clauses which provide acts that will not be infringement of copyright. Certain amendments have been made to extend these provisions in the general context. Act has been amended to provide fair dealing with any work, not being a computer programme, for the purposes of private and personal use, including research, criticism or review, the reporting of current event and current affairs, including the reporting of a lecture delivered in public,[39] the reproduction of any work for the purpose of judicial proceeding,[40]publication of any work prepared by the secretariat of a legislature,[41]the reproduction of any work in a certified copy made or supplied in accordance with any law for the time being in force,[42] the recitation in public of reasonable extracts from

[38] Singh, Dr. S. S., "Intellectual Property Rights Laws," p.202.
[39] Sec. 52 1(a) of the Copyright (Amendment) Act 2012.
[40] Id Sec. 52 1(d).
[41] Id Sec. 52 1(e).
[42] Id Sec. 52 1(f).

a literacy or dramatic work,[43]reproduction of any work- by a teacher in the course of instruction or as a part of the questions to be answered in an examination or in answers to such questions,[44]the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution,[45]the causing of a recording to be heard in public by utilising it,[46] the performance of a literary, dramatic or musical work by an amateur club or society,[47] the reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social topics,[48] the storing of a work in any medium by electronic means by a no commercial public library,[49] etc.

The Supreme Court Justices Ranjan Gogoi and N. V. Ramana held that[50] no one could have copyright over judgments delivered by the apex court. It could be reproduced in its raw form by anyone without the risk of being accused of infringing copyright, the bench said, settling a long-standing dispute. It also said judgments published by Eastern Book Company "are nothing but a verbatim reproduction of judgments reported by the Supreme Court website". It merely clarified that there was no copyright over judgments uploaded on the judgment section of the Supreme Court's website and that all were free to use it as a raw source. The apex court will permit new players in the legal publishing field to print SC judgments in book format and challenge the monopoly of a few firms.

In *the Chancellor, Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services*,[51]the Delhi High Court held that "in the course of instruction" would include "reproduction of any work while the process of imparting instruction by the teacher and receiving instruction by the pupil continues during the entire academic session... imparting and receiving of instruction is not limited to personal interface between teacher and pupil but is a process commencing from the teacher readying herself/himself for imparting instruction, setting syllabus, prescribing text books, readings and ensuring, whether by interface in classroom/tutorials or otherwise..." Hence it would be fair dealing if the students click photographs of each page of portions of the prescribed book. The Court further held that making course packs for suggested reading for students by photocopying portions of various prescribed reference books does not violate the copyright of the publishers. Undoubtedly, the judgment, which is a breakthrough in the Indian copyright jurisprudence, is a major victory to access to education in a developing country like India. It will certainly have a far-reaching impact in academic circles as well as on the copyright industry.

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[43] Id Sec. 52 1(g).
[44] Id Sec. 52 1(i).
[45] Id Sec. 52 1(j).
[46] Id Sec. 52 1(k).
[47] Id Sec. 52 1(l).
[48] Id Sec. 52 1(m).
[49] Id Sec. 52 1(n).
[50] Times of India, Lucknow, 25/11/2016.
[51] CS(OS) 2439/2012; December 9, 2016; www.academics-india.com/Rameshwari%20Photocopy%20Services%20case.pdf.

Copyright must increase and not impede the harvest of knowledge. Copyright is to motivate the creative activity of authors in order to benefit the public. Copyright holders invest considerably in creating works. Section 52 as a license for reproducing everything prescribed in the suggested reading. Access to education itself is a challenge none of the students can be expected to purchase expensive textbooks, especially when syllabi prescribe certain portions from various books. Copyright protected materials can be used in distance education—on websites and with other digital means—without permission from the copyright owner and without payment of royalties. There can be a copyright infringement even if the source is properly acknowledged. In an academic environment, a violator can also be subject to academic discipline.

Copyright laws are to balance public and private interests in recent years. Reproduction of copyrighted books for educational purpose as infringement was "wrong." Under the copyright Act, 1957, there are exemptions on "fair use" of work including educational propose from the purview of infringement. The use of reproduced copyrighted books by student was a "reasonable educational needs" and should not be treated as infringement. Some intellectual property experts said that the supremacy of social good over private property.

**Benefit-sharing of Genetic Resources:**

Intellectual property is protection of biodiversity, through access to genetic resources and benefit sharing and traditional knowledge. The Convention on Biological Diversity (CBD) is the first global comprehensive agreement to address all aspects of biological diversity, including conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of benefits arising from its use. The "Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization" (Nagoya Protocol) is an international instrument adopted on 29 the October 2010 under CBD. The Protocol is adopted for the access and benefit sharing of genetic resources under the CBD.

Benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the party providing such resources, that is, the country of origin of such resources or a party that has acquired the genetic resources in accordance with the Convention. Such sharing shall be upon mutually agreed terms. Parties shall take legislative, administrative or policy measures, as appropriate, to implement this principle. Benefits may include monetary and non-monetary benefits. Additional provisions may be made for benefit-sharing with regard to genetic resources that are held by indigenous and local communities as well as traditional knowledge associated with genetic resources.[52] It has also been provided that parties shall encourage users and providers to direct benefits arising from the utilization of genetic resources towards the conservation of biological diversity and sustainable use of its components.[53] Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism, for

[52] Article 5 of the Nagoya Protocol, 2010, http://www.cbd.int/abs/text/ .
[53] Id., Art. 9.

instance, for genetic resources and associated traditional knowledge in trans-boundary situations or for which it is not possible to grant prior informed consent (PIC).[54] Nagoya Protocol also states that the use of the genetic resources should also take the prior informed consent of the indigenous and local communities, in cases where they have the right to grant access to such resources. Also the benefits resulting from the use of the genetic resources rightfully held by indigenous and local communities should be shared with those communities. The Protocol requires the countries to preserve customary use and exchange of genetic resources and traditional knowledge amongst indigenous and local communities.

Access to genetic resources for their utilization shall be subject to the prior informed consent of the party providing such resources, that is, the country of origin of such resources or a party that has acquired the genetic resources in accordance with the Convention, unless otherwise determined by that party. Legal certainty, clarity and transparency in the ABS regulatory requirements, including information on how to apply for PIC and clear rules and procedures for establishing mutually agreed terns (MAT), a permit at the time of access as evidence of the decision to grant PIC and of the establishment of MAT where applicable, criteria for PIC or approval and involvement of indigenous and local communities.[55] Measures with regard to traditional knowledge associated with genetic resources of indigenous and local communities Benefit-sharing.[56] The protocol also encourages the users and providers to contribute to the conservation and sustainable use of biodiversity with the help of the resources generated through benefit sharing.[57] It covers traditional knowledge associated with genetic resources. According to Article 12 the parties in their domestic law take into consideration customary laws of indigenous and local communities, community protocols and procedures which are applicable with respect to traditional knowledge associated with genetic resources in implementing their obligations. The parties are obligated to establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations.

Each Party shall take legislative, administrative or policy measures to provide that genetic resources utilized within its jurisdiction have been accessed in accordance with PIC and that MAT have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other party. Each party shall take appropriate measures to address situations of noncompliance and cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements.[58] Similar provisions with regard to traditional knowledge associated with genetic resources.[59] To support compliance, each Party shall designate one or more checkpoints that would collect or receive information related to PIC, to the establishment of MAT, to the source of genetic resources, or to the utilization of genetic resources. Monitoring and enhance transparency

[54] Id., Art. 10.
[55] Id., Art. 6.
[56] Id., Art. 7.
[57] Id., Art. 9.
[58] Id., Art.15.
[59] Id., Art.16.

about the utilization of genetic resources. A permit or its equivalent issued at the time of access and made available to the ABS clearing house shall constitute an international recognized certificate of compliance.[60]

Genetic resources can be put to commercial use in crop protection, drug development, chemicals, cosmetics, detergents, and textiles, among others. Examples can be - the development of drugs from the use of plant components, such as compounds found in resin and latex, to treat diseases and research on the bioactive compound of a marine organism to be used as a potential ingredient in a personal care product. Genetic resources can be put to non-commercial use also such as, academic and public research institutions use genetic resources to increase our understanding of nature. Genetic resources are a key source of information for taxonomy and ecosystem analysis. Genetic resources provide a wide range of products and services essential to human well-being, notably in the following sectors:

a. Pharmaceuticals;
b. Personal care and cosmetics;
c. Seed and crop protection; and
d. Botanicals and horticulture

Therefore, countries have a shared interest in the advancement of research on genetic resources as it leads to new discoveries. The Nagoya Protocol is a landmark treaty that was devised keeping in mind the increasing loss of biodiversity on Earth. It calls on countries to consider the need for and modalities of a global multilateral benefit-sharing mechanism. Its provision will be legally binding on the countries that sign and ratify it. In addition, only countries that have signed and ratified the CBD are able to sign the Nagoya Protocol. Its fund would facilitate parties in fair and equitable sharing of benefits in trans-boundary situations or other cases in which it is not possible to grant or obtain prior informed consent. Such cases could include the use of resources coming from ex situ collections, unknown countries or areas beyond national jurisdiction. It could address situations of widely disseminated or publicly available traditional knowledge. The funds obtained through this mechanism must be used to support the conservation and sustainable use of biodiversity.

The Nagoya negotiations, certificates of compliance were put forth as possible tool to monitor, facilitate and verify the use of genetic resources and traditional knowledge. It was suggested that these certificates could act as “passports” along the supply chain. Article 10 calls upon the parties to consider the need for and modalities of a global multilateral benefit sharing mechanism to address fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in “trans boundary situations” and “situations for which it is not possible to grant or obtain prior informed consent”. This could apply to the situations when the genetic resources are obtained outside their place of origin, or in a manner not compliant with the Convention. This provision needs to be clarified in future negotiations in the COP/ MOP meetings.

[60] Id., Art.17.

India and other likeminded countries at Durban Climate Talks to ensure that its three agenda issues – equity, intellectual property in green technologies and unilateral trade barriers – become central to the UN climate negotiations after having fallen off the talks table at the Cancun meet last year. The principle of equity ensures that any new deal is fair to developing world. India wants the IPR regime to be tweaked to ensure costly green technologies are provided to poor countries sans the exorbitant proprietary price tag. It also wants to insure that the EU moves like unilateral imposition of carbon tax on aviation is blocked in future.

The ABS rules of the CBD have not been implemented by industrialized countries - who are the main users of genetic resources.[61] The Protocol covers the access and benefit-sharing clearing-house mechanism. This clearing house mechanism is established as a part of the clearing house mechanism under Article 18(3) of the CBD. It shall provide access to information made available by each party relevant to the implementation of this Protocol.[62] Article 14(2) provides that each state party shall make available to the Access and Benefit-sharing Clearing House any information required by this Protocol, as well as information required pursuant to the decisions taken by the Conference of the Parties".[63] The information to be provided to the clearing house includes legislative, administrative and policy measures on the access and benefit-sharing; information on the national focal points and competent national authorities and permits or other orders issued at the time of access as evidence of prior informed consent and of the establishment of mutually agreed terms. Wherever applicable, the details such as the relevant competent authorities of indigenous and local communities, model contractual clauses; methods and tools developed to monitor genetic resources; and the codes of conduct and best practices should also be submitted to the clearing house.

Articles 15, 16, 17 and 18 cover the compliance with domestic legislation or regulatory requirements on access and benefit sharing, for traditional knowledge associated with genetic resources and compliance with mutually agreed terms respectively. The protocol requires all the parties to establish "appropriate, effective and proportionate" measures to provide those genetic resources and traditional knowledge utilised in their jurisdiction have been accessed on the prior informed consent and mutually agreed terms, as required by the country of origin. Article 17 provides that to monitor and enhance transparency on the utilization of genetic resources, countries must designate one or more "checkpoints" and encourage the use of the cost-effective communication tools and systems. These checkpoints could be established at any stage of the value chain; research, development, innovation, pre-commercialization or commercialization.

The matter of safeguarding the living natural world and its variety has become the global subject of prime importance. All efforts are being made at national and international level for overcoming the environmental imbalance and provides for a promoting regulatory system

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[61] The Nagoya Access and Benefit Sharing Protocol, briefing 3, October 2010, available www.cbdalliance.org.
[62] Article 14 (1) of the Nagoya Protocol, 2010, http://www.cbd.int/abs/text/
[63] Id., Art.14 (2).

by which access to knowledge relating to growing area of concern and its relevance to the vast majority of the global population, particularity tribal and traditional communities-farmers, fisher folk and indigenous peoples heavily dependent on biodiversity and biological resources for their survival and livelihoods.

**Conclusion**

The intellectual property issue relates to the collection of royalties on patents. The patent regime should ensure that the public benefit from innovation far exceeds the cost imposed by monopoly profits. This implies a high bar for granting patents. Patents are supposed to spur innovation, but when granted over-liberally they create so much lawsuit risk and cost that they end up hampering innovation, not aiding it. The patent rights amongst medicine industry directly affect one of the fundamental rights that are health.

Pharmaceutical companies have muscled their way into the WTO and turned it into a royalty collection agency simply because the WTO has the authority to apply trade sanctions. But the US and other western countries have been giving patents so liberally and broadly. Normally, governments promote competition and prohibit monopolies. But temporary monopolies (patents) are justified to promote innovation in drugs and other fields. India's ability to keep providing affordable medicines depends on India's patent laws remaining intact. We may conclude by saying that the India's patent law is facing the problem of protection of life. And what we see in the price of many drugs in that life and, by extension, health is therefore unaffordable to most people in the world.

Copyright law provides one of the most important forms of intellectual property protection on the Internet. The WIPO Copyright Treaty (WCT) and the TRIPS Agreement offer responses to the Internet's challenges. Another instrument, the WIPO Performances and Phonograms Treaty (WPPT), updates copyright law's twin concept – the concept of related rights. The Internet is necessary to preserve an optimal balance between authors' interests and the public's interests. It is also important to remember that copyright legislation alone will not solve all the Internet's challenges. It is important to treat "copyright-and-the-Internet" not as a merely a legal issue, but also as a social one. Right of copyright owners to equitable remuneration should always be balanced with the interests of society at large.

Intellectual property is protection of biodiversity, through access to genetic resources and benefit sharing and traditional knowledge. But the biggest problem faced by the policy makers and many stakeholders is on the benefit sharing arrangements, defining rightful owners' group who can give consent and receive benefits of biological resources and traditional knowledge that may become available and access procedure.

India, one of the world's biggest repositories of diverse biological resources in terms of plant and animal species and traditional knowledge, has an immense potential in the production of medicines and food. If only this can be developed and utilized using proper contract and monitoring systems, substantial benefits will accrue to benefit national food and medical security, while preserving biodiversity and lead to improvements in the lives of local and

indigenous peoples. As a condition of an access contract, agreements may be reached about sharing the benefits resulting from obtaining a patent or any eventual commercialization. A biodiversity framework may require access to genetic resources and benefit sharing contracts of this kind and there have been calls internationally to link access to genetic resources and benefit sharing regulations to patent laws.

# Crime against Women and Violation of Human Rights

***Dr. Vijay Kumar***[1]

## Introduction

We all know very well in the ancient times in Indian our women held a sky-scraping place of respect in the society as mentioned in our Hindu religions Ved "Rigveda" and other scriptures. Volumes can be written about the status of our Indian women and their brave performance from the vedic period to the modern times. But later on, we see that, because of social, political and economic changes, women lost their position and were banished to the background. Many evil customs and traditions stepped in which in prison the women and fixed them to the boundaries of the house[2].

Physical, sexual and psychological violence strikes women in pandemic extent worldwide. It crosses every social and economic class, every religion, race and society. From domestic abuse to rape as a weapon of war, violence against women is a gross violation of their human rights. Not only does it threaten women's health and their social and economic well-being, violence also baffles the global efforts to reduce poverty.

The official statistics showed a deteriorating sex-ratio, health status, literacy rate, work participation rate and political participation among women. While on the other hand the spread of societal evils like dowry deaths, child marriage, domestic violence, rape, sexual harassment, exploitation of women workers is widespread in different parts of India. Humiliation, rape, kidnapping, molestation, dowry death, torture, wife-beating etc. have grown up over day of the years.

The behaviour of our society is women as sex object is a very common picture in every sphere of life and scene made by advertising agency on TV channel and marketing and also be it torture, rape, beating, molestation, physical abuse or any such thing that has a direct effect on the mental and physical state of the women.

The management of girl as a burden on the family because of the reason for the huge dowry to given at the time of her wedding, and because of this reason many of the girls are not even encouraged to take up even middle education. Gender inequity be it education, employment, home or anywhere is prevalent enough to aspect to the feeling of gender bias because of which girls are restrained to the house. Violence happens everywhere, but India is a

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[2] Violence and Protective Measures for Women Development and Empowerment by Aruna Goel, New Delhi, Deep & Deep Publications, 2004, pp. 3-4.

particularly harsh place to be female. Over 40 percent of the child marriages in the world take place in India. Sex selective abortions occur there at surprising rates.

In 2011, the gender ratio was at its most imbalanced since India's 1947 independence: among children six years old or under, there were only 914 girls per every 1,000 boys. Increases in wealth and literacy have only exacerbated the problem of female feticide. Women lag far behind of men because the laws granting rights by Indian Constitution same rights as well as man but circumstances to women have been extremely slow and their implementation lacks smoothness and effectiveness. Although, women are victims of all kinds of crime, be it cheating, murder, robbery, etc., yet the crimes in which a woman is specifically targeted to be harmed are characterised as "crime against women". Broadly, crimes against women are classified under two categories:

(1) Crimes under the Indian Penal Code (IPC):

1. 1.Rape (Sec. 376 IPC)
2. Kidnapping & Abduction for different purposes (Sec. 363-373)
3. Homicide for Dowry, Dowry Deaths or their attempts (Sec. 302/304-B IPC)
4. Torture, both mental and physical (Sec. 498-A IPC)
5. Molestation (Sec. 354 IPC)
6. Sexual Harassment (Sec. 509 IPC)
7. Importation of girls (up to 21 years of age)

(2) Crimes under Special and Local Laws (SLL), which include seventeen crimes, of which the important ones are:

1) immoral traffic (1956 and 1978 Act),
2) dowry prohibition (1961 Act),
3) committing Sati (1987 Act),
4) indecent representation of women (1986 Act).
5) Domestic violence act (2005 Act)

The term violence is actually applied to physically striking an individual resulting in an injury[3], striking a person with the intent of causing harm but not actually causing it[4], act where there is high risk of causing injury3 or an act which may not involve actual hitting but involves verbal abuse and psychological stress and suffering. The distribution pattern of crimes against women has not changed much in the last few years, but between 2001 and 2011 the overall number of incidents of crime against women rose steadily, and was 59% higher than in 2001.These figures are, at best, indicative. Rape and violence against women

[3] Kempe, et. Al, "The battered child syndrome" „quoted by Richard Gellar in wolf gang and wiener, criminal violence", 1982 p.201.

[4] Gelles and Straus, "Determinants of violence in the family: towards a theoretical integration." in burr, hill, Nye and reis (eds.)," contemporary theories about the family,1979.

are among the most under-reported crimes worldwide because of the social stigma attached to the nature of the crime. The UN Office on Drugs and Crimes records that in 2010 there were only 1.8 cases of rape6 reported per thousand people in India; in Germany it was 9.4, in Norway the figure was 19.2, in the United States it was 27.3 and in Sweden it was 63.5 per thousand. It is legitimate to question whether these figures represent the number of crimes, or how easy it is for women in these countries to report them to the police.

**Meaning of Crime against Women**

The meaning of crime is defined as express or implied physical or mental cruelty to women. Crime which are specifically "directed against women" and in which the "women are victims" are termed as crime against women4.

Crimes against women are of various types as crimes involving sex for economic gains including prostitution, keeping of brothel seduction, wrongful confinement, trafficking, dowry extortion murder, crimes relating to women's property which includes dishonest misappropriation, criminal breath of trust, extortion, robbery and murder, crimes in relation to sex including outraging the modes of women, use of criminal force, assault, kidnapping, abduction wrongful confinement, rape, trafficking, adultery, murder, other immoral acts injurious to the society and other injurious acts against women.

The United Nations defined "Violence against Women" in 1993 in Declaration on the Elimination of Violence against Women. It is defined as any act of gender biasness violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life5. The challenges Indian women face include an often-misogynistic society outdated and sometimes repressive governance structures, an inefficient legal justice system, a weak rule of law and social and political structures that are heavily male-centric.

According to the 2011 census the sex ratio between men and women indicates 940 women to 1000 men which is a definite improvement over the 2001 census where the ratio was 933:1000. However, India still has one of the lowest sex ratios on the world with approximately 35 million women "missing". The highest number of missing women at birth is in the north-western states of Punjab, Rajasthan and Haryana, etc. Research indicates that 12% of this gap is found at birth which increased to 25% in childhood7. Much of the violence against Indian women is in the form of domestic violence, dowry deaths, acid attacks, honour killings, rape, abduction, and cruelty by husbands and in-laws. One of the key challenges is dowry – a practice of the bride's family giving gifts of cash and kind to the groom and his family. In some cases the groom's family mistreats the bride if such demands are not met to protect women against this threat the Indian government had enacted the Dowry Prohibition Act and the Protection of Women from Domestic Violence Act and cruelty under Sec 498A of the Indian Penal Code.

In 2012, according to the National Crime Records Bureau (NCRB), dowry deaths – or murders of women by the groom or in-laws because of unmet high dowry expectations - constituted 3.4% of all crimes against women. In other words, last year in India on average 22 women were killed per day because their families could not meet dowry demands.

**Provisions for women in Indian Constitution**

Gender equality is enshrined in every sphere of Indian constitution, be it preamble, fundamental rights, fundamental duties and directive principles. The Constitution of India not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the cumulative socio economic, education and political disadvantages faced by them. Fundamental Rights, among others, ensure equality before the law and equal protection of law; prohibits discrimination against any citizen on grounds of religion, race, caste, sex or place of birth, and guarantee equality of opportunity to all citizens in matters relating to employment.

India has also ratified various international conventions and human rights instruments committing to secure equal rights of women. Key among them is the ratification of the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in 199310.

Constitutional Provisions for women are as under:

- Equality before law for women (Article 14)
- The State not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them (Article 15 (i))
- The State to make any special provision in favour of women and children (Article 15 (3))
- Equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State (Article 16)
- The State to direct its policy towards securing for men and women equally the right to an adequate means of livelihood (Article 39(a)); and equal pay for equal work for both men and women (Article 39(d))
- To promote justice, on a basis of equal opportunity and to provide free legal aid by suitable legislation or scheme or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities (Article 39 A)
- The State to make provision for securing just and humane conditions of work and for maternity relief (Article 42)
- The State to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation (Article 46)
- The State to raise the level of nutrition and the standard of living of its people (Article 47)

- To promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of women (Article 51(A) (e))
- Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat to be reserved for women and such seats to be allotted by rotation to different constituencies in a Panchayat (Article 243 D (3))
- Not less than one- third of the total number of offices of Chairpersons in the Panchayats at each level to be reserved for women (Article 243 D (4))
- Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a Municipality (Article 243 T (3))
- Reservation of offices of Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes and women in such manner as the legislature of a State may by law provide (Article 243 T (4)

- Legal Provisions for women are as under:

  - Factories Act 1948: Under this Act, a woman cannot be forced to work beyond 8 hours and prohibits employment of women except between 6 A.M. and 7 P.M.

  - Maternity Benefit Act 1961: A Woman is entitled 12 weeks maternity leave with full wages.

  - The Dowry Prohibition Act, 1961: Under the provisions of this Act demand of dowry either before marriage, during marriage and or after the marriage is an offence.

  - The Equal Remuneration Act of 1976: This act provides equal wages for equal work: It provides for the payment of equal wages to both men and women workers for the same work or work of similar nature. It also prohibits discrimination against women in the matter of recruitment.

  - The Child Marriage Restrain Act of 1976: This act raises the age for marriage of a girl to 18 years from 15 years and that of a boy to 21 years.

  - Indian Penal Code: Section 354 and 509 safeguards the interests of women.

  - The Medical Termination of Pregnancy Act of 1971: The Act safeguards women from unnecessary and compulsory abortions.

- Amendments to Criminal Law 1983, which provides for a punishment of 7 years in ordinary cases and 10 years for custodial rape cases.

- 73rd and 74th Constitutional Amendment Act reserved 1/3rd seats in Panchayat and Urban Local Bodies for women.

- The National Commission for Women Act, 1990: The Commission was set up in January, 1992 to review the Constitutional and legal safeguards for women.

- The Protection of Human Rights Act, 1993:

- Protection of Women from Domestic Violence Act, 2005: This Act protects women from any act/conduct/omission/commission that harms, injures or potential to harm is to be considered as domestic violence. It protects the women from physical, sexual, emotional, verbal, psychological, economic abuse and also marital rape.12

- Protection of Women against Sexual Harassment at Workplace Bill, 2010: on November 4, 2010, the Government introduced protection of Women against Sexual Harassment at Workplace Bill, 2010, which aims at protecting the women at workplace not only to women employee but also to female clients, customer, students, research scholars in colleges and universities and patients in hospitals. The Bill was passed in Lok Sabha on 3.9.2012.

- Section 376 A- if a person committing the offence of sexual assault, "inflicts an injury which causes the death of the person or causes the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death.

**Classification of Crimes against Women's**

Women have been suffering since ages and this torture against them still continues in the form of murder, robbery, cheating etc. Although Women may be victims of any of the general crimes such as "Murder", "Robbery", "Cheating" etc. Crimes which are directed specifically against women are characterised as "Crimes against Women". Various new legislations have been brought and amendments have been made in existing laws with a view to handle these crimes effectively. These are broadly classified under two categories i.e. (A) The Crimes under the Indian Penal Code (IPC) and (B) The Crimes under the Special & Local Laws (SLL)13.

1) Rape (Sec. 376 IPC) (Incidence- 24,923 Rate- 4.3):

Rape is one of the most common crimes against women in India14and by the UN‟s human-rights chief as a "national problem15. According to 2012 statistics, New Delhi has the highest number of rape-reports among Indian cities, while Jabalpur has the per capita incidence of

reported rapes.16 Sources show that rape cases in India have doubled between 1990 and 2008.17 According to the National Crime Records Bureau, in 2012, 25,000 rape cases were reported across India. Out of these, 24,470 were committed by relative or neighbour. Men accounted to commit 98 per cent of reported rapes18. The latest estimates suggest that a new case of rape is reported every 22 minutes in India.[5]

**2) Kidnapping & abduction (Sec. 363-373 IPC) (Incidence- 38,262 Rate- 6.5)**

According to the 2012 census, kidnapping and abduction cases have reported to increase to 7.6% of which Uttar Pradesh alone has accounted for 22.2% cases alone at national level. The number of kidnappings and abductions of women and girls have jumped a whopping 163.8% since 2002.

**3) Dowry Deaths (Sec. 302, 304B IPC) (Incidence- 8,233 Rate- 1.4)**

One woman dies every hour due to dowry related reasons on an average in the country, Death by burning of Indian women have been more frequently attributed to dowry conflicts.[6] In dowry deaths, the groom's family is perpetrator of murder or suicide[7]. The Dowry Prohibition Act, passed in India in 1961, prohibits the request, payment or acceptance of a dowry, "as consideration for the marriage", where "dowry" is defined as a gift demanded or given as a precondition for a marriage. National Crime Records Bureau (NCRB) figures state that 8,233 dowry deaths were reported in 2012 from various states. The statistics work out to one death per hour. The number of deaths under this category of crime against women was 8,618 in 2011 but the overall conviction rate was 35.8 per cent, slightly above the 32 per cent conviction rate recorded in the latest data for 2012.[8]

**4) Torture (cruelty by husband or his relatives) (Sec. 498-A IPC) (Incidence-1,06,527 Rate-18.2)**

In 1983, domestic violence was recognised as a specific criminal offence by the introduction of section 498-A into the Indian Penal Code. This section deals with cruelty by a husband or his family towards a married woman. Four types of cruelty are dealt with by this law[9]

- conduct that is likely to drive a woman to suicide,
- conduct which is likely to cause grave injury to the life, limb or health of the woman,
- harassment with the purpose of forcing the woman or her relatives to give some property, or
- Harassment because the woman or her relatives is unable to yield to demands for more money or does not give some property.

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[5] "Court sentences 4 men to death in New Delhi gang rape case". CNN. 2013-09-14. Retrieved 2013-09-15.

[6] Kumar, Virendra (Feb 2003). "Burnt wives". Burn 29 (1): 31–36.

[7] Oldenburg, V. T. (2002). Dowry murder: The imperial origins of a cultural crime. Oxford University Press.

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[9] Available on http://indiatogether.org/manushi/issue137/laws.htm

The NCRB statistics indicate that an Indian woman is most unsafe in her marital home with 43.6% of all crimes against women being "cruelty" inflicted by her husband and relatives. These numbers do not include incidences of marital rape, as India does not recognize marital rape as an offence[10]. Of the 24,923 rape incidences in India in 2012, 98% of the offenders were known to the victim[11], which is higher than the global average of approximately 90%.

**5) Assault on women with intent to outrage her modesty (Sec. 354 IPC) (Incidence-45, 351 Rate- 7.7)**

In section 354 it has been mentioned that whoever assaults or forces any women intended to outrage her modesty shall be punished not less than one year which may be extended to five years and is also liable to be fined. The 2012 census of national crime record bureau shows the incidence of assault on women to have increased by 5.5% over the past years. Madhya Pradesh has reported the highest incidence amounting to 14.7% of total such incidences while Kerala has reported the highest crime rate.[12]

**6) Importation of girl from foreign country (Sec. 366-B IPC) (Incidence- 59):**

Importation of girls from other country or from Jammu and Kashmir under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person is punishable under the Indian Penal Code sec.366-B with imprisonment which may extend to ten years and is also liable to be fined[13]. A decrease in the number of cases has been recently found in the census 2012 of which only 59 cases have been reported in 2012.

**7) Immoral Traffic (Prevention) Act, 1956 (Incidence-2,563 Rate- 0.4)**

The recruitment, transportation, transfer, harboring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse, of power or of a position of vulnerability or of the giving and the receiving of payments or benefits to achieve the consent of a person having control over any other person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs" [14]. Cases seem to have increased in the recent years by 5.2% in which the incidences in Andhra Pradesh and Tamil Nadu are comparatively high (19.5% and 18.4% resp.)[15]

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[10] Available on http://www.freiheit.org/India-Violence-Against-Women-Current-Challenges-and-Future-Trends

[11] Available on http://www.freiheit.org/India-Violence-Against-Women-Current-Challenges-and-Future-Trends

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[13] Available on http://www.theindiankanoon.com/2012/11/section-366b-ipc-dhara-366b-importation.html

[14] Available on https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html?ref=menuside

[15] Available on ncrb.gov.in/CD-CII2012/cii-2012/Chapter%205.pdf

*"Violence against women continues to persist as one of the most heinous, systematic and prevalent human rights abuses in the world. It is a threat to all women, and an obstacle to all our efforts for development, peace, and gender equality in all societies. Violence against women is always a violation of human rights; it is always a crime; and it is always sun acceptable. Let us take this issue with the deadly seriousness that it deserves."*

*…….…….. Ki moon, United Nations Secretary*

## Conclusion

Violence against women in its various forms is a violation of human rights, the very nature of which deprives women of their ability to enjoy fundamental freedoms. It is a serious obstacle to equality between women and men. Violence against women remains hidden in the culture of silence. The causes and factors of violence against women include entrenched unequal power relations between men and women that foster violence and its acceptability, aggravated by cultural and social norms, economic dependency, poverty and alcohol consumption etc. In India, where the culprits are largely known to the victim, the social and economic "costs" of reporting such crimes are high. General economic dependence on their families and fear of social ostracization act as significant disincentives for a woman to report any kind of sexual violence or abuse.

Therefore, the actual incidence of violence against women in India is probably much higher than the data suggests and because of this most of the women are experiencing violence and living its consequences There is need to break the silence and ensure that violence against women is not just a woman's issue but primarily a political, social, economic and cultural issue that concerns men as well. While men represent the majority of perpetrators of violence against women, they have an important role to play in preventing and combating violence against women. Because of their role models as fathers, husbands, brothers, and sons, men and young boys should be part of the solution and thus be involved in eliminating violence against women. If men felt involved, they should help promote changes in attitudes among other men. It is not women or men working alone to end gender-based violence that yields the best results. It is the partnership between them that has the greatest impact and reach.

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# Role of UDHR to Protect the Rights of Domestic Help Sector: An Analysis on the Social Security Laws

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## Abstract

*The purpose of this research is to know the legal protection for woman domestic workers regulated in fundamental international law on the protection of women. The results of this research are identified that the legal protection of woman domestic workers rights is consistent with international convention. According to Convention Decent work for domestic workers, minimum standard by the convention are basic rights of domestic worker, information on terms and conditions of employment, hours of work, remuneration, occupational safety and health, social security, standards concerning child domestic workers, standards concerning live-in workers, standards concerning migrant domestic workers, private employment agency measures to be put in place, dispute settlement, complaints and enforcement. In addition, UDHR has a role in social security laws in relation to its major principles and to obligate the state to respect and enhance the rights of domestic help sector.*

**Keywords:** *Domestic Workers, Human Rights, Social Security, UDHR, Rights of Domestic Worker.*

## Introduction

Despite being one of the oldest and most important employment sectors for millions of people, all over the world, domestic work is often undervalued and poorly regulated. Thus, in addition to being underpaid and overworked, many domestic workers remain socially and legally unprotected.[3] This lack of regulation has led to innumerable violations of domestic workers' rights, including working hours ranging between 8 and 18 hours and the absence of any job security. Domestic workers invariably represent the more marginalized communities in society. For too long, this group a large majority of whom are women has remained outside the realm of policy-making on social and labour issues, and has largely been confined to the informal economy. Since they work behind the closed doors of private households, domestic workers are shielded from public view and attention, and are often hard to reach by conventional policy tools. However, this should not be used as a convenient excuse for inaction.[4]

## Defining Domestic Workers?

To gain better clarity of the issue it becomes extremely important to understand who is a domestic worker. The delegates to the International Labour Conference while defining the

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[3] Birti Klemm, "Protection for Domestic Workers: Challenges and Prospects", *Briefing Paper Special Issue Fredrich Ebrit*, (2011).

[4]https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/publ/documents/publication/wcms_173363.pdf

"domestic worker", did not rely on a listing of the specific tasks or services performed by domestic workers, which vary from country to country and may change over time. Rather, they supported a general formulation that draws on the common feature of domestic workers that they work for private households.[5]

The Domestic Workers Convention, 2011 (No. 189), reflects this when it defines "*domestic workers*" in Article 1:

a) The term "*domestic work*" means work performed in or for a household or households;
b) The term "domestic worker" means any person engaged in domestic work within an employment relationship;
c) A person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker.

The terms domestic work and domestic worker embrace many different forms of labour, complicating the task of designing working time laws that meet the needs of all domestic workers and their employers. This endeavor requires awareness of the variables that shape the diversity of domestic work.[6]

**Statistical Data**

According to the most recent global and regional estimates produced by the ILO, at least 52.6 million women and men above the age of 15 were domestic workers in their main job. This figure represents some 3.6 per cent of global wage employment. Women comprise the overwhelming majority of domestic workers: 43.6 million workers or some 83 per cent of the total. Domestic work is an important source of wage employment for women, accounting for 7.5 per cent of female employees worldwide.

Available data show, that domestic work is a growing economic sector. As stated by the International Labour Conference, "*the challenge of reducing decent work deficits is greatest where work is performed outside the scope or application of the legal and institutional frameworks*".

**International Human Rights Framework protecting Domestic Workers**

According to the United Nations Human Rights are universal legal guarantees protecting individuals and groups against actions which interfere with fundamental freedoms and human dignity. The most important characteristics of human rights as envisaged by the United Nations[7] are they are internationally recognized, they are legally protected, they focus on the dignity of the human being, they protect individuals and groups, they obligate State and State actors, they cannot be waived/taken away, they are equal and interdependent and they are

[5]https://www.ilo.org/wcmsp5/groups/public/---dgreports/-dcomm/publ/documents/publication/wcms_173363.pdf
[6]https://www.ilo.org/wcmsp5/groups/public/ed_protect/protrav/travail/documents/publication/wcms_150650.pdf
[7]Available at: http://hrp.cla.umn.edu/assets/doc/IntroductiontoInternationalHumanRights2009withnotes.pdf, (Visited on March 19th, 2017)

universal. The rights may be divided in to different groups as under:[8] Civil rights- rights of individuals to be protected from arbitrary interference by government in their life liberty and security, freedom to travel, right to due process.

Political rights- rights of individuals to interfere and participate in the affairs of the governments, e.g. right to vote, stand for election, participate in state and social management, freedom of speech, press, assembly etc. Social, economic, and cultural rights progressive demands of the people to improve their standard of living. e.g. right to education, work, healthy and working environment, practice of religion uses of one's language and enjoy one's culture.

**Individual Rights**

Rights accorded to individuals such as the rights to life, education, health, work, rights to suffrage: freedom of expression, freedom from torture, right to speedy trial Collective/group rights, are rights given to a specified vulnerable group which may be exercised because of one's membership to such community such as women's rights, children's rights, indigenous people's rights.

Apart from the above the following human rights instruments are equally important to be considered as milestones in upholding human rights:[9]

- American Declaration of the Rights and Duties of Man,
- European Convention for the Protection of Human Rights and Fundamental Freedoms.

Thus, by the end of 1950, the above three systems of instruments have become established as the major international instruments in the field of international human rights for its promotion and protection. However, in the decades that followed, each have diversified and additional oversight mechanisms came in to existence like United Nations treaty bodies and Universal Periodic Review, the Inter-American Court of Human Rights, and the European Committee of Social Rights.[10]

International convention has put a good attention on the case of domestic worker, since there are 8 conventions related to domestic workers, which are:

- The Freedom of Association and Protection of the Right to Organize Convention, 1948;
- The Right to Organize and Collective Bargaining Convention, 1949;
- The Forced Labour Convention, 1930;
- The Abolition of Forced Labour Convention, 1957;
- The Equal Remuneration Convention, 1951;

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[8] Available at: www.aspbae.org/bldc/sites/default/files/ppt/Know%20Your%20 Rights.ppt, (Visited on February 24th, 2017).

[9] http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments. aspx (Visited on April 20, 2017).

[10] *Ibid.*

- The Discrimination (Employment and Occupation) Convention, 1958;
- The Minimum Age Convention, 1973;
- The Worst Forms of Child Labour Convention, 1999.
- The other conventions relating to domestic worker in the summary of ILO conventions are:
- The Wage-Fixing Machinery Convention, 1928;
- The Minimum Wage Fixing Convention, 1970;
- The Protection of Wages Convention, 1949;
- The Maternity Protection Convention, 2000;
- The Workers with Family Responsibilities Convention, 1981;
- The Termination of Employment Convention, 1982;
- The Private Employment Agencies Convention, 1997;
- The International Convention on the Protection of All Migrant Worker and Member of Their Families, 1990;
- The Migration for Employment Convention (Revised), 1949; and
- The Migrant Workers (Supplementary Provisions) Convention, 1975;
- Convention Decent work for domestic workers, 2011.

In addition to the Convention contained in the ILO summary, the international community recognizes several international legal norms relating to domestic worker, including:

- The Universal Declaration of Human Rights/ UDHR, 1948;
- International Covenant on Civil and Political Rights/ICCPR, 1966
- International Covenant on Economic, Social and Cultural Rights/ICESCR, 1966;
- Convention on the Elimination of All Forms of Discrimination against Women/CEDAW, 1979;
- The Convention on the Rights of the Child, 1989;
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950.

**Rights guaranteed under Universal Declaration of Human Rights**

The UN Declaration on Human Rights is hailed as a milestone in the development of the concept of Human Rights across the world. According to the preamble of the Universal Declaration of Human Rights, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.[11] The declaration envisages that -Human Rights: Belong to all humans, regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[12]

Since its inception, it has become an important instrument on human rights and has exerted considerable influence in all legislations based on human rights in all the different parts of the

[11] Available at: http://www.un.org/en/universal-declaration-human-rights/, (Visited on April 02, 2017)

[12] Article 2, UDHR, available at: http://www.un.org/en/universal-declaration-human-rights/, (Visited on March 10, 2017)

world. Its importance is all the more as it is the first document of its kind which clearly defined that there are certain rights which are inalienable and has to be respected by all others and it cannot be taken away. Over the years this commitment has become a law and it has influenced a lot of treaties and declarations based on human rights. The most prominent among these treaties are the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights enacted and implemented in 1976. The provisions of these two covenants being binding on the member states have played an important role in inspiring human right legislations across the globe. These declarations talk about inalienable rights of human beings which are universal in nature like, the right to life and personal liberty, right to equality, right to freedoms etc.

The most important aspect of this law is that it lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect, and to fulfill human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights.[13]

Through ratification of international human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. The domestic legal system, therefore, provides the principal legal protection of human rights guaranteed under international law. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual and group complaints are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.[14]

**Major Principles of UDHR**

The following are the major principles as laid down in the Universal Declaration of Human Rights:[15]

- We Are All Born Free & Equal. We are all born free. We all have our own thoughts and ideas. We should all be treated in the same way.
- Don't Discriminate. These rights belong to everybody, whatever our differences.
- The Right to Life. We all have the right to life, and to live in freedom and safety.
- No Slavery. Nobody has any right to make us a slave. We cannot make anyone our slave.
- No Torture. Nobody has any right to hurt us or to torture us.
- You Have Rights No Matter Where You Go. I am a person just like you!
- We're All Equal before the Law. The law is the same for everyone. It must treat us all fairly.

[13]Available at: http://www.un.org/en/universal-declaration-human-rights/, (Visited on March 11, 2017)
[14]Available at: http://www.un.org/en/universal-declaration-human-rights/, (Visited on April 20, 2017)
[15] Available at: http://www.youthforhumanrights.org/what-are-human-rights/universal-declaration-of-human-rights/articles-16-30.html, (Visited on April 26, 2017).

- Your Human Rights Are Protected by Law. We can all ask for the law to help us when we are not treated fairly.
- No Unfair Detainment. Nobody has the right to put us in prison without good reason and keep us there, or to send us away from our country.
- The Right to Trial. If we are put on trial this should be in public. The people who try us should not let anyone tell them what to do.
- We're Always Innocent till Proven Guilty. Nobody should be blamed for doing something until it is proven. When people say we did a bad thing we have the right to show it is not true.
- The Right to Privacy. Nobody should try to harm our good name. Nobody has the right to come into our home, open our letters, or bother us or our family without a good reason.
- Freedom to Move. We all have the right to go where we want in our own country and to travel as we wish.
- The Right to Seek a Safe Place to Live. If we are frightened of being badly treated in our own country, we all have the right to run away to another country to be safe.
- Right to a Nationality. We all have the right to belong to a country.
- Marriage and Family. Every grown-up has the right to marry and have a family if they want to. Men and women have the same rights when they are married, and when they are separated.
- The Right to Your Own Things. Everyone has the right to own things or share them. Nobody should take our things from us without a good reason.
- Freedom of Thought. We all have the right to believe in what we want to believe, to have a religion, or to change it if we want.
- Freedom of Expression. We all have the right to make up our own minds, to think what we like, to say what we think, and to share our ideas with other people.
- The Right to Public Assembly. We all have the right to meet our friends and to work together in peace to defend our rights. Nobody can make us join a group if we don't want to.
- The Right to Democracy. We all have the right to take part in the government of our country. Every grown-up should be allowed to choose their own leaders.
- Social Security. We all have the right to affordable housing, medicine, education, and childcare, enough money to live on and medical help if we are ill or old.
- Workers' Rights. Every grown-up has the right to do a job, to a fair wage for their work, and to join a trade union.
- The Right to Play. We all have the right to rest from work and to relax.
- Food and Shelter for All. We all have the right to a good life. Mothers and children, people who are old, unemployed, or disabled, and all people have the right to be cared for.
- The Right to Education. Education is a right. Primary school should be free. We should learn about the United Nations and how to get on with others. Our parents can choose what we learn.

- Copyright. Copyright is a special law that protects one's own artistic creations and writings; others cannot make copies without permission. We all have the right to our own way of life and to enjoy the good things that art, science and learning bring.
- A Fair and Free World. There must be proper order so we can all enjoy rights and freedoms in our own country and all over the world.
- Responsibility. We have a duty to other people, and we should protect their rights and freedoms.
- No one can take away your Human Rights.

**Role of UDHR in enhancing the Rights of the Domestic Workers**

The importance or need of the Universal Declaration of Human Rights was to prevent the kind of tragedy that shook the world in the Second World War. William Golding, author of the ever popular 'Lord of the Flies' and winner of the Nobel Prize for Literature, wrote "I know why the thing rose in Germany. I know it could happen in any country. It could happen here." Golding was referring to the Holocaust in Germany, his belief that the evil behind the Holocaust came in fact from the inherent evil of humankind, and that it was not an isolated event. He expressed his fear that humankind was flawed, and that anywhere evil was allowed to surface, suffering and death would follow.[16]

This is where Universal Declaration of Human Rights can have its importance. This is why it is relevant today because humankind is fatally flawed. It is not the UDHR that has failed. It is humankind. It is our hunger for power that brings about dictatorship, our selfishness that causes poverty our inability to forgive those results in genocide. And the UDHR is a document that we have created as a Band-Aid to try and patch these fatal flaws of humanity. I don't think it is able to solve the world's problems. But it is far better than nothing.[17]

There are people who argue that this is a dream rather than a reality as most of the kind of equality and other principles are not possible to achieve because of the inherent difference among human beings in the world in many aspects. These flaws in humankind are so vast that it cannot be anywhere closer to reality. For the poorest of the poorest in any part of the world, these principles will only remain as principles and it is not going to bring any difference in their case. If we take the example of domestic workers in India, can we say that the glorious principles as laid down in the Universal declaration of Human Rights did help in any way to ameliorate their condition? The answer is definitely a big NO and even after 68 years of its implementation there are many sections of the society who have not benefitted by these principles and there are people who argue that these principles failed to achieve the basic objectives for which it was enacted.

[16]Available at: https://wcjphumanrightsblog.wordpress.com/2011/05/29/what-is-the-relevance-of-the-universal-declaration-of-human-rights-today/, (Visited on April 21, 2017).
[17]Available at: https://wcjphumanrightsblog.wordpress.com/2011/05/29/what-is-the-relevance-of-the-universal-declaration-of-human-rights-today/, (Visited on May 10, 2017).

A number of scholars argue that the declaration has an inherent Western bias. For example, *Riffat Hassan* argues that – "What needs to be pointed out to those who uphold the Universal Declaration of Human Rights to be the highest, or sole, model, of a charter of equality and liberty for all human beings, is that given the Western origin and orientation of this Declaration, the "universality" of the assumptions on which it is based is at the very least problematic and subject to questioning. Furthermore, the alleged incompatibility between the concept of human rights and religion in general, or particular religions such as Islam, needs to be examined in an unbiased way".[18]

The American Anthropological Association criticized the UDHR while it was in its drafting process. The AAA warned that the document would be defining universal rights from a Western paradigm which would be unfair to countries outside of that scope. They further argued that the West's history of colonialism and Evangelicalism made them a problematic moral representative for the rest of the world.[19]

During the lead up to the World Conference on Human Rights held in 1993, ministers from Asian states adopted the Bangkok Declaration, reaffirming their governments' commitment to the principles of the United Nations Charter and the Universal Declaration of Human Rights. They stated their view of the interdependence and indivisibility of human rights and stressed the need for universality, objectivity, and non-selectivity of human rights. However, at the same time, they emphasized the principles of sovereignty and non-interference, calling for greater emphasis on economic, social, and cultural rights, in particular, the right to economic development over civil and political rights. The Bangkok Declaration is considered to be a landmark expression of the Asian values perspective, which offers an extended critique of human rights universalism.

**Contemporary Expansions on Human Rights**

In recent developments to the further expansion of this concept, regional human rights organizations came in to existence for the monitoring of human rights abuse on regional basis like the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights Monitor State compliance with the African Charter on Human and Peoples' Rights. The decline of the Soviet Union spurred the formation of the Organization for Security and Co-operation in Europe (OSCE) which recognized dialogue on human rights, political and military relations, and economic development as being equally important to sustained peace and stability across Europe and the (former) Soviet States. In addition, there are other international bodies outside of what is traditionally referred to as the "international human rights framework". They also play an important role in addressing human rights violations in their respective areas of operation.[20]

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[18]Available at: https://Universal_Declaration_of_Human_Rights#Significance (Visited on April 04, 2017).
[19] *Ibid.*
[20] *Ibid.*

For example, States may bring complaints against other States before the International Court of Justice, which from time to time decides cases involving individuals' human rights from the standpoint of one State's allegation that another violated the terms of an international agreement (such as by not affording its nationals access to consular representatives when they were detained in the second State). The International Labor Organization (ILO) also oversees States' compliance with international labor standards, including by receiving inter-State complaints concerning alleged violations of ILO conventions.[21]

Further, individuals (as opposed to States) may be criminally prosecuted for violations of international humanitarian law or international criminal law or of *jus cogens* norms of international law, or may be sued civilly under domestic law. The International Criminal Court, International Criminal Tribunal for Rwanda, International Criminal Tribunal for the former Yugoslavia, and a number of internationalized criminal tribunals undertake such prosecutions.[22]

A number of regional courts created through economic integration or development agreements have jurisdiction to adjudicate disputes related to human rights. These courts and tribunals of regional economic communities operate in sub-regions of Africa, the Americas, and Europe.[23]

Finally, national, or "domestic," bodies also play an important role in implementing and enforcing international human rights standards, including through national human rights institutions (NHRIs), domestic civil and criminal legal proceedings, the exercise of universal jurisdiction, and truth and reconciliation commissions.[24]

**Conclusion**

Understanding the legal protection for woman domestic worker is to provide a balanced and real space as well as the space given to men, as Lisa Smyth mentioned in the European Journal of Women's Studies "*Enabling women to participate in reconceiving the social spaces, domestic and more 'public', which they routinely inhabit, might go some way towards reducing the moral tone and at the same time recognizing as an arena where citizenship is at stake*".

The research can be concluded that the form of legal protection of women's rights as domestic workers according to international convention based on the Convention Decent work for domestic workers defined as the minimum standard by the convention is basic rights of domestic worker, information on terms and conditions of employment, hours of work, remuneration, occupational safety and health, social security, standards concerning child domestic workers, standards concerning live-in workers, standards concerning migrant

[21] http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments. aspx (Visited on March 20, 2017).
[22] *Ibid.*
[23] *Ibid.*
[24] http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments. aspx (Visited on April 02, 2017).

domestic workers, private employment agencies is measures to be put in place, dispute settlement , complaints and enforcement.[25]

Thus, if we ask the question whether the Universal Declaration Human Rights have contributed to the cause of human rights violations in the world, the answer is definitely yes. It has played a commendable role in protecting human right violations across the globe by compelling the state governments to conform to certain basic standards in policy formulation as well as implementation. Thus, it can be viewed as a revolution or break through in international arena. It is needless to say that all the human rights documents drafted after this had this basic principle as part of it or are influenced by these principles. Thus, we cannot undermine the importance of Universal Declaration for Human Rights, even though it is not binding, it has its influence in the making of many constitutions across the globe and has become the fundamental principle in the enactment of laws, international laws, treaty, and a guideline to be considered wherever human rights are talked about.

[25] Lalu Husni, "*Legal Protection for Woman Domestic Workers based on the International Convention*", Journal of Legal, Ethical and Regulatory.

# Right to Food in Global Perspective

***Om Prakash Kannaujia***[1]

## Introduction

The term "Right to Food" is not explicit under the foundational law of the country of India, however, it is defined in Human Right discourse of International Human Rights Conventions, Treaties and Declarations.Now it is recognizedas indispensable right for every human being in the national as well as international norms. Right to Food is essential for the survival of life. Objective of the International declarations and treaties referring to "Right to Food" emphasized link of food status of person to issue of dignity, on-discrimination, justice and participation. The efforts of United Nation's institutions organs as well as human right scholars and activistshas been taking part actively to developing the "Right to Food" as an important Human Right, and in the human development of country and world at large

## Causes Food problem and Global Hunger

The causes of food crisis and hunger all over the world are as follows as-

## Increasing Population

Dr. Julian Huxley, late director of UNESCO, opened the population problem with a survey. It had been the fashion in this country, he said, to speak of a possible decline in population, but that was only a local and temporary phenomenon, masking the real issue, which was the trend of world population as a whole. In all human history, apart from temporary periods of stagnation or of regression, the population had steadily increased, and not only so, but the rate of increase had risen. The present population of the world is above 7.8 billion; in 1800 it was 920 million; in 1650 about 545 million. Earlier computations suggested that at the beginning of civilization the population was 20 million, reaching 200 million by the middle period of the Roman Empire. The rate of increase was now 1% per annum; in earlier periods it was 0.1%. The net increase of world population is now roughly 3 persons in every second, or something like 243360 person every twenty-four hours.

## Low food production and Increasing Price[2]

i.e., low per capita food production and high rates of population growth are main cause of cause food shortage in several underdeveloping countries, particularly in tropical and semi

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[2] Available on http://legalserviceindia.com.access on 12-08-2016 at 10:22 am.

tropical regions. Even though 60 to 80 percent of the people in these countries are of engaged in farming, there productivity is so low that it does not fulfil the needs of the whole population. By contrast in some industrialized countries less than 8% of the population is engaged in an agricultural industry that produces vast surpluses. Although these surpluses help to meet the needs of many other parts of the world, malnutrition is widespread and persistent in the underdeveloped areas and is responsible for much of the high morality in these areas, whether by itself or in a combination with infections of various types.

Increasing price is one of the causes of the food crisis. World food prices is increasing because of competition of bio fuel production with food production,[3] if the most affected countries were not dependent on food imports to guarantee population food needs, they could have substituted food imports with local products, which would have been sold in the cities at affordable prices. But this substitution was made impossible by the imposition of structural adjustment programmes since the 1970s by the International Monetary Fund (IMF) and the World Bank (WB), which forced countries of the South to liberalize their agricultural sector, eliminate subsidies to small farmers and promote export crops as a source of foreign currency to pay off the debt.

The withdrawal of States from rural development, under the influence of the international financial institutions, has been one of the root causes of the food crisis. The other root cause is the poverty of populations living in cities of the South, which obliged them to spend practically all their income on food, when prices increased. In most countries of the North, price increases had far less impact on the capacity of households to purchase food. In order to understand the real causes of the food crisis and to respond appropriately, it is critical to understand the causes of structural hunger.

These are physiological causes**;**they are the same for any person suffering from hunger, under-nutrition and malnutrition. Underlyingcausesare much more complex. It was believed for a long time that the main cause of hunger was lack of available[4]food.

**Current World Food Situation**

In all over World and accessibility of Food security is depends on available supplies of food, the income of the designated population and accessibility to the available supplies as well as the consumption rate of food.Global food supply has improved enormously since the early 1960s. World food and agricultural production has never experienced more favourable conditions than in the 1980s and 1990s. FAO's forecast for global cereal productionin year 2016has been lowered for the third consecutive months, with downward revisions forall the major cereals. Nevertheless, globalcereal production is stillexpected to reach a record high level of 2742 million tonnes.

[3]Available on http://worldhunger.org/article/08, access on 13-08-2016 at 12:30 pm.

[4] "Food Security and Entitlement New York, Clarendon Press, Oxford University Press.

The agricultural sector on average has kept up with population growth and demand for agricultural produce. World grain production (mainly wheat, corn, and rice) has shown an upward trend, with the exception of slight fluctuations in some years due primarily to drought and other natural disasters. Thus, it is evident that, more than ever before, an adequate amount of food is being produced today. Based on current trends and improved agricultural technology, world aggregate food production will be sufficient to meet demand in the decades ahead.[5]

But now, it is anticipated that world food supplies will be adequate to feed the global population. Right now there are viable alternative technologies in agriculture to secure the world food supply. The FAO observed that it is possible to increase agricultural efficiency without environmental degradation. It's suggested that this could be accomplished through better research, more effective education and training, improved access to markets, and more ecologically suitable farming practices.

**Right to Food in the International Law**

The right to food has essentially been developed as a treaty right; it is embodied mainly in the two international covenants and has refined by the often subtle and creative work of the covenants. However, other international and regional instruments are relevant to our analysis. While human rights treaties are often cited as evidence of state practice, given that they effectively signal a state's acceptance of legal obligation, they may also be cited as evidence of opinion juries. As stated in Part I, the right to food is most clearly pronounced in Article 11 of the ICESCR. Like the ICCPR, the ICESCR has been widely ratified.

Additionally, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires States Parties to ensure adequate nutrition for women during pregnancy and lactation. It has been ratified by 179 states. The Convention on the right of the child (CRC) has 192 States Parties. Each State Party is called upon to take appropriate measures to combat disease and malnutrition through, inter alia, the provision of adequate nutritious foods and clean drinking water. In the case of the ICESCR, CEDAW and CRC, not only have the conventions been widely ratified, but their States Parties include countries that are most affected by world hunger, including India and the countries of sub- Saharan Africa.[6]

In addition to human rights treaties, the right to food can be found under humanitarian law, in U.N. resolutions, and in countless international declarations. According to one commentator, the international community's attempts to actualize the right to food can be found in "over one hundred instruments relevant to the right to food's definition and establishment as a human right. "Against the background we purpose to give outlive of the right to food prescribe of the convention, how a right treaties and declarations."

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[5] Available on http://www.radianceweekly.com. Access on 14-08-2016 at 10:12 am.
[6]Available on http:/www.fao.org/english/newsroom/news/2003/html. Access on 14-08-2016 at 10:19 am.

**Convention on the Elimination of All Forms of Discrimination against Women 1979**[7]
**Article 12**
Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 14: States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

**Article 25 of Universal Declaration of Human Rights, 1948**[8]
Prescribe that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social service, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

**Article 11 of the International Covenant on Economic, Social and Cultural Rights, 1966:-** The right to food is related in Article 11 of the International Covenant on Economic, Social and Cultural Rights 1966[9]this article define the right to food in the following words-
(I) The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on tree consent.

(II) The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which have needed:

(a)To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

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[7]General Assembly Resolution on 34/180, Enforcement date 3 Sept. 1981.
[8] Gen. Ass. Resolution 217-A (III) of 10 December 1948.
[9] Gen. Ass. Resolution 2200-A (XXI) of 16 Dec 1966, Enforcement Date 3 Jan. 1976.

**International Covenant on Civil and Political Rights 1966**

The right to food is avid and all compassing right and closely linked the right to life which is regarded as a supreme have a right, article 6 of the International Covenant on Civil and Political Rights 1966[10]proclaims that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

**Humanitarian Law and Right to Food**

The Geneva Conventions, considered the cornerstones of international humanitarian law and widely claimed as customary international law, ensure the availability of food in cases of armed conflict. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I) requires a state that has captured medical personnel from a neutral country, who were providing medical assistance to an enemy party, to provide such individuals with the same food as is granted to the corresponding personnel in the state's own armed forces, and to ensure that "The food shall in any case be sufficient as regards quantity, quality and variety to keep the said personnel in a normal state of health." Similarly, the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) requires the detaining power to "supply prisoners of war who are being evacuated with sufficient food" and to ensure that "The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies." A number of other provisions in the same Convention also relate to the right to food. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) contains several articles that address the right to food.

Article 55 is of particular importance as it imposes an affirmative duty on the occupying power to ensure food and medical supplies for the occupied population. Two Protocols to the Geneva Conventions also address the right to food.[11] Those norms that are observed even in times of conflict can easily be seen as having the status of fundamental rights. Additionally, humanitarian law is increasingly seen as incorporating those norms that are already established under human rights law.

**U.N. Resolutions and Declaration**

Resolutions made by multi-state actors in international forums are an important indication of state practice, and depending on their content, may also provide evidence of opiniojuris. The U.N. General Assembly resolutions are of particular importance because they reflect the views and actions of a plurality of states. U.N. General Assembly resolutions repeatedly reference the right to food and/or the obligation to refrain from endangering food security.

Resolution 57/226, The Right to Food, for example, states that "food should not be used as an instrument of political or economic pressure" and reaffirms "the importance of international cooperation and solidarity, as well as the necessity of refraining from unilateral measures that

[10] Gen. Ass. Resolution 2200-A (XXI) of 16 Dec 1966, Enforcement Date 23 March 1976.
[11]Available on http://www.icrc.org/web/english/html/genevaconventions. Access on 19-08-2016 at 10:55 am.

are not in accordance with international law and the Charter of the United Nations and that endanger food security."[12]

The Resolution also reaffirms "the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger so as to be able fully to develop and maintain their physical and mental capacities."

Similar statements are made in General Assembly Resolution 58/186, The Right to Food. Declarations provide additional evidence of state practice and, in some circumstances, opinio-juris. Multi-state declarations are gaining importance as states increasingly act collectively by forming conferences, groups, and compacts. It is in these forums that states are likely to pronounce their positions on legal rights and obligations.

**Food Aid Convention**

The right to be free from hunger and to some degree the right to adequate food has been reaffirmed by states in a number of conferences and declarations, beginning as early as 1967, when eighteen states signed a Food Aid Convention (FAC), declaring their intention to supply a minimum amount of food aid to countries in need. In 1997, members of the Food Aid Committee (Argentina, Australia, Canada, the European Community and its Member States, Japan, Norway, Switzerland, and the United States) negotiated a new FAC, which came into effect on July 1, 1999, with an initial duration period of three years. The overarching objective of the FAC is "[t]o contribute to world food security and to improve the ability of the international community to respond to emergency food situations and other food needs of developing countries." The FAC was extended by two years in June 2003.[13]

**U.N. General Assembly**

In 1974, the Universal Declaration on the Eradication of Hunger and Malnutrition proclaimed the unequivocal right of every individual to be free from hunger. In 1984, the U.N. General Assembly resolved that "the right to food is a universal human right which should be guaranteed to all people, and, in that context, [the General Assembly] believes in the general principle that food should not be used as an instrument of political pressure." A year later, the World Food Security Compact reaffirmed the fundamental right to be free from hunger.

**Universal Declaration on the Eradication of Hunger and Malnutrition, 1974[14]**

Recognizing that the elimination of hunger and malnutrition and the elimination of the causes that determine this situation are the common objectives of all nations:

i. Every man, woman, and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties. Society today already possesses sufficient: resources, organizational ability and

[12] *Ibid.*
[13] Available on http://www.fao.org/docoments/show.html. Access on 19-08-2016 at 11:15 am.
[14] Gen. Ass. Res. 3180 (XXVIII) of 17 Dec. 1973 Adopted by World Food Conference 16 Nov. 1974.

technology and hence the competence to achieve this objective. Accordingly, the eradication of hunger is a common objective of all the countries of the international community, especially of the developed countries and others in a position to help.

ii. It is a fundamental responsibility of Governments to work together for higher food production and a more equitable and efficient distribution of food between countries and within countries.

**World Declaration on Nutrition, 1992**

We recognize that access to nutritionally adequate and safe food is a right of each individual. We recognize that globally there is enough food for all and that inequitable access is the main problem. Bearing in mind the right to an adequate standard of living, including food, contained in the Universal Declaration of Human Rights, we pledge to act in solidarity to ensure that freedom from hunger becomes a reality.

**Article 8 of Declaration on the Right to Development, 1986[15]**

It isrelated to theStates should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.

**Food and Sustainable Agricultural Development, 1996[16]**

The General Assembly, Reaffirming the right of everyone to have access to safe and nutritious food consistent with the right to adequate food and the fundamental right of everyone to be free from hunger.

(g)Article 24 of the Convention on the Rights of Child 1989[17] proclaims the right to food of the child and links with the right to education, child health and nutrition under article 24:- Paragraph 1 of article 24 is States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. Paragraph 2 of Article 24 required that States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

1) To combat disease and malnutrition, including within the framework of primary health care, though, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
2) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental

[15] General Assembly Resolution 41/128.
[16] Gen. Ass. Resolution 51/171-1996.
[17] General Assembly Resolution 44/25 Enforcement 2 Sept. 1990.

sanitation and the prevention of accidents; Article 27 is another provision which recognizes the right of the child to a slandered of living for the adequate child's physical, mental, spiritual, moral and social development.

**World Declaration on the Survival, Protection and Development of Children, 1990**

We will work for optimal growth and development in childhood, through measures to eradicate hunger, malnutrition and famine, and thus to relieve millions of children of tragic sufferings in a world that has the means to feed all its citizens.

**Vienna Declaration and Programme of Action 1993**

The World Conference on Human Rights calls upon States to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that creates obstacles to trade relations among States and impedes the full realization of the human rights set forth in the Universal Declaration of Human Rights and international human rights instruments, in particular the rights of everyone to a standard of living adequate for their health and well-being, including food and medical care, housing and the necessary social services. The World Conference on Human Rights affirms that food should notuse as a tool for political pressure.

**Millennium Development Goals**

While the declarations confirm states recognition of the right to food as a fundamental human right, it could be argued that the declarations do not represent universal acceptance of the right to food as a legal right. On the other hand, these declarations formed part of the process that led to the promulgation of the Millennium Development Goals (MDGs), which have been universally recognized. The MDGs were adopted by all members of the United Nations. The first MDG concerns the eradication of extreme poverty and hunger. Specifically, it calls for reducing the proportion of people living on less than $1 a day to half the 1990 level by 2015. It also calls for halving the proportion of people who suffer from hunger between 1990 and 2015.

The MDGs represent virtually universal acceptance of the right to be free from hunger, which is the core minimum component of the right to food. Commitments to the MDGs have also been reinforced or confirmed in other forums, including the WTO's Doha Ministerial Declaration, the Monterrey Consensus, and most recently, the FAO's Voluntary Guidelines for the Implementation of the Right to Adequate Food. [18]In addition to MDGs and other declarations, the right to be free from hunger and, to some extent, the broader right to adequate Food have been reaffirmed or read into regional charters, conventions, and declarations, including the American Declaration of the Rights and Duties of Man (1948), the Charter of the Organization of American States (1948), the Inter-American Charter of Social Guarantees, the Additional Protocol to the American Convention on Human Rights, the Cairo Declaration on Human Rights, and the African Charter on Human and Peoples' Rights.

[18] General Assembly Resolution 44/25 Enforcement 2 Sept. 1990.

**The World Food Summit & FAO for the right to food**

During the 1996 World Food Summit (WFS), a Plan of Action was adopted with the aim of reducing the number of undernourished people to half their 1996 number by 2015. The Plan of Action contained seven commitments which were to act as guiding principles to all those involved in formulating the policies to implement the Plan of Action at national and international levels. The FAO Committee on World Food Security (CFS), which had been the negotiating forum for the preparation of the WFS, was appointed to monitor progress at regular intervals and, at its June 1998 session, it presented a first review of the action taken to fulfill each of the seven commitments, at national and international levels, during 1997.

This review has based on reports contributed by about 100 countries and 33 United Nations agencies, international organizations, regional or sub regional bodies and nongovernmental organizations (NGOs). Many of the countries covered by the CFS review had introduced institutional measures to support the Plan of Action and its aims. These included: establishing interministerial coordination mechanisms; reviewing national strategies in the light of WFS objectives; and developing national plans of action. More specifically, Food for all campaigns and other initiatives, including World Food Day celebrations, had carried- out with a view to raising public awareness of food security issues.

**Conclusion and Suggestions**

There are so many tools to protect the human right to food at global level as well as regional levels which is good initiative of international society including public and private tools. United Nation bodies i.e. Food and Agriculture Organization, World Trade Organization, NGOs and several other public welfare organizations played collectively a pivotal role to establish right to food as a fundamental human right. Several treaties and conventions provisioned that to protect food security of all human being in their objectives.

It is also mention here that several treaties and conventions organized by United Nation tried to provide more and more beneficial policies to all for their food securityaccording to concern problems regarding food security. With these regards my suggestion is that the international societies should educate their citizens regarding their right to food and State should make policies to establish economic equality among people, further sustainable development in agricultural productivity should be encourage without harming environment and health of human being including biodiversity.

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# Triple Talaq under Muslim Personal Law: A Critical Analysis

***Mr. Dharmender Singh Yadav***[1]

## Introduction

India is a multicultural society where we find different religious groups have their own faith and belief. Their belief is decided by the set of law. And these laws are by considering different customs followed by that religion. So, in India, different groups have their separate personal laws. Indian is following these laws since the colonial period.

India does not have a uniform code of family law. Its present family law domain, prevailing since mid 1950s, consist of two parelled streams- general laws of a secular nature which citizens can opt for at their choice , and community -specific laws otherwise applicable to followers of particulars religions, known in common parlance as the 'personal laws.' while the personal laws of all other communities have been almost wholly codified and reformed by the state, legislation in the area of Muslim Personal law has been few and far between due to a strong minority syndrome prevailing in the traditional Islamic law as sacrosanct.

Till today there only the following brief Acts:

(a) The Muslim Personal law (Shariat) Application Act 1937.
(b) The Dissolution of Muslim Marriage Act, 1939.
(c) The Muslim Women Protection of Rights on Divorce Act 1986.

The first of these only defines the scope of Muslim law in India and includes divorce among the subjects for deciding which the rule of decision, if both parties to a case are muslim, shall be Muslim personal law. In this respect it refers to various concepts which are generally regarded as 'forms' of divorce in Islamic law – Talaq, Khula, mubaraat, lian ,Ila and Zihar. This Act, or any other Act for that matter does not define or explain any of these concepts and consequently all these remain victims of grave misconceptions and gross misuse in the society. The second Act deals with the Muslim Women's right to obtain divorce through a court: and the third- enacted in the aftermath of the celebrated *Shah Bano case* of 1986- with their post divorce rights.

Now a days there is a burning issue in society about Triple Talaq i.e. Talaq-ul-Biddat. Almost all news channels and print media have given space in the news about it. Social and political thinkers and intellectuals have more and more interest on this topic. The debate over Muslim personal law has taken a serious turn over the matter of Triple Talaq. The government of

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India is looking for its reform. While the All India Muslim Personal Law Board (AIMPLB) – established in 1972 – is being blamed for all the regressive provisions of Muslim Personal Law, in operation in India for about 1000 years.

The Bharatiya Muslim Mahila Andolan (BMMA), formed in 2007, is aggressively initiated the debate to reform Muslim Personal Law. The Prime Minister himself spoke of the plight of Muslim women and has appealed to bring an end to what he called the tyranny of Triple TalaqTalaq in legal sense means dissolution of marriage tie of husband and wife, according to Muslim law, a husband, who is of sound mind and has attained puberty may divorce his wife whenever he desires, without assigning any reason, at his mere whim o caprice. Under shia law in addition to the requirement of sound mind and puberty free will and intention are essential for valid Talaq.

Talaq, by which is meant dissolution of the marriage in the life time of the parties thereto, may be affected by the act of the husband or bye the wife of by mutual agreement; or it may be annulment of the marriage by a decree of a law count.[2] To understand the nature and concept of divorce law of Islam, a brief account of historical background of divorce is necessary. The following paragraphs deal with a brief historical sketch.

**Holy Quran Perspective on Triple Talaq**

"And the divorced women should keep themselves in waiting for three courses, and it is not lawful for them that they should conceal what Allah has created in their wombs, it they believe in Allah and the last day; and their husband have a better right to take them back in the meanwhile if they wish for reconciliation; and they have rights similar to those against them in a just manner and the men are a degree above them and Allah is Mighty, wise."

**Quran, Ch.II, Ver. 228**

Divorce may be (pronounced) twice, then keep (them) in good fellowship or let (them) go with kindness; and it is not lawful for you to keep any part of what you have given them, unless both fear that they con not keep within the limits of Allah of Allah there is no blame on them for what she gives up to become free thereby. These are the limits of Allah, so do not exceed them and whoever exceeds the limits of Allah these it is that are the unjust.

**Quran, Ch. II, Ver. 229**

So, it he divorces her she shall not be lawful to him afterwards until she marries another husband; then if he divorces her there is no blame on them both if they return to each other (by marriage) if they think that they them both if they return to each other (by marriage) if they think that they can keep within the limits of Allah and these are the limits of Allah which he makes clear for a people who know. Keep within the limits of Allah and these are the limits of Allah which he makes clear for a people who know.

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[2] F.B., Tyabji Muslim Law, 5th Ed, Bombay,1969, p.143.

**Quran, Ch.II, Ver. 230**

And when you divorce women and they reach their prescribed time, then either retain them in good fellowship or set them free with liberality and do not retain them for injury, so that you exceed the limits, and whoever does this he indies is unjust to his own soul; and do not take Allah's communications for a monkery, and remember the favor of Allah upon you and that which He has revealed to you of the Book and the Wisdom admonishing you thereby. And be careful (of your duty to) Allah and know that Allah is the knower of all things.

**Quran, Ch.II, Ver. 231**

And when you have divorced women and they have ended their term (of waiting) then do not prevent them from marrying their husbands when they agree among themselves in a lawful manner; with this is admonished he among you who believes in Allah and the last day, this is more profitable and purer for your; and Allah knows while you do not know.

**Quran Ch. II Ver. 232**

**Constitutional Perspective**

**Equality before law (Article 14)**

The State shall now deny to any person equality before the law or the equal protection of the laws within the territory of India.

**Prohibition of discrimination on grounds of religion, race, caste sex or place of birth (Article 15)**

1. The State shall now discriminate against any citizen on grounds only of religion, race caste, sex, place of birth or any of them.
2. No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability liability, restriction or condition with regard to-
    a) Access to ships, public restaurants hotels and places of public entertainment; or
    b) The use of wells tanks bathing ghats roads and places or public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
3. Nothing in this article shall prevent the State from making any special provision for women and children.
4. Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
5. Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provision ralate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State other than the minority educational institutions referred to in clause (1) of article 30.

**Protection of Life and Personal Liberty (Article 21)**

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

**Freedom of Conscience and Free Profession, Practice and Propagation of Religion (Article 25)**

**Article 25** of Indian constitution states "all persons are equally entitled to freedom of conscience and the right of freely profess, practice, and propagate religion subject to public order, morality and health.

**Uniform Civil Code for the citizen (Article 44)**

The State shall endeavor to secure for the citizens uniform civil code through the territory of India. As per discussion of all the above there are two views of arguments about triple Talaq has been originated.

**Arguments in Favour of Abolition of Talak and Against of Abolition of Talak**

Uniform civil code calls for replacing of the personal laws that are bases on religion and scriptures with a common set of laws governing all the citizens of India. These are usually laws relating to marriage divorce, inheritance of property, adoption etc. Triple talak is one such Muslim personal law which has been practiced since time immemorial.

There have been a lot of disputes regarding the triple talaq law which gives a man the right to utter the word thrice and seal the deal of divorce permanently. Women are suffering injustice in the name of personal law and hence they want the triple talaq thing to be abolished and be replaces with uniform civil code.

**In Favor of Abolition of Talaq**

1. **Unjust to Women:**
   Women are aggrieved due to this age old practive to giving all the power to a man to get rid of the women without giving her any explanation or having to justify his act in front of a court or gathering of people. It is only women and children who have to suffer the consequences of their action. Man could be drunk and utter "talaq" thrice and it's over between them Is is not he who shall face the consequence but the women.

2. **Personal Law bodies are of no help:**
   If Muslim personal Law board is so worried about keeping the government from interfering in the matters that relate to their religtion they should have heard the grievances of the suffering women and found solution for them instead of turning a deaf ear. Many women have testified that the personal law board refused to hear their plead in situations where these women were met with injustice.

3. **Un-Islamic:**
   Those advocates of Islam were born and raised patriarchs who have believed that the verses of Quran are extreme terms that couldn't have any other interpretation. They follow verses that entertain their masochistic belief only while ignoring those that have provision for safeguarding the interests of women. Islam has held women in high esteem. Triple talaq has various limitations of time and place and sanity of the man which is

something that is not followed in India while it prevails in many other countries with Muslim majority.

4. **Unconstitutional:**
   Bestowing extra rights to men regarding divorce is unfair. Though Islam also gives right to seek divorce to women but the powers are limited. A man on the other hand can simply utter the three words, giving no reason taking up no responsibility of the children or giving her alibi money and he's suddenly single again. This is unconstitutional and must be done away with.
5. **Misused Laws:**
   The triple talaq thing is badly misused by men everywhere. They could marry a woman live with her for a few years and for whatever reason leave her shattered. Rich men from Gulf countries have been popularly known to marry and take poor Indian girls as wives and later after a few years send her back with the tag of a 'divorcee'.

**Against of Abolition of Talak**

1. **Diverse Culture:**
   India is known for its diverse cultural trends. Every religion can follow its own laws and practices with no interference from the law making bodies. Admonishing this factor will be a bad move since there are Hindi personal laws too that allows them to have their own set of rules. Changing th diversity of India farcing people to adapt to the Uniform Civil Code will be an extreme mob.

2. **Interference in Religion:**
   Constitution of India gives the right to all religions to freely practice their own customs and traditions. if government interferes in the matters which are supposed to be traditional to a particular religion, people are bound to oppose it in large numbers this could create mistrust amongst people which can affect the harmony of our nation.

3. **Direct them to Decide:**
   Instead of enforcing uniform civil code the government of India could instruct the personal law boards to act with sensitivity with these matters such as Triple Talaq and Nikah halala. Many Muslim personal law boards can do that too with some instruction from the High courts.

**Conclusion**

If Muslim countries can bring about reform in family laws India must follow suit. In the words of Justice *Hidayatulla:* "if the lead is coming from Muslim countries, it is hoped that in the course of tie the same measures will be applied in India also." Presently talaq system do not deliver social justice, it only enables political parties to gain political mileage. Personal law boards were created for a reason. It was supposed to act as a medium that would be able to maintain integrity of law and order in that particular community and people would willingly follow the verdict of the board.

However, it must be noted that the personal boards are nearly dead except for being stubborn on matters that the government wants to take in its hands. If the personal boards are active, they should have been able to ensure that justice is served to those women who are victims of triple Talaq. Muslim women in large numbers are showing support to the abolition of triple talaq which shows that it is the need of the hour. Now ball in the court of Honorable Supreme Court Constitutional bench in *Shayara Bano v. Union of India*. In this case judgment has been reserved by the Apex court and pronouncement waited. We are highly confirmed that Supreme Court will pronounce judgment on the basis of rule of law and it will be just, fair and reasonable.

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# Position of Public Interest Litigation in India

***Dr. Aniruddha Ram***[1]

## Introduction

India is a social welfare state, as distinguished from a mere police state, which aims at social, welfare and the common good and to secure to all its citizens. Justice- Social and economic[2]. The 'Social welfare philosophy is imbibed in the constitution itself. The public/social welfare and interest lies in attainment of an egalitarian order and a society where rule of law exists. India is a developing country; still the majority of its population is poverty stricken and illiterate. For them, the guarantee of fundamental rights as is incorporated under prat III of the constitution does not hold any significance. Every day, they sacrifice a number of their rights at the hands of rich and literate. For the poor, illiterate and ignorant of the technicalities of law, justice is a far-fetched reality.

On the other hand, the Government has also not shown any concern for their well-being. Not only this with regard to many other issues, sometimes the public has to wait for years for Government's response. As the directive principles are not enforceable by law[3], so it makes the government to ignore its duties having public concern. Thus, in order to prevent the violation of the rights of sizeable segments of the society which owing to poverty, ignorance, social and economic disadvantages cannot themselves assert and to realize the government its responsibilities, the concept of Public Interest Litigation/ Social Action litigation has been introduced.

## Meaning of Public Interest Litigation

The word Public Interest Litigation is not defined in any dictionary. basically, the word 'Public Interest is defined in various many dictionaries. The oxford English Dictionary[4] define Public Interest as the common well-being also public welfare. In shroud's judicial dictionary[5], Public Interest is defined thus: a matter of public or general interest "does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected". In Black's law Dictionary (Sixth Edition). Something in which the public, the community at large has some pecuniary interest, or some interest by which their

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[2] *P.B.K.M Samity v. State of West Bengal* AIR 1996 SC 2426.
[3] Article 37 of the Constitution of India, 1950.
[4] 2nd Edition, Vol. XII.
[5] IV Edition Vol. 4.

legal right or liabilities are affected, it does not mean anything so narrow as mere curiosity, are as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government.

The expression 'litigation' means a legal action including all proceedings therein, initiated in a court of law with the purpose of enforcing a right or legal seeking a remedy. Therefore, lexically the expression 'Public interest litigation' means a legal action initiated in the court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected[6].

**Origin of Public Interest Litigation**

The concept of Public Interest Litigation (PIL) had its origin in U.S.A. but the seeds of PIL, in Indian legal system were initially sown by Krishna Iyer J. in 1976 (without assuming the terminology[7]). The emergence of the concept of Public Interest Litigation in India has been explained by Bhagwati. J in one of his articles "Social Action Litigation: The Indian experience"

*"The judiciary has to play a vital role not only in preventing and remedying abuse but also in eliminating exploitation and injustice. For this purpose, it is necessary to make procedural innovation in order to meet the challengesposed by this role of an action and committed judiciary[8]"*

**Role of locus standi**

With Public Interest Litigation gaining momentum, the Supreme Court relaxed the traditional rule of locus standi in the filing of a Public Interest Litigation and evolved a broad rule which now permits Public Interest Litigation or Social Action litigation at the instance of 'public spirited citizens' for the enforcement of Constitutional and other legal rights of any person or group of persons who because of their poverty or socially or economically disadvantaged position are unable to approach the court for relief. Thus, a Public Interest Litigation can be filed by any member of public acting Bonafedeon the behalf of other/ others for the enforcement of fundamental rights or others legal/statutory rights under Article 32 or Article 226 respectively[9].

In *A.B.S.K. Sangh (Rly) v. Union of India*[10] it was held that the Akhil Bhartiya Soshil Karma Chari Sangh (Railway), though an unregistered association could maintain a writ petition under Article 32 for the redressal of a common grievance. 'Access to Justice through class

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[6] Dr. Bijan Narain Mani Tripathi, An Introduction to Jurisprudence, 14th Edition, p. 387.
[7] *Mumbai Kamdar Sabha v. Abdulbhai* (1976) 3 SCC 832.
[8] Vide 'Role of Judiciary in Plural societies' Published in 1987.
[9] Article 32, The Constitution of India, 1950.
[10] AIR 1981 SC 298.

actions. Public Interest Litigation and representative proceedings is the present Constitutional Jurisprudence.

**Epistolary Jurisprudence**

The Indian judiciary rising above the established contours of filing a petition or technical rules of procedure, not only relaxed the traditional rule of locus standi but has also acted 'pro-bono -publico' i.e., by treating letters as petitions and in some cases, the courts have been even taken Suo motu cognizance of 'news' published in newspapers and treated them as petitions. With the view to make themselves more accessible to disadvantaged sections of the society, the court has introduced procedural innovations. Mere letters addressed to the court have been treated as writ-petitions in cases of gross violation of fundamental rights, thus led to the evolution of Epistolary Jurisprudence

The active role played by the judiciary in showing concern towards safeguarding the rights of public has given a boost to. Public Interest Litigation. Hence, it would be right to say that Public Interest Litigation is an important contribution of judicial Activism of the late 1980 and early. 1990.

**Nature and Scope of Public Interest Litigation**

The innovation of Public Interest Litigation by the Supreme Court is an extension of it' a Jurisdiction under Article 32 of the Constitution. However, PIL is not in the nature of adversary litigation rather it is a challenge and an opportunity to the government to vindicate and effectuate the prevention of basic human rights meaningful to the deprived and vulnerable section of the community and to assure them social and economic justice which is the main objective of our constitution.

In *S.P Gupta and others v. President of India and others*[11], popularly known as (judges Transfer Case), the Court examined the scope and object of Public Interest Litigation. The Court held that any member of the public having "sufficient interest" can approach the court for enforcing Constitutional or legal rights of other persons and redressal of a common grievance. On the behalf of majority, Bhagwati, J. stated the rule regarding the Public Interest Litigation i. e when can it be filed, who can file it and how can it be filed.

(1) Where a legal wrong of legal injury is caused to person or to a determinate class or persons by reason of violation of any constitutional or legal right and such person or determinate class of person is by reason of poverty, helplessness of disability or socially or economically disadvantaged position unable to approach direction or order writ in the high Court under Article 226 or in case of breach of any fundamental rights to this court under Art. 32.

(2) Where the weaker sections of the community are concerned such as under-trial prisoners languishing in jails without trial, inters of protective home or poor workers

[11] AIR 1982 SC 149.

who are helpless victims of the exploitative society and do not have easy access to justice, the Supreme Court will not insist on a regular writ petition to be filed by the public-spirited individual espousing their cause and seeking relief of them. The Supreme Court will readily respond to a letter addressed by such individual action pro bono publico.

(3) No doubt, there is a prescribed procedure for moving the petition under Article 32 but the Court may cast aside the technical rules of procedure in the exercise of its dispensing power and treat the letter of public minded individual as a writ petition and act upon it.

**Remedy under Public Interest Litigation**

In PIL the Court has power to take affirmative action by issuing specific direction is cases of governmental inaction to perform its duty/functions. The court also has the power to award cost to the petitioner who has brough an important matter before the court for consideration. The Court can also grant compensation to person who has suffered on account of the violation of their constitutional or legal rights.

The pill of Public Interest Litigation has been used to cure many social problems. Following are some of the cases in which Public Interest Litigation (PIL) jurisdiction has been invoked. These cases are primarily related to the protection of weaker sections of society, protection of environment and other human rights and also related to issues of public importance.

In *Neeraja Chaudhari v. State of MP*[12], case the Supreme Court dealt with bonded labour, contract labour, child labour cases and directed the authorities to take steps for ensuring better enforcement of labour laws and for identification, release and rehabilitation of bonded labour.

In *Hussainara khatoon v. State of Bihar*[13], case the Court declared the detenu has a right to speedy trial and free legal aid, constrained in the right to life and personal liberty under Art. 21.

In *Lakshmi Kant Pandey v. Union of India*[14], case the Supreme Court laid down certain principles and norms to be followed by government and other concerned agencies in determining whether a child should be allowed to be adopted by foreign parents. This is done to ensure the welfare of children of tender age proposed to be adopted by foreign parents and to keep a check on the illegal activities taking place in the name of adoption such as child trafficking.

[12]AIR 1984 SC 1099 Also See: *M.C Mehta v. State of T.N.* AIR 1991 SC 417.
[13] AIR 1979 SC 1369.
[14] (1994) 2 SCC 244.

In *Parmanand Katara v. Union of India*[15], case the Supreme Court observed that it is the paramount obligation of every member of medical profession. Private or government to give medical aid to every injured citizen brought for treatment immediately without waiting for procedural formalities to be completed in order to avoid negligent death.

In *Olga Tellis v. Bombay Municipal Corporation*[16], case the Court held that right to livelihood is included in right to life. In the present case, the removal of pavement dwellers by Bombay Municipal Corporation (BMC) was challenged, The Supreme Court said "Deprive a person of his right to livelihood and you shall have deprived his of his life" and ordered BMC to provide alternate arrangement to the displaced persons.

In *M.C Mehta v. Union of India*[17], case the Court ordered the closure of tanneries at Jajman near Kanpur which were polluting the river Gangas.

In *M.C Mehta v. Union of India*[18], case the Apex Court directed 292 industries located and operating in Agra to change over to natural gas as industrial fuel or stop functioning with coal/coke and get relocated, since the emissions generated by the coke/coal consuming industries were air pollutants and had damaging effects on the TAJ and the people living around TAJ Trapezium.

In *Sheela Barse v. Union of India*[19] , case the Court told the State Governments to set up necessary remand houses and observation homes where children accused of an offence could be lodged pending investigation and trial.

In *Vineet Narain v. Union of India*[20] case wherein the Supreme Court issued directions in regard to the Constitution of the Central Gig lance Commission (CVC) and its functioning in order to make central bureau (CBI) an impartial agency. It was contended that CBI has failed to perform its duties and legal obligations in as much as it has failed to investigate matters arising out of the seizure of "Jain Diaries" and to prosecute all persons who were guilty.

In *Mohan Lal Sharma v. State of U.P.*[21] case a telegram was sent to the Court from the petitioner alleging that his son was murdered in police lock-up by the police. The telegram was treated as writ petition by the Court and the case was referred to CBI for detailed investigation.

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[15] AIR 1989 SC 2039.
[16] AIR 1986 SC 180.
[17] (1987) 4 SCC 463.
[18] AIR 1997 SC 734.
[19] AIR 1986 SC 1773.
[20] AIR 1998 SC 889.
[21] (1989) 2 SCC 609.

Thus, the objective of innovating Public Interest Litigation (PIL), is to bring socio economic justice by protecting the interests of Public, and securing them the valuable human rights and making the government answerable on ignoring the matters of public importance.

**Extended scope of Public Interest Litigation**

In *M.C Mehta v. Union of India*[22], the Court further widened the scope of Public Interest Litigation.

(1) The Court held that the poor in India can seek enforcement of their fundamental rights form the Supreme Court by writing a letter to any judge. Also, such a letter does not need to be accompanied by an affidavit. Earlier the rule laid was that the letter should not be addressed to any individual judge but only to the court. The court did away with this rule because such an approach would deny easy access to justice as the poor and illiterate masses might not know the proper procedure to address the court.

(2) The court held that under Art. 32, it has power to grant compensation in appropriate cases where the fundamental rights of poor and disadvantaged person are violated. However, Art. 32, cannot be used as a substitute for claiming compensation for the infringement of fundamental rights which can be sough through the ordinary process of a Civil Court. Only in the cases where it affects large number of people that the compensation can be claimed from this court under Art. 32.

(3) The Court held that Court can appoint socio-legal commission or devise any procedure and forge any tool it deems appropriate for the enforcement of fundamental rights of the poor.

**Abuse of Public Interest Litigation**

Liberalizing the rule of Locus standi has certainly posed some dangers in the field of public interest litigation. With such a wide scope, the chances and risks of frivolous litigation increases. The court are already having huge number of cases in their balance which are yet not put for hearing or are pending for disposal for years. In such cases entertaining frivolous petitions is in itself injustice to the public. The abuse of Public Interest Litigation can be showcased in the following's cases.

*Janta Dal v. H.S Chaudhari*[23] , In this case the petitioner tried to misused the public interest litigation for political purposed. In 1986, before gun deal was made by Indian government. Later on, some politicians were charged word taking bride in the deal. For further inquiry CBI moved an application before these special judges to issue a later of rogatory (request) to Switzerland government for providing necessary assistance in conducting investigation. At this stage, an advocate H.S Choudhari filed PIL to not to issue the letter of rogatory unless allegations against the concerned persons is proved. The PIL was dismissed on the account

[22] AIR 1987 SC 1087.
[23] (1992) 4SCC 653.

that the petitioner had no locus standi to file petition as he was a total stranger to the prosecution and more than they were not even authorized by the convicts.

*Simranjit Singh Mann v. Union of India*[24]., In this particular case the petitioner who was a prominent political leader filed PIL on the basis that he was interested in establishing the rule of law and thus challenged the conviction of two convicts on the grounds of violation of Art. 22, 21, and 14

The Supreme Court dismissed the PIL and held that in criminal cases as far as possible, the courts should be approached by the accused only and not by a stranger through PIL.

**Criticism of Public Interest Litigation**

Inspired of its benefits, the PIL has been criticized by many. According to critics firstly, the relaxation of locus standi would flood the courts with litigation thereby resulting in delay in disposing of important matters and secondly, the Court has not capacity to enforce its order and in many cases the conditions have not changed.

Thirdly, it has been pointed out that through PIL, sometimes the courts make interference in the occupied field on the legislature and executive which is not justified as this against the connotational mandate and will result into conflict between the three organs of the State.

In order to meet the criticism of inability to enforce orders, Justice P.N Bhagwati referred to Art. 144 which says that "All authorities civil and judicial in the territory of India shall act in aid of the Supreme Court. If any of these authorities fail to carry out the orders of the Court, the Court can punish them for the contempt of court".

With regard to the criticism of flooding of litigations, the court replied by quoting the words of the Australia law Reforms Commission, "the liberalized standing rules has caused no significant increase in the number of actions brought arguing that the parties will not litigate at considerable personal cost unless they have a real interest in the matters.

**Conclusion**

There is no doubt that importance of Public Interest Litigation cannot be ignored in our country where the law enforcing agencies like police are involved in violation of fundamental rights of citizens. Inefficient and passive law enforcing machinery is a boon to the law violators. India has been largely accused on the international front for the violation of human rights. A large number of India's population is poor and lives in the rural areas, for them such a remedy will be a panacea for all their problems. But at the same time the court should be cautious so that frivolous litigations are not entertained.

In this regard I would like to quote Bhagwati., J words Justice Bhagwati said that with the relaxation of locus standi rules caution must also be observed so that the liberal rule of locus

[24] (1992) 4 SCC 653.

standi might not be used by Public, who approaches the Court in case of giving a note of caution, he Started. “But we must be careful to see that the member of the public, who approaches the Court in case of this kind, is acting bonfire and not for personal gain or private profit or political motivation or other oblique consideration. The Court must not allow its process to be abused by politicians and others.

# Sexual Harassment at Workplace

***Dr. Chandra Sen Pratap Singh***[1]

**Abstract**

*Harassment at workplace by the Males is the reality of the working woman's life. It was in August 1997, in the case of Vishaka v. State of Rajasthan & Ors., that for the first time, sexual harassment was explicitly or legally defined "as an unwelcome sexual gesture or behaviour, whether directly or indirectly as sexually colored remarks, physical contact and advances, showing pornography, a demand or request for sexual favors, any other unwelcome physical, verbal/ non-verbal conduct being sexual in nature." Starting from Vishaka to the enactment of the Sexual Harassment Act, 2013, a long journey and progress has been done in the field of sexual harassment at workplace. Still a lot has to be done in this field. The Article critically evaluate the progress in India in curbing the menace of sexual harassment at workplace.*

**Key Words:** *Sexual Harassment, Vishaka, CEDAW, Apparel Export Promotion Council, Workplace, Medha Kotwal Lele.*

## Introduction

The status of women throughout the world has been a debatable issue. Regardless of their caste, religion or class, Indian women have never enjoyed equal status, neither in their families nor in the society. Despite several Constitutional and legal safeguards, a lot of things still have to be done for the safety and empowerment of women. The menace of sexual harassment has been a part of our society. The economic compulsion of women led to many chances of exploitation. In today's era, the number of women entering the formal labor workforce in India is unprecedented. With the current global economic situation, more and more women are entering the workforce. In the light of this development, there is a need more than ever to respect, protect and fulfill the rights of women, especially at the workplace.

The 'right to work' includes the right to work free of any form of sexual harassment. Sexual harassment at the workplace, a new form of crime, has been emerged due to the women's effort to fight against the economic disparity with men. This crime is the most vivid example of human rights violation, gender equality and injustice. Harassment should not be treated as a joke. It creates feelings of discomfort, uneasiness and humiliation. Any such behavior is unacceptable and intolerable regardless of the perpetrator.

Sexual harassment is a complex issue involving women, their perceptions and behaviour, and the social norms of the society. Of all the forms that violence against women can assume, sexual harassment is the most ubiquitous and insidious; all the more so because it is deemed 'normal' behaviour and not an assault on the female entity.[2]

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[2] Available on http://www.womenstudies.in/elib/others/ot_sexual_harassment.pdf,

The emergence of the term 'sexual harassment' can be traced back to the mid-1970s in North America.[3] Sexual harassment, the legal claim, is a demand that State Authority stand behind women's refusal of sexual access in certain situations that previously were a masculine prerogative.[4] Sexual harassment at work is an unwelcome or uninvited behaviour of sexual natures, which is offensive, embarrassing, intimidating or humiliating and may affect an employee's work performance, health, career or livelihood.[5]

As far as the international prospect is concerned, the provisions for gender equality and protection of women at the workplace has been considered as a serious issue. Sexual Harassment of Women at Workplace has been taken up by various International Organizations, including the United Nations (UN) and the International Labour Organization (ILO).

The Preamble to the Declaration on the Elimination of Violence Against Women states: …Violence against women constitutes a violation of the rights and fundamental freedoms of women.[6]

The Declaration on the Elimination of Violence Against Women, 1993 states:

Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.[7]

The UN Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) is one such convention. It has been adopted in 1979 by the UN General Assembly and is often described as an International Bill of Rights for women. The CEDAW defines what constitutes discrimination against women, focuses on the protection of women from sexual harassment at the workplace.

The CEDAW consists of a Preamble and 30 Articles. The Convention defines discrimination against women as:

"Discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of

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[3] Carrie N. Baker, "The women's Movement against Sexual Harassment", p. 1, Cambridge University Press, 2008.
[4] C. MacKinnon, "Sexual Harassment: Its First Decade in Court" in *Feminism Unmodified: Discourses on Life and Law (9th printing, 1994)* 104.
[5] Sabitha, M., "Sexual Harassment Awareness Training at Workplace: Can it effect Administrators' Perception?", JOAAG, Vol. 3. No.2, (2008), p. 2.
[6] General Assembly Resolution No. 48/104, 1993.
[7] Article 1 of the Declaration on the Elimination of Violence Against Women and the Platform for Action from the Fourth World Conference on Women.

men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[8]

The other relevant provisions in this context contained in CEDAW are:

"1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;
(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction."[9]

At the International level, the United Nations *General Recommendations 19*[10] to the Convention on the Elimination of all Forms of Discrimination Against Women defines sexual harassment as including:

*such unwelcome sexually determined behaviour as physical contact and advances, sexually colored remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.*

The International Bill of Human Rights protects rights "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[11] The Universal Declaration of Human Rights pronounced safe working conditions with dignity as a basic human right.[12]

**Sexual Harassment in UK**

In England, sexual harassment is tried under Section 154 of the Criminal Justice and Public Order Act, 1994 which has inserted a new Section 4-A into the Public Order Act. It states:
4- A. *Intentional harassment, alarm or distress*
(1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he-

[8] Article 1 of the UN Convention on Elimination of All Forms of Discrimination Against Women (CEDAW).
[9] Article 11 of the UN Convention on Elimination of All Forms of Discrimination Against Women (CEDAW).
[10] Available on Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against women, (Eleventh session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 84 (1994). (umn.edu).
[11] Article 2 of the United Nations Declaration of Human Rights, 1948.
[12] Article 23, United Nations Declaration of Human Rights, 1948.

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress.

Further, the Protection from Harassment Act 1997 (PHA) was enacted into the United Kingdom's legal system by the Conservative Government, to prove to citizens that the state was being tough on crime.[13] The Protection from Harassment Act 1997 was originally introduced to deal with the problem of stalking. However, it deals with a much wider range of behaviour, including behaviour which alarms or distresses the victim. The Act gives both criminal and civil remedies. There are two criminal offences:

- pursuing a course of conduct amounting to harassment;
- a more serious offence where the conduct puts the victim in fear of violence

Harassing a person includes alarming the person or causing the person distress.[14]

**The US**

Even in a country like the US, which is the hub of all human right activities and feminist movements, it was only in 1980 that the United States Equal Employment Opportunities Commission issued a set of guidelines which concisely defined sexual harassment. It is basically the same definition as was adopted by the Convention on Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW). In US, two types of sexual harassment have been addressed by the courts: "*quid pro quo"* and *"the hostile work environment"*.

**India**

The Government of India ratified the CEDAW on 25th June, 1993. The Preamble to the Constitution of India clearly states that "equality of status and opportunity" must be secured for all its citizens. Further, equality of every person under the law is guaranteed by Article 14 of the Constitution. A safe workplace is therefore a woman's legal right. Indeed, the Constitutional doctrine of equality and personal liberty is contained in Articles 14, 15 and 21 of the Indian Constitution. These articles ensure a person's right to equal protection under the law, to live a life free from discrimination on any ground and to protection of life and personal liberty. Article 51-A (e) of the Constitution obligates every citizen to renounce the practices derogatory to women. Article 51 provides for promotion of international peace and security, and Article 253 read along with List I of the Seventh Schedule authorises the appropriate authority to make laws for honouring international commitments. It is the principle of *jus cogens*, making the international law automatically incorporated in the municipal laws which applies, in the absence of domestic law in the field of sexual harassment.

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[13] J. Gowland, 'Protection from Harassment Act 1997: the 'new' stalking offences' (2013) 77(5) Journal of Criminal Law 387.

[14] Available on https://researchbriefings.files.parliament.uk/documents/SN06648/SN06648.pdf

In India, sexual harassment of women has not been articulated as a juridical classification of crime in Criminal law. Prior to Vishaka judgment (1997), the person facing sexual harassment at workplace had to lodge a complaint under Section 354 of the Indian Penal Code 1860 that deals with the 'criminal assault of women to outrage women's modesty', and Section 509 that punishes an individual/individuals for using a 'word, gesture or act intended to insult the modesty of a woman. Later on, section 354 A was added to the IPC through the way of Criminal Law (Amendment) Act, 2013 which enlists the acts which constitutes the offence of sexual harassment. They are:

- physical contact and advances involving unwelcome and explicit sexual overtures; or
- a demand or request for sexual favours; or
- showing pornography against the will of a woman; or
- making sexually coloured remarks

**Vishaka** was a landmark judgement in the field of Sexual Harassment at Workplace by Supreme Court of India. In *Vishaka v. State of Rajasthan*[15], a writ petition was filed for the enforcement of fundamental rights of working women under Articles 14,19 and the most important Article 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon. In this case, the Supreme Court has declared certain guidelines in the absence of particular legislation on the Sexual Harassment at workplace, by exercising it power conferred under Article 141[16] of the Constitution of India. It is a landmark case in the sense that because for the first time ever in the Constitutional history of India, it was officially recognized at such a high level of need for laws for sexual harassment and laying down of guidelines of sexual harassment of working woman. Till 1997 even after India's independence of 50 years there was hardly any law to safeguard sexual harassment of working women.

Vishaka's case was the outcome of the infamous judgment in Bhanwari Devi case given by the Lower Court in which the District Judge infamously stated that "since the men were of higher caste, he could not have raped them." The case brought about immense anger and fury from various sections of the society, and lead to mass protests, and a demand for sexual harassment laws at the workplace. Various women's groups led by Naina Kapur and her organisation, Sakshi filed Public Interest Litigation (PIL) against the state of Rajasthan and the Central Government of India to enforce the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India.

The immediate cause of filing petition was due to the brutal gangrape of Bhanwari Devi. She was a social worker in Rajasthan worked as a *saathin* for the Women's Development Project and she tried to stop a child marriage. The rape survivor did not get justice from Rajasthan High

[15] (1997) 6SCC 241; 1997 SCC (Cri) 932.
[16] Law declared by Supreme Court to be binding on all courts- The law declared by the Supreme Court shall be binding on all courts within the territory of India.

Court and the rapists were allowed to go free. This enraged a women's rights group called Vishaka that filed a public interest litigation in the Supreme Court of India. Vishaka judgment has been followed in many cases. Some of them are:

***Apparel Export Promotion Council v. A.K. Chopra***[17]**:** This case has brought the issue of sexual harassment of women at the workplace in the light. In this case, the respondent, A.K. Chopra used his superiority and tried to molest the female employee of the appellant, Apparel Export Promotion Council. The Supreme Court while emphasizing on the definition of what amounts to sexual harassment, upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexually harassing a subordinate female employee at the workplace.

According to the court: "Sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such conduct by the female employee was capable of being used for affecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile work environment for her."

"That in such cases, the courts must try to look at the broader implications and not deny justice to women based on narrow technicalities or dictionary meanings, the conduct of the respondent was indecent and hence amounted to sexual harassment."

***Sri Subrata Kumar Choudhary v. State Bank of India & Others***[18]**:** The Apex Court observed in this case that "in view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose."

***Medha Kotwal Lele and Ors v. Union of India***[19]***:*** In this case, a letter written by Medha Kotwal highlighting a number of individual cases of sexual harassment stating that the Vishaka Guidelines were not being effectively implemented had been converted into a writ petition by the Supreme Court. The Supreme Court took cognizance and undertook monitoring of implementation of the Vishaka Guidelines across the country by directing State Governments to file affidavits emphasizing on the steps taken by them to implement the Vishaka Guidelines. The result showed a poor performance by a majority of the States.

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[17] AIR 1999 SC 625.
[18] W.P. NO. 23245 (W) of 2008, A.S.T. No. 1237 of 2008 HC Kol.
[19] (2013) 1 SCC 297.

The Supreme Court was not satisfied with the implementation of the Vishaka Guidelines. In its judgment, the Supreme court observed that *"the implementation of the Vishaka Guidelines has to be not only in form but also in substance and spirit so as to make available safe and secure environment for women at workplace in every aspect and thereby enabling working women to work with dignity, decency and due respect."*

The other important cases related to the same are *Meeenakshi v. University of Delhi & Others*[20], *Sakshi v. Union of India*[21], *Seema Lepcha v. Union of India & Others*[22], *and Independent Thought v. Union of India*[23].

**Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013**

The lack of a substantive law affected the issue of Sexual harassment at Workplace which leads to the passing of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. After the 1997 Vishaka Guidelines, it took almost 16 years for the Act to be a reality. The Act received the President's assent on April 12, 2013 and came into effect from December 9, 2013.

The Sexual Harassment Act was enacted with the objective of providing women protection against sexual harassment at the workplace and for the prevention and redressal of complaints of sexual harassment. The initial paragraphs of the Act Lay down the intent explicitly as follows:

"Sexual harassment results in violation of the fundamental rights of a woman to equality under articles 14 and 15 of the Constitution of India and her right to life and to live with dignity under article 21 of the Constitution and right to practice any profession or to carry on any occupation, trade or business with includes a right to a safe environment free from sexual harassment."

The Act had in its background the famous Vishaka case of 1997, which had laid down the "Code of Conduct for Workplace" to enforce the fundamental rights of working women under Article 14, 19 and 21 of the Constitution of India. It was also *Medha Kotwal Lele vs. Union of India*[24]which led to the making of this Act.

The whole Act has been divided into 8 chapters and comprising of 30 sections. The ambit of the Sexual Harassment Act is very wide and is applicable to the organised sector[25] as well as the organised sector[26]. Chapter II of the Sexual Harassment Act requires an employer to set up

[20] 2009 (2) SCC 210.
[21] AIR 2004 SC 3566.
[22] Civil Appeal No. 1632 of 2012, decided on February 3, 2012; (2013) 11 SCC 641.
[23] W.P. (Civil) No. 382 of 2013, decided on October 11, 2017.
[24] (2013) 1 SCC 297; (2013) 1 SCC (Cri) 459.
[25] Section 2(o), Sexual Harassment Act, 2013.
[26] Section 2(p), Sexual Harassment Act, 2013.

an "Internal Complaints Committee" (ICC)[27] at each office or branch of an organisation employing at least 10 employees to hear and redress grievances pertaining to sexual harassment. Additionally, the Sexual Harassment Act also details the procedural aspect, such as the process to be followed for making a complaint and inquiring into the complaint in a time bound manner.[28]

One of the significant provisions of this Act is that, it empowers the Internal Committee or the local Committee, as the case may be, to recommend to the employer, at the request of the aggrieved employee, interim measures such as — (a) transfer of the aggrieved woman or the respondent to any other workplace; or (b) granting leave to the aggrieved woman up to a period of three months; or (c) granting such other relief to the aggrieved woman as may be prescribed. The leave granted to the aggrieved woman under this section shall be in addition to the leave she would be otherwise entitled.[29] The Act prescribes monetary penalty of up to Rs. 50000 for non-compliance with provisions of Act.[30]

**Loopholes/ Lacunae in the Sexual Harassment Act**

The enactment of Sexual Harassment Act, 2013 is a significant step in the direction of curbing the menace of Sexual Harassment at Workplace and ensuring conducive environment to the working women at the workplace. But there are certain loopholes in this Act. There is absence of Gender Neutrality in the Act. In many developed countries like USA, the law relating to sexual harassment at workplace is gender neutral. In modern times, various studies shows that cases of sexual harassment against male also exists though it may not be as prevalent as seen among women.

The limitation period of three months to register a complaint is a provision that will hinder the purpose of the Act. There is also Confidentiality Concerns in the enforcement of the Act as the Act requires one member from amongst non-governmental organizations or associations committed to the cause of women, to be a part of the Internal Complaints Committee. Ineffective implementation of the law is another major concern for its failure. The Act makes provision for punishment in case of a false or malicious complaint. This threat of punitive action for false complaints will definitely act as an obstacle because it is not easy for a woman to always prove the charges and approaching the authorities needs a lot of courage.

**Conclusion**

Sexual harassment of women at workplace is a shameful reality of modern era. Women constitutes nearly 50 percent of the total population. India in the 21st century has been rapidly changing and growing. More and more women are willing to work and become financially independent. But the instances of Sexual harassment at Workplace is posing hindrance in this

[27] Section 2(l), Sexual Harassment Act, 2013.
[28] Section 11, 13-14, Sexual Harassment Act, 2013.
[29] Section 12, Sexual Harassment Act, 2013.
[30] Section 26 (1), Sexual Harassment Act, 2013.

direction. A country's progress is directly proportional to the progress of its women. To have a check on the malpractices of Sexual Harassment at Workplace, stringent action should be taken and the provisions of the Sexual Harassment Act should be strictly enforced. Awareness in the field of Gender Sensitization will be a welcome step for the effective sensitization of the employees.

# Matrimonial Disputes and Alternative Dispute Resolution in Indian Law

***Dr. Syed Ali Nawaz Zaidi***[1]
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## Introduction

The Constitution of India is the supreme legal authority in India, and Part III of the Constitution guarantees citizens "fundamental rights" that can be enforced directly in high courts and the Supreme Court under Article 226 and 32 respectively. Laws, judicial precedents, and customary principles which are not inconsistent with the Constitutional provisions are given appropriate respect.

India is a huge country with a population of 3.28 million square kilometres, with diversified communities and people of all religions and cultures reside harmoniously in one of the world's biggest democracies. The Indian legal system has evolved in response to the lives and aspirations of its citizens, as well as the diverse cultures, religious traditions, and personal laws that exist in the country.

## Family Law Legislations in India

Personal rules governing Hindus and Muslims are the oldest aspect of the Indian legal system. The Hindu personal law has evolved over time as a result of a constant codification process. Changes in society have resulted in changes in law, which reflect the changing social situations and strive to solve social problems using new techniques based on the experience of legislation in other countries. Muslim personal law has mostly been unaffected by legislation. The Indian Parliament has adopted a number of family laws that apply to religious communities as described in the enactments themselves. The following is a brief description of these enactments.

The Hindu Marriage Act, 1955, is the main legislation addressing marriage in India that is relevant to the majority population of Hindus, and it was enacted to improve and codify Hindu marriage law. It includes anyone who is not a Muslim, Christian, Parsi, or Jew, as well as anyone who is a Hindu, Buddhist, Jain, or Sikh.

The Special Marriage Act, 1954, was adopted by the Indian Parliament to allow a specific type of marriage in certain circumstances. People who choose to marry outside of the ceremonial

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marriage under their own personal laws use this enactment to solemnise their marriage. Regardless of personal beliefs, this law applies to people of all faiths and cultures in India.

In addition to these laws, the Indian Parliament passed The Family Courts Act, 1984, with the objective of encouraging conciliation and assuring fast resolution of disputes connected to marriage and family relations. Apart from these rules, the Indian Parliament added specific provisions addressing out-of-court settlements in the Code of Civil Procedure, 1908.

**Background of ADR in India**

It is thought that the tradition of amicable dispute resolution in India dates back to ancient times, when disputes were settled by elders, between members of specific relationships or profession, as well as between residents of a specific location. In rural India, the 'local bodies' known as Panchayat consisting of local elders and prominent members decided practically all conflicts involving village residents. These techniques of peaceful dispute resolution were not only a "alternative" to the official court system, but were regarded as legitimate means of administering justice. Both systems continued to function in a similar manner. Depending on the nature of the dispute, traditional institutions used an arbitration or conciliation process.

**India's Existing Statutory ADR Provisions**

In India, the legislature's concern for ensuring prompt and effective justice is reflected in the following statutes:

1. Section 89 of the Civil Procedure Code (CPC) of 1908, as supplemented by Order X Rules 1A, 1B, and 1C: Dispute Settlement outside the Court.
2. Settlement under Order XXXIIA of the Civil Procedure Code, 1908.
3. The Legal Services Authority Act of 1987 established Lok Adalat to promote mediation, conciliation, and informal settlement of legal issues.
4. Reconciliation under the Hindu Marriage Act of 1955, Sections 23(2) and 23(3), as well as the Special Marriage Act of 1954, Sections 34(3) and 34(4).
5. Under the Family Courts Act of 1984, it is the duty of the family court to make reasonable efforts to reach an agreement.

**Provisions regarding ADR in the Civil Procedure Code, 1908**

The CPC contains three substantive and procedural provisions that allow for dispute resolution outside of the courtroom. The following are a few examples of these provisions:

- Section 89 of the Civil Procedure Code deals with out-of-court resolution of disputes. It clearly outlines the legislative forms, techniques, machinery, and procedures for alternative dispute resolution in all civil litigation situations in India. Order X, Rules 1A, 1B, and 1C of the CPC provide procedural basis for these substantive provisions.

- The Court's inspection of parties is governed by ORDER X of the Civil Procedure Code of 1908. Rule 1A of Order X gives the parties to the suit the option of settling their differences outside of court. It shall appoint a date for the parties to appear before

whatever place or body they select for settlement once they have exercised their option. Rule 1B also states that the parties must appear before whichever forum or authority they choose. If the presiding officer of the forum or authority believes that in the interests of justice, the body or authorities should not proceed with the matter. Rule 1C requires the presiding officer to send the case back to the court.

- Suits Relating to Family Matters are covered by ORDER XXXIIA of the Civil Procedure Code of 1908. The Indian Parliament added Order XXXIIA to the Civil Procedure Code, 1908, in 1976, to establish mandatory settlement procedures in all marriage disputes. According to Order XXXIIA, in any suit or proceeding to which this Order applies, the Court must attempt in the first instance to facilitate the parties in reaching an agreement on the suit's subject matter. And if the Court considers that the parties have a reasonable chance of reaching an agreement at any stage during any such action or procedure, the Court may adjourn the hearing for as long as it considers necessary to allow such attempts to be made.

The term "People's Court" refers to the Lok Adalat. Under Chapter six of the Legal Services Authorities Act, 1987, authorities may hold Lok Adalats for the purpose of resolving disputes at such intervals and locations as they deem appropriate. The Lok Adalat system is built on Gandhian principles, and its major goal is to resolve disputes via conciliation and compromise rather than following rigorous procedural norms. Lok Adalat is merely an improved version of a system that has an ancient tradition of resolving disagreements through elders or leaders of the tribe or village in India. The Law Commission of India advocated in its 129$^{th}$ Report that courts are required to submit disputes to alternative dispute resolution mechanisms after framing problems.

**Indian Family Law Statutes Allow for Alternative Dispute Resolution (ADR)**

The Special Marriage Act of 1954 and Hindu Marriage Act of 1955, hereafter referred as SMA and HMA respectively, both require reconciliation as mandatory. Other Indian matrimonial legislations, on the contrary, do not contain such provisions, hence in other circumstances, there is no legal obligation to settle or try to reach an agreement.

According to section 23(2) of Hindu Marriage Act, if remedy is sought on the majority of the HMA's Section 13 fault grounds for divorce, the court must first make every effort to reconcile the parties before issuing any remedy under it. Section 23(3) of the HMA provides that if the court believes or at the request of the parties, court thinks that it is reasonable and just for reconciliation; the court may adjourn the proceedings for a reasonable period of time not to exceed 15 days. As a result, Hindu law encourages reconciliation and rapprochement before terminating a Hindu marriage.

In terms of requirements, Sections 34(2) and 34(3) of the Special Marriage Act are similar to Sections 23(2) and 23(3) of the Hindu Marriage Act. Despite the fact that marriages contracted under the Special Marriage Act lack the sacramental nature of those solemnised under the Hindu Marriage Act, the Indian Parliament has kept the procedures for marriage reconciliation in

place. It's worth mentioning that the clauses of both legislations are nearly identical, and both require that every reasonable effort be made to achieve reconciliation.

**Additional Preventive Measures under the Hindu Marriage Act of 1955**

It may be interesting to read Section 14(1) of the HMA, which provides that "notwithstanding anything in this Act, no court shall be competent to accept any petition for dissolution of marriage by decree of divorce[3], (unless one year has elapsed since the date of marriage)." As a result, The HMA prohibits filing petition for the purpose of seeking divorce within the first year of marriage (section 14). The reasoning behind this provision is to encourage parties to settle and reconcile rather than divorce quickly.

The HMA also states this in section 14(2) that *"In disposing of any application under this section for leave to present a petition for divorce before the (expiration of one year)[4] from the date of marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the (said one year)"[5]*. Similar provisions and prohibitions are included in Section 29 of the SMA.

**Petition for Divorce by Mutual Agreement**

Both the HMA's Section 13B and the SMA's Section 28 provide for divorce by mutual consent. However, it is not given immediately, and both parties must file a joint motion in the first instance, and must wait at least 6 months but no more than 18 months for the second request for a divorce by mutual consent to be validated. Similar provisions and prohibitions are included in Section 28 of the SMA. The reasoning behind these provisions is to allow for reconciliation between the first and second motions during a thinking phase. It must be mentioned, however, that HMA and SMA both require the court to undertake reconciliation[6]. It is a court-mandated and statutory requirement that cannot be excused.

**Family Courts Act**

The Family Courts Act of 1984 was enacted by the Indian Parliament. The preamble of the Act states: "An Act to provide for the creation of Family Courts with a view to encourage conciliation in, and achieve rapid settlement of disputes relating to marriage and family affairs and matters associated therewith". The Act requires the Family Court to make every effort in the first instance to encourage reconciliation or a compromise between the parties to a family dispute. Section 9 of the Family Courts Act of 1984 lays out the requirements for reconciliations. It mandates that Family Court make reasonable efforts to seek a settlement.

The family court might "obtain the services of a medical expert or such person (preferably a woman where available) for the purposes of aiding the Family Court in performing the functions

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[3] Substituted by Act 68 of 1976, Section 9 for certain words.
[4] Substituted by Act 68 of 1976, Section 9, for "expiration of three years" (w.e.f. 27-5-1976).
[5] Substituted by Act 68 of 1976, Section 9, for "said three years" (w.e.f. 27-5-1976).
[6] *Pramila v. Ajit*, AIR 1989 Pat 163: (1989) 2 DMC 466.

imposed by this Act," according to Section 12 of the Act. Again, the thinking, rationale, and motivation behind this Act's provision of professional expert services is to give counselling, expert aid, and qualified mediators. We may state that this is a good piece of law that allows for reconciliation in the Indian marital court system.

**Judicial Pronouncements**

The legislative is responsible for drafting and amending laws, but the judiciary is responsible for developing and interpreting them in light of the requirements and conditions of society. It would be very helpful to discuss and quote some recent noteworthy Indian court rulings that have underscored and highlighted the critical need for positive Indian legislation addressing mandated reconciliation procedures.

In the matter of ***Jagraj Singh v. Bir Pal Kaur***[7], the Indian Apex Court was asked to interpret Section 23 of the Hindu Marriage Act, 1955, Order XXXIIA of the Civil Procedure Code, 1908, and the court's responsibilities. In a historic decision, the Supreme Court ruled that:

*"It is ample clear that a court is expected and even bound, to make all attempts at reconciliation and section 23(2) is a salutary provision, which requires the court to make endeavour in the first instance to bring about a reconciliation between the parties."*

In the case of ***Baljinder Kaur v. Hardeep Singh***[8], the Supreme Court once again stated that: *"emphasis should always be on preserving the institution of marriage. That is the basic requirement of law. One may refer to the objectives and reasons of the Family Courts Act, 1984. For the purpose of settlement of family disputes emphasis is laid on conciliation and achieving socially desirable result and eliminating adherence to rigid rules of procedure and evidence."*[9]

Apex Court also observed: *"it is now obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or settlement between the parties to a family dispute. Even where the Family Courts are not functioning, the objects and principles underlying the constitution of these courts can be kept in view by the Civil Courts trying matrimonial causes."* [10]Section 23 of the Hindu Marriage Act of 1955, according to the Supreme Court, applies to all matrimonial courts.

The Supreme Court upheld a case settlement made by the Delhi mediation centre in ***Aviral Bhatla v. Bhavana Bhatla***[11], applauding the expeditious manner in which the parties were assisted in reaching an agreement by the mediation centre of Delhi High Court. The Supreme Court of India has also made a statement about the problematic phenomenon of a large number of divorce or judicial separation cases. The Supreme Court held in ***Gaurav Nagpal v. Sumedha***

[7] JT 2007 (3) SC 389.
[8] AIR 1998 SC 764 Para 9 of the judgment.
[9] Para 10 and 11 of the judgment.
[10] Para 15 of the judgment.
[11] 2009 SCC (3) 448.

***Nagpal***[12], that *"the availability of such a course should not necessarily induce a person to seek divorce unless the marriage has irretrievably broken down. Efforts should be made to achieve conciliation in order to close the communication gap that leads to such adverse outcomes. The emphasis should be on saving the marriage rather than breaking it, especially when the children are bearing the brunt of the split."*

On the basis of a combined reading of the above-mentioned judgments, it can be concluded that the importance of attempting mandated reconciliation procedures is becoming increasingly apparent, with superior Indian courts stepping in to amend the record where matrimonial courts have failed to do so.

Mr. Justice A.M. Ahmadi, the former Chief Justice of India, emphasized on the importance of fostering ADR as a technique of resolving disputes:

*"While we encourage Alternative Dispute Resolution mechanisms, we must create a culture for settlement of disputes through these mechanisms. Unless the members of the Bar encourage their clients to settle their disputes through negotiations, such mechanisms cannot succeed."*

**Conclusion and Suggestions**

For a long time, formal courts have played an important and leading role in the justice delivery system. These formal courts use an adversarial approach, which makes litigation a never-ending process. Litigation's adversarial tone is detrimental to the social and personal relationships that must be maintained. It does not foster a climate of compromise, cooperation, and consensus, which is the most basic prerequisite in matrimonial problems.

Due to the shortcomings of the previous system of dispute resolution, new solutions for dispute settlement in lieu of litigation have been developed. The concept of speedy justice sparked the development of Alternative Dispute Resolution (ADR) procedures. Not only have these alternative ways played an important role in the administration of justice, but some have fared substantially better than others. The benefits of these strategies, on the other hand, have not been completely explored as they should be. The application of these strategies still has room for improvement. Forced marriages, honour killings, live-in partnerships, juvenile delinquency, surrogacy, and inter-country adoptions are among the new generation's issues confronting the nuclear Indian family today.

The framers of traditional family law never imagined the socioeconomic complexities that have recently emerged. The failure of statute law to address these types of scenarios has further exacerbated family law difficulties. Supreme Court in ***Jagraj Singh* v. *Birpal Kaur***[13] case observed, "*Matters of the family, which can be repaired, must be mediated and settled by sewing and patchwork. Human relationships must be bonded by settlement and, as far as possible, not litigated in court."*

[12] AIR 2009 SC 557.
[13] AIR 2007 SC 2083.

Again, in ***Gaurav Nagpal v. Sumedha Nagpal***[14], the Supreme Court noted that "*efforts should be made to bring about conciliation and to bridge communication gaps so as to prevent people from rushing to courts*." If alternative dispute resolution procedures could be given equal weight in practise and professional training, it would be vital for the legal system. A comprehensive approach to justice will be more effective, as it recognises that different techniques or methods of resolution are permissible and beneficial for different types of legal challenges.

**Suggestions**

The following are some suggestions that, if implemented, could aid in the promotion of alternative dispute resolution, especially in the resolution of marriage disputes:

1. Ideal training programmes for judges and advocates should be developed in order to expedite the resolution of cases and to enable them to identify instances that may be suitable for mediation or that would be appropriate for using a specific type of ADR.
2. In the legal education curriculum, formal adjustments should be made. Alternative conflict resolution should be required in all law school curricula. Arbitration law should be taught in law schools as a specialised subject. Legal education should be geared at teaching law students' creative approaches to conflict settlement. Even in personal legislation, ADR should be included as an inherent aspect of conflict resolution.
3. For marriage cases, a provision equivalent to section 80 of the CPC should be implemented. When a person is needed to file a case, he may be required to provide the affected party two months' notice. He shall provide an affidavit with his plaint, stating the fact of service of notice, as well as a copy of the plaint, while presenting his case in court. If a matter is urgent and giving notice would defeat the purpose, the Court might waive the notice requirement and hear the plaintiff or petitioner, who must provide grounds for the urgency. After giving notice, the plaint/petition can be returned for filing if the urgency is not established. This will promote pre-litigation mediation and dispute resolution.
4. More Family Courts are required and urgently needed under the Family Courts Act of 1984. These Family Courts will use alternative dispute resolution (ADR) to aid in the resolution of family law issues. At the absolute least, a Family Court should be established in each District, with enough infrastructure, staff, and other support systems in place.
5. Family Courts should serve as a pleasant, conciliatory forum, with CPC, Cr.P.C., and Evidence Act procedures not being closely followed. Otherwise, the Family Courts will be unable to fulfil its mandate, and the parties will be denied access to justice on a timely basis.
6. Family courts should hear cases involving marriage, divorce, and children. Trained counsellors, mediators, and advisers should be enlisted to help resolve these disagreements amicably. The spirit of conciliation must be included into the appellate

[14] AIR 2009 SC 557.

jurisdiction of superior courts.

7. While there are laws in place to encourage the use of ADR approaches, the infrastructure, professional help, and means by which these beneficial reconciliation procedures are to be executed are insufficient. A good implementation framework is essential; thus, the legislator must help, assist, and implement ADR.

# Hate Speech and The Democracy: An Analysis

***Dr. Surendra Pratap Singh***[1]

## Introduction

Hate speech is a challenging issue plaguing the online social media. While better models for hate speech detection are continuously being developed, there is little research on the bias and interpretability aspects of hate speech. Rights are the cornerstone of individual autonomy. They are guaranteed as limits on the power of State.[2] In democratic societies they have been granted to protect individual from undue State interference. Freedom of expression has been enshrined in article 19 of the Universal Declaration on Human Rights[3]. It is considered to be one of the most significant rights as it allows a person to attain self-fulfilment and strengthen the capacity to fully enjoy freedom.[4]

The Constitution acknowledges that liberty cannot be absolute or uncontrolled and makes provisions in clauses (2) to (6) of article 19 authorising the State to restrict the exercise of the freedom guaranteed under that article within the limits specified in those clauses. Thus, clause (2) of article 19, as subsequently amended by the Constitution (First Amendment) Act, 1951 and the Constitution (Sixteenth Amendment) Act, 1963, enabled the legislature to impose reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of (i) the security of the State and sovereignty and integrity of India, (ii) friendly relations with foreign States, (iii)public order, (iv) decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

In a plural democracy, there is always a conflict between different narratives and interpretation of what constitutes public interest. Democracy thrives on disagreements provided they do not cross the boundaries of civil discourse. Critical and dissenting voices are important for a vibrant society. However, care must be taken to prevent public discourse from becoming a tool to promote speech inimical to public order. The mode of exercise, the context and the extent of abuse of freedom are important in determining the contours of permissible restrictions. The State therefore assumes an important role in ensuring that freedoms are not exercised in an unconstitutional manner.[5]This paper aims to discus the hate speech and its implication on society for which the relevant statutory provisions and judicial pronouncements are highlighted. The methodology that has been followed for the discussion is doctrinal.

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[2] J.S. Mill, On Liberty and Utilitarianism 4 (Bantam Classic, New York, 2008).
[3] U.N.G.A. Res. 217 A (III), 1948.
[4] Steffen Schmidt and II Mack C. Shelley, Barbara Bardes et. al., American Government and Politics Today (Cengage Learning, USA, 2014).
[5] Law Commission of India 267th Report.

**Meaning and Concept of Hate Speech**

Hate speech generally is an incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, gender, sexual orientation, religious belief and the like (sections 153A, 295A read with section 298 IPC). Hate speech is an emotive concept, and there is no universally accepted definition of it in international human rights law. Many would claim they can identify "hate speech" where they see it, but the criteria for doing so are often elusive or contradictory. The idea is that the concept "hate speech" might be a complex concept, composed of two basic concepts *hate* and *speech*. Thus, hate speech is any word written or spoken, signs, visible representations within the hearing or sight of a person with the intention to cause fear or alarm, or incitement to violence.

Hate speech poses complex challenges to freedom of speech and expression. Individuals believe in stereotypes that are ingrained in their minds and these stereotypes lead them to believe that a class or group of persons are inferior to them and as such cannot have the same rights as them. The stubbornness to stick to a particular ideology without caring for the right to co-exist peacefully adds further fuel to the fire of hate speech. The constitutional approach to these challenges has been far from uniform as the boundaries between impermissible propagation of hatred and protected speech vary across jurisdictions.

**Hate Speech and the Statutory Provisions**

**The Indian Penal Code 1860**

Right to speech is the essence of the liberty granted under article 21 of the Constitution. One of the greatest challenges before the principle of autonomy and free speech principle is to ensure that this liberty is not exercised to the detriment of any individual or the disadvantaged section of the society. Presently, in our country the following legislations have bearing on hate speech, namely: - (i) Section 124A of the Indian Penal Code, 1860 (hereinafter IPC. Section 153A IPC penalises sedition. Section 153B IPC penalises 'imputations, assertions prejudicial to national-integration'. Section 295A IPC penalises 'deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs'. Section 298 IPC penalises 'uttering, words, etc., with deliberate intent to wound the religious feelings of any person.

**The Representation of The People Act, 1951**

Section 8 disqualifies a person from contesting election if he is convicted for indulging in acts amounting to illegitimate use of freedom of speech and expression. Section 123(3A) and section 125 prohibits promotion of enmity on grounds of religion, race, caste, community or language in connection with election as a corrupt electoral practice and prohibits it. (iii) the Protection of Civil Rights Act, 1955. Section 7 penalises incitement to, and encouragement of untouchability through words, either spoken or written, or by signs or by visible representations or otherwise.

**The Criminal Procedure Code 1973**

Section 107 empowers the Executive Magistrate to prevent a person from committing a breach of the peace or disturb the public 8 tranquillity or to do any wrongful act that may probably cause breach of the peace or disturb the public tranquillity. Section 144 empowers the District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf to issue order in urgent cases of nuisance or apprehended danger. The above offences are cognizable. Thus, have serious repercussions on liberties of citizens and empower a police officer to arrest without orders from a magistrate and without a warrant as in section 155 CrPC.

**Role of Judiciary and the Heat Speech**

Hate speech can be curtailed under article 19(2) on the grounds of public order, incitement to offence and security of the State. The Supreme Court in *Brij Bhushan v. State of Delhi*[6] opined that public order was allied to the public safety and considered equivalent to security of the State. This interpretation was validated by the First Constitution Amendment, when public order was inserted as a ground of restriction under 19(2). However, in *Ram Manohar Lohiya v. State of Bihar*[7], Supreme Court distinguished law and order, public order and security of State from each other. Observing that: One has to imagine three concentric circles. Law and order represent the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State.

In *Ramji Lal Modi v. State of U.P.* [8] the Supreme Court upheld the constitutional validity of this section 295A19 IPC and ruled that this section does not penalise every act of insult to or attempt to 'insult the religion or the religious beliefs of a class of citizens but it penalises only those acts of insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class.'20 It was also held by the Court that the expression in the 'interest of public order' mentioned in article 19(2) is much wider that 'maintenance of public order.

In *Shreya Singhal v. Union of India*,[9] the court declared section 66 A of the Information Technology Act invalid as it did not establish any proximate relationship between the restriction and the act. It was opined that: …the nexus between the message and action that may be taken based on the message is conspicuously absent – there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquillity. The context of speech plays an important role in determining its legitimacy under article 19(1)(a) of the Constitution. In *State of Maharasthra v. Sangharaj Damodar Rupawate*[10] the Court observed that the effect of the

[6] AIR 1950 SC 129.
[7] AIR 1966 SC 740.
[8] AIR 1957 SC 620.
[9] AIR 2015 SC 1523.
[10] (2010) 7 SCC 398

words used in the offending material must be judged from the standards of reasonable strong-mind.

**Hate Speech and its effect**

Hate speech is an expression which is likely to cause distress or offend other individuals on the basis of their association with a particular group or incite hostility towards them. There is no general legal definition of hate speech, perhaps for the apprehension that setting a standard for determining unwarranted speech may lead to suppression of this liberty.[11] Free speech has always been considered to be the quintessence of every democracy. The doctrine of free speech has evolved as a bulwark against state's power to regulate speech. The liberal doctrine was a measure against the undemocratic power of the state.

The greater value accorded to the expression, in the scheme of rights, explains the reluctance of the law makers and judiciary in creating exceptions that may curtail the spirit of this freedom. Perhaps, this is the reason behind the reluctance in defining hate speech.[12] Political speeches often assume a divisive tone in order to exploit social prejudices for electoral gains. However, this discourse must take place in an environment that does not foster abusive or hateful sentiments. Though, political rivalry might encourage the use of unwarranted language, it is unwise to restrict speech that merely showcases the tendency to evoke unwanted circumstances without intention.

**Conclusion**

In view of the above, it appears that hate speech is still subject to wider intellectual and academic debate. Hate speech poses complex challenges to freedom of speech and expression. The constitutional approach to these challenges has been far from uniform as the boundaries between impermissible propagation of hatred and protected speech vary across jurisdictions.

What is at issue is the criminalisation of hate speech and how the existing laws look at it. Since it is entrenched in the constitutional right of freedom of speech and expression, "hate speech" has been manipulated by many in different ways to achieve their ulterior motive under the garb of such right and the law courts in absence of clear provisions in IPC suggested that new provisions in IPC are required to be incorporated to address the issues elaborately dealt with in the preceding paragraphs. It is time that people take a stand against public and campus hate speech, minorities feel attacked and harassed by it.

The only way to fix the problem is by shedding light to the issue. It is the time that the proposal of Viswanathan Committee (2019) to insert Sections 153 C (b) and Section 505 A in the IPC to make the incitement to commit an offence on grounds of religion, race, caste or community, sex, gender identity, sexual orientation, place of birth, residence, language, disability or tribe should be made punishable and the punishment should be up to two years along with Rs. 5,000 fines.

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[11] *Supra note* 4 p.15.
[12] *Ibid*.

For a country like India with a massive population of diverse backgrounds and culture, subjects like hate speech become a complex issue to deal with as it is difficult to differentiate between free and hate speech. Several factors are to be considered while restraining speeches like the number of strong opinions, offensive to certain communities, the effect on the values of dignity, liberty, and equality. Certainly, there are laws for such atrocities but a major part of work is still left. Therefore, giving a proper definition to hate speech would be the first step to deal with the menace and other initiatives such as spreading awareness amongst the public is the need of the hour.