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<table>
<thead>
<tr>
<th>S.No</th>
<th>Name</th>
<th>Title</th>
<th>Page No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Gaurav Gupta</td>
<td>Intellectual Property as a Tool of Women Empowerment</td>
<td>6</td>
</tr>
<tr>
<td>3.</td>
<td>Stuti Sanghamitra</td>
<td>The Case that Shook And Gave Birth to Yellow Journalism in India</td>
<td>30</td>
</tr>
<tr>
<td>4.</td>
<td>Tanya Sehgal</td>
<td>The Ambit of Defamation Under Article 19 With Respect to Shreya Singhal V. Uoi</td>
<td>45</td>
</tr>
<tr>
<td>5.</td>
<td>Anshita Priyadarshini</td>
<td>Judicial Independence in Contemporary Times</td>
<td>54</td>
</tr>
<tr>
<td>7.</td>
<td>Annie Mampilly</td>
<td>Government Liability And Justification For Discretion</td>
<td>74</td>
</tr>
<tr>
<td>8.</td>
<td>Yogita Shinde</td>
<td>India’s Struggle to Find Balance Between Complete Freedom of Speech And Contempt of Court.</td>
<td>86</td>
</tr>
<tr>
<td>10.</td>
<td>Abhay Kumar &amp; Shubham Kumar</td>
<td>Critical Analysis of Section 497 And Honor Killing in India</td>
<td>101</td>
</tr>
<tr>
<td>11.</td>
<td>Mr. Shantanu Pachahara</td>
<td>Right To Privacy In India: Reflection Into It’s Nature And Journey</td>
<td>113</td>
</tr>
<tr>
<td>12.</td>
<td>Coming Soon</td>
<td>Coming Soon</td>
<td></td>
</tr>
<tr>
<td>13.</td>
<td>Coming Soon</td>
<td>Coming Soon</td>
<td></td>
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<tr>
<td>14.</td>
<td>Coming Soon</td>
<td>Coming Soon</td>
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<td>15.</td>
<td>Coming Soon</td>
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<td>16.</td>
<td>Coming Soon</td>
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<td>17</td>
<td>Coming Soon</td>
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<td>18</td>
<td>Coming Soon</td>
<td>Coming Soon</td>
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<td>19</td>
<td>Coming Soon</td>
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<td>20</td>
<td>Coming Soon</td>
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<td>21</td>
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<td>22</td>
<td>Coming Soon</td>
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<td>23</td>
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<td>25</td>
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<td>26</td>
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<td>27</td>
<td>Coming Soon</td>
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<td>28</td>
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<td>Coming Soon</td>
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<td>29</td>
<td>Coming Soon</td>
<td>Coming Soon</td>
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</tr>
<tr>
<td>30</td>
<td>Coming Soon</td>
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<td>31</td>
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<tr>
<td>32</td>
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</tbody>
</table>
INTELLECTUAL PROPERTY AS A TOOL OF WOMEN EMPOWERMENT

(By Gaurav Gupta)

ABSTRACT

When major communities can tie together intellectual property rights, these shifts can add to reducing inequality and improving the set of life for many of the world’s population. Intellectual property now has turn into a prevailing instrument for creating wealth.\(^1\) And above the last few years, the problems that women in India face in understanding their property and inheritance rights have fairly acknowledged substantial consideration from both the local and the international society. Amongst the most important opinion offered by various organizations supporting women's property and inheritance rights is the positive impact their protection would have on women’s economic empowerment. On the other hand, protection and enforcement of intellectual property rights has not received as much attention even though it can also be an important factor affecting female entrepreneurial success. Intellectual property (IP) is not physical in nature but is often the most valuable asset of a company because it gives the creator an exclusive right over the use of his or her creation for a certain period of time. The purpose of IP rights is to encourage women and develop their innovation and creativity, which in turn helps improve the quality of their lives. When most people think of IP, inventions in various fields of science, technology, engineering or mathematics come to mind, but IP goes far beyond patented inventions and includes other types of exclusive rights such as trademarks, copyrights, geographical indications, industrial designs, so-called traditional knowledge, to mention only a few.

Key words: - copyrights, trade mark, women empowerment, development, economic growth, intellectual property, innovation, creativity, technology, entrepreneurial

\(^1\)Sarah Yookyung Kim, Intellectual property as a tool of empowerment, OpenGlobalRights, (Oct. 01, 2020, 03:55 PM), https://www.openglobalrights.org/intellectual-property-as-a-tool-of-empowerment/
INTRODUCTION

The ways in which IP protection affects women empowerment has been discussed and analyzed by various organizations around the world. Although history recognizes important, world-changing inventions in which women played a major role, various studies show that women do not use the IP system as much as men. In order to inform women about the opportunities that the IP system provides for protection of works of creative or intellectual effort and to show appreciation and gratitude to women who have influenced innovation, the World Intellectual Property Organization (WIPO) chose a theme "Powering change: Women in innovation and creativity" for the World IP Day 2018.²

Still, to what extent do female business owners in India know about IP protection and the opportunities offered by the IP system? Unfortunately, many small businesses do not pay much attention to IP protection, even though timely identification and protection of intellectual property created in the course of business activities can increase the profits. From my professional experience, business owners in India usually show interest in protecting their IP only after finding out that their rights have been infringed, which is usually too late. Therefore, the empowerment lies above all in assisting women in protecting the IP they may have already created but are not aware of it.³

According to a research, in India women-owned or women-run businesses can mostly be found in the trade and service sectors, followed by firms involved in textile, food, vegetable and sweets production. Although creation of IP rights reaches its highest potential within the science and technology-related industries, the sectors in which the highest number of women-owned businesses are active can also lead to creations of the mind with commercial value, able to generate revenues and incomes. While writing this article, for instance, I found that the textile industry in India mostly consists of textile, clothing and leather companies and is predominantly


³ Ibid
owned by women. All these products could be subject to IP protection and there is no doubt that women entrepreneurs can use IP tools to increase their profits.4

The first type of an IP right that can be taken advantage of by women entrepreneurs in the apparel industry would be an industrial design right, which constitutes the ornamental or aesthetic aspect of a product. The industrial design law in India protects the design, defined as the outer appearance of the whole or of a part of product resulting from the features, shape, form, color, lines, contours, texture or materials of the product itself or its ornaments – if it is new and has individual character. An industrial design needs to be registered in order to be protected and the competent local institution is the Industrial Property Agency. The holder of an industrial design has the exclusive right to use the registered design and prevent third parties from its unauthorized use. There are, however, arguments that using industrial design law to protect products in the apparel industry is not the wisest option because products in this industry, be it ready-to-wear clothes or footwear, are mainly seasonal.5

Copyright law provisions can also be used by companies in the apparel sector, particularly those with seasonal production lines. Provided that the design is original, the designer gets an automatic protection and does not need to bother with the administrative registration procedure. Certain designs, if original and new, may be protected cumulatively by both the Law on Industrial Design and the Law on Copyright.

Getting a trademark registration would also be an important option for women to consider, because trade marking the brand, that is producing, advertising, selling and exporting apparel products under their own distinctive trademark will certainly help the products compete in the market and stand out. A trademark can be a word, slogan, image, symbol, design or a combination of any of these that represent a product and helps to identify and distinguish a product from other similar products at home and abroad. It is important not to use somebody

4 SDP KOSOVE, Supera 2.
else’s trademark or elements thereof as this would certainly be a barrier when exporting the goods.\(^6\)

Patents may not be as applicable in the apparel industry as industrial designs and trademarks, but if a new process or a new type of material is used in the production of apparel, the Law on Patents may come into play. There are a number of patents in the apparel industry worldwide, a typical example being waterproof footwear. Therefore, entrepreneurs should also be aware of the possibilities that the Law on Patents offers to them and when to seek patent protection.\(^7\)

As soon as new entrepreneurs start taking steps to establish a business or implement a product idea, such as obtaining licenses and securing production, it’s a good idea to identify whether their products or services are protectable by trademark, industrial design, copyright, patent, or other forms of IP rights. Basic understanding of various IP types and procedures and awareness about the differences will help women entrepreneurs protect their IP correctly. Timely protection is crucial – using the IP system to protect a product that is already being copied can turn out to be too complicated and costly. In some cases bringing an enforcement action will not even be possible if the IP is not registered.

Also, one should not think of owning IP rights as an expenditure but as one of business's most important assets. It is true that some cash should be spent for the registration and maintenance of an IP right, but businesses with IP portfolios are more likely to receive funding and investment capital – IP ownership assures a level of exclusivity for the investor, if the product proves to be successful. Foreign investors will surely take into account whether a particular product or service is protected by IP rights when assessing investment possibilities.

**EMPOWERING WOMEN IN INTELLECTUAL PROPERTY**

During this research I came across various topics, including the skills required for effective leadership, what it means to lead as a woman, and the challenges and opportunities that women face as women leaders and I also researched on senior women who shared their inspiring

\(^6\) Ibid
\(^7\) SDP KOSOVE, Supera 5.
personal experience, success, challenges and lessons-learned throughout their careers and their paths into leadership, notably in male dominated fields.8

I found extremely pleased with the outcomes of the research, with one stating that: “it has helped me to change my leadership style in a positive manner.” Many expressed the need for more sessions and content on women’s leadership and other specific skills, such as negotiation skills and gender bias, because “changing gender stereotypes is an ongoing process”, considering “it will take time to change attitudes.” The women delegate then encouraged WIPO and UNITAR to continue implementing this work in future assemblies as part of their efforts to raise awareness of gender disparity and to promote positive change.9

The role of intellectual property rights as a development tool for women entrepreneurs. Despite the very significant role women entrepreneurs in developing countries play, their businesses lack financial security, which in turn stymies their economic growth. This is as a result of various factors including limited access to formal finance mechanisms, high costs of finance (high interest rates), and other infrastructural deficiencies. One of the foremost ways in which women are shut out of many economic activities is their lack of access to intellectual property (IP) protections. This is not because they are women per se, but because IP mechanisms were not designed to include traditionally female occupations.10

My research has two aims. The first is to draw women entrepreneurs into the ongoing global debates about the role of intellectual property in developing countries. This will be carried out by investigating their level of interactions with and their experiences in the IP system.

Second, to find and propose reforms in the current IP system that may create an equal playing field in the IP process by reducing the barriers faced by women entrepreneurs. It is hoped that the proposed reforms I uncover may help to bridge the gender gap, helping to unlock the full potential of women entrepreneurs in developing countries to achieve their economic goals.

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9 Ibid
IP’S GENDER DEBATE

The primary function of intellectual property rights (IPR) are to protect a person’s work from being used by others. Despite the wide recognition of the importance of IP in promoting innovation and galvanizing global trade, IPRs have often been a matter of much debate in terms of their applicability and impacts on the economic prospects of developing countries. Further, the IP system was designed in highly gender stratified societies, with strict gender roles, making many scholars and practitioners call for a complete redesign of IPRs in their current format (Carys Craig, UNDP, Dan Burk). For this reason, it is important to investigate the role of IP laws in defining markets and in advancing commercial interests from a feminist perspective.

Investing in women is widely recognized as crucial to achieving the UN SDGs, with more than one specifically dealing with ensuring gender parity in economic opportunities. In order for such investments to be effective, a closer examination of the role of IPRs on women entrepreneurs in developing countries is required. Such studies may provide a basis for the current suggestions for reforming the IP system in developing countries, such as Nigeria, India so that they will support the economic success of women entrepreneurs. This will hopefully lead to re-imagining an IP system that actually provides real incentives to entrepreneurs in low income areas concentrated in the informal sector, rather than primarily for the use and benefit of multi-national companies concentrated in the formal sector (Oguamanam 2012).

WOMEN ROLE IN IPR

Women have contributed in every field of life. Either when it is come to contribute for their families or when it comes to contributes for their works. They actually compromise more with their own life. They also contribute in the field of all fields of creativity, technology and endeavors.11 But all of that is they always misrepresented in many areas. In the field of inventions we have heard many names as a male inventor. Here is the list of some popular inventor which is known by every person if he belongs to the science background.12 James watt invented the steam engine; Alexander Graham Bell invented the Telephone. J.L.baird invented the television; Rights brothers invented the aero plane. But when you think about the

12 Ibid
female inventor. You found it not so many names you know as female inventors rarely anyone can take name of marry curie. But that is completely untrue.13

TRADITIONAL KNOWLEDGE RELATED INTELLECTUAL PROPERTY RIGHTS: EMPOWERING WOMEN

WOMEN INVENTORS, INVENTED STORIES
We begin this section with some stories – poignant, angry and illustrative. Theses stories are evidence of the assumptions about gender and invention: women do not invent. This is true even as we enter the second millennium and the third technological revolution. These stories are important because they show how women’s contributions to the production of knowledge and recognition of women as inventors have been historically denied on grounds of their sex, class or race. They also reveal that the exclusion of women from the discussions about regulation of knowledges through a denial of their work as sufficiently important to be counted as invention, continues today. Any assessment of intellectual property rights (IPRs) that privileges intellectual production in the public domain needs to take the message of these stories into account. By doing so we can become aware of the limitations of the language of market based rights, and therefore of a need for caution in promoting these as important to the individuation of women and a means for their empowerment.

WORLD TRADE ORGANISATION AND INTELLECTUAL PROPERTY RIGHTS
TRIPS are therefore part of an extremely powerful group of regulatory mechanisms that all members of the WTO must put in place by 2005 at the latest. As we will see below, countries of the South suffer disproportionately from such a proscriptive and encompassing view regulatory regime. Given what we have been arguing above in the context of the gendered nature of these regimes, TRIPS is important in etabllising dominant discourses of knowledge/power through over-riding nationally fought for and negotiated arrangements which might have, in some case, protected the livelihoods of both poor women and men.

WOMEN AND INVENTIONS

13 IIPTA Supra11.
To invent is to find, but differs from discovery in terms of applications of discovery to practical use. Why are there so few women inventors? Some of the answers are obvious - invention usually requires money, materials and the opportunity to share ideas. However, here we also encounter the power relations that define, recognise and privilege only certain forms of knowledge. Women, and poor women particularly, stand outside the world of formal science and technology and far from the world of patents. They, together with other marginalised populations, inhabit a world where everyday processes of experimentation and adaptation lead to a problem-solving approach to knowledge (UNIFEM, 1999). Though such processes are very much the result of logical and internally consistent frameworks of understanding these knowledge do not get the status of scientific inquiry. Indigenous knowledge thus commands a weak price in a market place, which privileges Science and its methodologies. Historically, few women have been financially independent, and most have been excluded from sources of education and intellectual stimulation. This has meant that even though women have made several path breaking technological inventions, they have often been viewed as weak in the field of invention and as our stories above suggest, often not credited with the inventions that they have made. Inventions such as cotton gin, the Jacquard loom, the fire escape (Ann Connelly), filter paper (Melita Bentz), the sewing machine and several other inventions, which made a profound impact on the quality of our lives, were all made by women inventors but how many of us know this?

As per the several indexes maintaining the scorecard of how well the nations crossways the world secure their IP Rights among women, nations that are highly well-organized in running their IP Rights provide women with equal heritage rights and access to land and credit. For the proper development and economic progress and women empowerment, protection of Intellectual Property Rights (IPR) is a essential area. This year, the subject of this day was, “Powering change: Women in innovation and creativity” for celebrating women and their role in creating the future of the nation as well as world economy.

IP Rights not only boost the economy but also restore financial incentives for women and also give them exclusive power over their unique novelty creations. As per several data, reports, analysis and surveys conducted, counties with effective IP protection laws have better measures of gender equality. In spite of several steps made for gender equality, women are still not treated
equal to men by law in various sections of the globe. Being from owning land and coming to obtaining inheritance, women face a lot of challenges. If used accordingly, IP Rights can lead to a major advancement in the private enterprise by motivating and moving women who come up with inventive ideas and inventions. Therefore, IP organization must analysis and acknowledge the creativity subsequent from the indigenous and traditional knowledge of women across the globe.14

CONCLUSION

Though securing IP can definitely change this as the nation that protects IP Rights is also known for its tremendous entrepreneurial environment for women. While developed countries usually have more beached IP protection laws as compared to the developing nations, still they can make several efforts to improve the IP protection and rights for women. According, to the Women’s Institute for Policy Research, women have quintuple their representation among the patent holders since 1977. But, on the other side, data, studies, surveys and reports have also recommended that women add only to 7.7% of prime inventors who own patents. The World Intellectual Property Organization (WIPO; encouraging the protection of IP throughout the world) Every year 26 April is celebrated as World IP Day in order to increase awareness and to endorse alertness about various IP associated matters like trademarks, copyrights, patents, etc., along with the vital role they engage in recreate in promoting innovations.15

Therefore, it won’t be wrong to confess the fact, “Empowering women means giving them equal Intellectual Property Rights.” Securing IP Rights is a win-win for all countries. Protection of these rights and liabilities will also ensure that women of the country also participate and develop and economic incentives always exist to invest and innovate. Developing nations with weak IP norms and high population aggravate unequal living conditions for women. furthermore they also tend to have higher levels of female unemployment, lower female education rates, and higher infant mortality rates. It may also lead to universal economic development and progress.


15 Ibid
Everyone must celebrate or welcome the role and participation of women by not only including or counting their past achievements and rewards but also motivating them for future deeds, development, and progress. Though, an proficient organism of Intellectual Property (IP) Protection can help improve this inconsistency. Intellectual Property Protection can additionally protect the other rights of women as well. For illustration the nations with a efficient system of Copyright Protection will, in general, have the highest-paid female artists and actresses too.¹⁶

¹⁶ KIPG, Supera 14.
BIBLIOGRAPHY


CRITICAL ANALYSIS: MENTAL HEALTHCARE ACT, 2017

By - Vasundhara Sharan & Kushagra Jain

Symbiosis Law School, NOIDA

1. INTRODUCTION

The preamble of the Act promises to provide mental healthcare and services for individuals with mental illness and to protect, promote and fulfil the rights of such individuals during delivery of such mental healthcare and service. The MHA 2017 is a welcome change from the existing legislation. Through various provisions pertaining to right of the patients, family members and the role of various healthcare institutions along with removing certain practices, forms of treatment and care, the Act attempts to remove the stigma and the taboo hovering around the concept of mental health and awareness. MHA 2017, influenced heavily by the western model of legislation, is a heavy advocate of individual rights, is thereby patient centric and elucidates various rights in respect to the choice and autonomy the individual would possess in context to his/ her treatment and care.

The former legislation, Mental Health Act, 1987, restricted the ambit of the Act to admission and treatment of persons with severe mental illness in mental hospitals when there is detention against the patient’s will. One of the major initiatives, among other welcome provisions, is to regulate all such mental health establishments and also to provide mental healthcare in other institutions by means of registration. It is observed that many of the sections, enlisted and introduced in the said Act, although are essential and revolutionary, in ways, in theory but are not practical in the current Indian setup. The paper will discuss the areas and parts of the Act which may be amended for better and a more realistic implementation.

2. HISTORICAL BACKGROUND

State-funded public hospitals in India have been around since the times of Emperor Ashoka, in the third century BC. Although, the mentally ill were not institutionalised and were treated...
within the community itself. During the rule of the British East India Company, in 1787, the first mental asylum came into place, in Kolkata (then Calcutta). English laws, such as, The Act for Regulation Madhouses, 1774 were governing these asylums. After the first war of independence in 1857, the first British Indian law on the matter was introduced, The Indian Lunacy Act, 1857. This was amended to later become the Indian Lunacy Act, 1912. 65 years later, this act was replaced by the Mental Health Act, 1987. The current statute to govern mental illness and their treatment is the Mental Health Act, 2017.

A detailed survey of every mental hospital in the country was conducted by the Bhore Committee, which was chaired by Sir Joseph Bhore, who was at the time the Honorary Consultant to the Eastern Army Command, Colonel Moore Taylor. He said, “‘Every mental hospital which I have visited in India is disgracefully understaffed. They have scarcely enough professional workers to give more than cursory attention to the patients, to say nothing of carrying a teaching burden... The policy of increasing bed capacity, which has incidentally led to gross overcrowding in most of the mental hospitals...’” This was a clear indication that the conditions of mental facilities in India were abysmal, and were in dire need of improvement. In the upcoming years, the matter of the condition of mental hospitals reached the Supreme Court through public interest litigation. The Supreme Court considered them as a violation of the fundamental right to life and personal liberty provided by the Constitution of India under Article 21.

The National Human Rights Commission (NHRC) surveyed 37 government mental hospitals, to write a NHRC Report, which reiterated the fact that the state of mental hospitals in the country were abysmal and needed a serious upgrade.

The current Mental Healthcare Act, 2017, which is the current governing body on Mental Healthcare in India, is described in its opening paragraph as "An Act to provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfil the rights of such persons during delivery of mental healthcare and services and for matters connected therewith or incidental thereto."

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22 Ibid.
3. PROMISING ASPECTS OF THE ACT

Chapter V is the heart and soul of the Mental Healthcare Act, 2017. It acts as a safeguard for the patient’s right to various mental healthcare facilities comprising of both inpatient and outpatient services, pertaining to the right to community living, right to confidentiality, right to access medical records, right to protection from cruelty and inhumane treatment, and right to equality and non-discrimination.

It attempts to provide the listed mental healthcare facilities to each and everyone including those below the poverty line, whether in possession of the below poverty line card or not, the destitute, and the homeless - by providing free mental health treatment and free legal aid as well.

The Act makes huge strides by banning electroconvulsive therapy (ECT) without anaesthesia and any type of ECT to children and restricting psychosurgery as well. The Right to confidentiality circumferences the patient’s mental health status, treatment along with the information obtained during such care and treatment.

The Act pushes great emphasis on autonomy and consent by introducing the patient’s right to make an advanced directive i.e. a detailed written statement which pertains to the manner the patient wants to be treated in context to his/her illness and to choose a Nominated Representative who can assist him/her with the treatment related decisions. In pursuance of the same, no information relating to the patient undergoing treatment in a mental health establishment can be released to the media without the former’s consent and stretches to all such information stored in electronic or digital format in real or virtual spaces.

According to the Indian Penal Code, "Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term

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which may extend to 1 year or with fine, or with both.”35 However, MHA 2017 stipulates that any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said code. Furthermore, the appropriate government will have a duty to provide care, treatment, and rehabilitation to a person having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of an attempt to commit suicide.36

4. **DRAWBACKS AND RECOMMENDATIONS**

**DEFINITION OF MENTAL ILLNESS**

“2.(s) ‘mental illness’ means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs…”37

The definition restricts the ambit of the term “mental illness” and therefore, does not apply to all the patients of mental illness. Further, Section 3 lays down that the determination of mental illness shall be in accordance with the requisite national and international standards, which adds on to the complexities pertaining to how “mental illness” must be construed and applied. It is suggested that the two sections must be combined and conveyed in pursuance to the requirement of the law and the preamble of the Act.

**CAPACITY TO CONSENT**

Section 4 of the Act dictates the capacity of the patient to make mental healthcare and treatment related decisions with respect to his/ her ability to comprehend the information, or assess the risk or communicate the decision. If the patient faces difficulty with any of the same, the patient can refuse treatment on the basis of various reasons- absent sight, severe symptoms etc- which will have detrimental consequences as to purview of the Act. Therefore, the section needs to be urgently assessed and subsequently amended to protect the Act and its purpose from the same. Further, it is implicit how the section considers everyone to have capacity and further, seeks evidence of the lack of the same to initiate involuntary treatment through the tools of Advanced

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35 S. 309, The Indian Penal Code, 1860.
36 Supra 3, at 663.
37 S. 2(s), The Mental Healthcare Act, 2017.
directive or in its absence, a Nominated Representative.\textsuperscript{38} The MHA must make suitable provisions for involuntary treatment in all involuntary supported admissions through informed consent from the right to self-determination.\textsuperscript{39} Moreover, admissions under Section 89 and 90 must not assess the capacity of the patient and the consent of the nominated representative must be taken to give the requisite and due importance to the treatment and the patient’s liberties.\textsuperscript{40}

**ADVANCE DIRECTIVES**

As elucidated before, Advance Directives allow any adult to spell out their decisions concerning the care and treatment and can be revoked, amended or cancelled anytime posing difficulties for the patient’s family to handle such situations. The Act gives only the MHRB the power to amend or overrule the directive\textsuperscript{41} and would be required to done within a very short time so as to prevent any wrongdoings. Research pertaining to the human, economic and community resources must be done for the Indian population before introducing the said concept.\textsuperscript{42}

Further, the Act is very ambiguous and unclear about the scope and ambit of the said concept and about the issues related to it which can prove to be a deterrent while providing adequate care to the patient and can result in disharmony between the patients and their family\textsuperscript{43} as well as can also invite litigations and burden on the family members who are the true value and assets in the Indian context. Therefore, it is suggested that the inclusion of Advanced Directives is rather hasty and ill-conceived.\textsuperscript{44}

**LACK OF RESOURCES**

The Act, on careful deliberation, is bulked up with rights-based ideology, in consonance with the mental health legislations of various western countries. however, unlike the latter who have a very strong resource pool, implementation of the Act in India will face grave challenges due to

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\item \textsuperscript{38} A. Kala, *Time to face new realities; mental health care bill-2013*, 55 Indian Journal of Psychiatry 216, 217 (2013).
\item \textsuperscript{40} Supra 3, at 664.
\item \textsuperscript{41} Supra 42, at 25.
\item \textsuperscript{43} A. Avasthi, *Preserve and strengthen family to promote mental health*, 52 Indian Journal of Psychiatry 113, 118 (2010).
\item \textsuperscript{44} A. Sarin, *On psychiatric wills and the Ulysses clause: The advance directive in psychiatry*, 54 Indian Journal of Psychiatry 206, 207 (2012).
\end{itemize}
the scarcity of resources. The same is met with various obstacles pertaining to poor infrastructure, low budget for mental healthcare, inadequate mental health workforce, and overall lack of mental health resources in general healthcare settings.

The Act entitles the patients to access any other mental health services in the district whose costs will be born by the appropriate government, when the minimum mental health services are not available in the district where the patient resides. This form of compensation-based services can result in false claims and could have an adverse impact on the existing feeble resources.

In pursuance with the motive and functioning of the Act, it is important to introduce psychiatry at the undergraduate level (MBBS) for better understanding and knowledge about the subject.

It is essential to address the pressing matters and challenges such as lack of mental health workforce, financial aid, and stigma, which are the major threats to develop comprehensive psychiatric services in the community.

5. IMPACT OF THE ACT

IMPACT OF THE ACT ON WOMEN

In India, women and those afflicted by a mental illness are often restricted to the fringes of society; made to occupy as little space as possible and subject to abuse that often goes unnoticed and unpunished. Those who occupy the intersection of these two identities are uniquely disadvantaged and, thus, there is merit in examining the effect of the Mental Healthcare Act, 2017 on these individuals. Under chapter V of the act, individuals with mental illnesses are afforded the Right to access mental healthcare, Right to community living, Right to protection from cruel, inhuman and degrading treatment, Right to equality and non-discrimination, Right to information, Right to confidentiality, Restriction on release of

46 Supra 2, at 247.
48 Supra 3, at 665.
49 Supra 2, at 249.
50 Supra 39, at 248.
information in respect of mental illness, Right to access mental records, Right to personal contacts and communications, Right to legal aid, Right to make complaints about deficiencies in provision of services.

Section 18 of the Act ensures the right to access mental healthcare --- mental healthcare that's affordable, accessible geographically, and also devoid of discrimination on the basis of gender, religion, sexual orientation, etc. Accessibility is a large issue in this arena; India has only 43 state-run mental mental hospitals and only 10000 beds for the mentally ill in general hospitals.

Most states have 2 or less such hospitals, and even those are often in remote areas, 72% of India has access to only 25% of these locations, creating a disparity that has restricted the access of those at the bottom of the societal food chain. Section 18(5) outlines the integration of mental healthcare with general healthcare. This mandate has both detractors and benefits. The way that pathological medicine works is at odds with how mental illnesses are dealt with. In addition to that, it may keep many from approaching healthcare in the first place due to stigma and lack of privacy in general hospitals. That being said, this integration is essential, but must be accompanied by proper training for practitioners. This need is apparent in the treatment of women’s illnesses or injuries that require the expertise of general practitioners, but are often denied this access. Some mental hospitals don’t even have the resources to deal with HIV-positive patients.

Section 21 of the Act, seeks to provide equality to people afflicted by mental illnesses. Mentally ill women are subject of great atrocities that rarely get righted. Often, these women are abandoned in mental hospitals by their families. The Act seeks to ensure that these women aren’t left in such conditions perpetually and espouses their relocation to government homes, if

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65 Supra 66, at 70.
abandoned. Under section 21, this healthcare must be egalitarian in all ways and mustn’t discriminate on the basis of religion, caste, sexual orientation, or gender. It also disallows separation of a woman and her child (younger than 3 years), unless her mental illness makes her a danger; and even in that case, she has visitation rights, and the decision to separate is reevaluated every 15 dates. This ensures that such a separation is transient and a mother can regain her child after undergoing treatment.66

Yet, section 21 lacks an express inclusion of a woman's autonomy to decide whether to undergo treatments that do not pertain to her mental illness or her physical health. In many cases, hysterectomies have been performed on women with mental illnesses at hospitals without their consent. This practice is done for several reasons. One is to alleviate menstruation to retain hygienic conditions --- a reason that holds no factual basis; menstruation is not a disease, it's a basic female biological process. A more sinister and alarming, but unfortunately very real reason is to prevent pregnancy in case of rape or abuse while in treatment.67 This pays no mind to the fact that hysterectomies have risks and should be carried out purely for gynaecological reasons. Leaving this out of section 21 leaves women still vulnerable of losing all autonomy.

Section 20 of the Act endeavours to protect mentally ill individuals from humiliating or degrading conditions. This can come in the form of privacy, hygiene, adequate food, clothing, and water, and freedom from sexual or physical abuse. In Regional Mental Hospital, overcrowding happened due to inadequacy in beds and the dining area was full of flies. The patients had to wear compulsory uniforms, many of which were torn, thereby depriving the women of even a modicum of privacy.68 Such treatment was present in almost all women’s wards in mental hospitals. It is apparent that this section outlines the need of the hour. It is imperative to invest government resources into preventing such atrocities and abuse against such a vulnerable class. The enactment of this section, in tandem with the rest, could provide mentally ill women with the ability to live dignified lives.

68 Supra 66, at 40.
IMPACT OF THE ACT ON GERIATRIC MENTAL HEALTHCARE DELIVERY

The elderly, (i.e. people over the age of 60) constitute 8.6% of the total Indian population. Due to the increased life expectancy through modern medicine along with technological advancements, there has been an increase in the proportion of the elderly in the total population of India. Due to this, the demand for physical and mental healthcare amount elders has increased. The National Mental Health Survey, 2016, had reported that the mental morbidity was at 15.11% after 60 years of age. Their chronic medical disorders, frailty, sensory impairment, mental illness, and cognitive impairment caused due to old age, make them a unique population, that is dependent on others for basic needs. A very large percentage of the elderly population is prone to mental illness. Depression, dementia, and delirium are the three most common mental health illnesses that affect the elderly. The reported prevalence of geriatric psychiatric morbidity in the community was between 8.9% to 61.2%. Beyond mental and physical illness, the elderly also face abuse and neglect.

Section 4 of the Act discusses the capacity to make mental health care and treatment decisions. This section is seriously flawed. The section states that if a person with a mental illness has abilities of comprehension, understanding the consequences of a decision, or communication of the decision, they have the right to refuse treatment. However, if even one of these abilities is impaired, the person will not possess the same right. This section is deeply damaging to the liberty of the patient, and will act as a barrier to insuring the interest of the patients as well as their families. There is a need to rectify or clarify this section by deleting the “or” and bringing in an “and” between Section 4 (1) a, b, c. This will mean that the individual would have to be handicapped in all three ways to be proved mentally incapable, as opposed to only one of the three. The lack of mental capacity due to mental illness creates special issues within the elderly. Age has a direct effect on mental capacity, and the effect of mental illness can be of different types in old age. Often times, the impairment of mental capacity in older patients is of short term, and they are able to regain their capacity after treatment or medication. Fluctuating mental

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capacity in certain conditions, like delirium, make it challenging to assess the overall mental capacity of these individuals.

The concept of advance directive (AD) was a concept introduced by the MHA 2017, in order to safeguard the rights of patients suffering with mental illnesses, when their mental capacity is impaired. This provision enables to provides treatment to the patient on the basis of the decisions and preferences communicated by them before they developed mental incapacity. They can give an AD to communicate how they wish or not wish to be cared for and the choice of individuals for appointment as nominated representative (NR).

When it comes to geriatric mental healthcare, an AD has considerable consequences relating to the treatment, and end-of-life care of these individuals. The situation of an AD is common with the elderly as they suffer with chronic illnesses that progressively deteriorate their mental condition. The Supreme Court upheld the provision of AD for terminally ill patients in a recent judgement given by a five-judge bench. The court held that the right to die with dignity was a fundamental right.

**IMPACT OF THE ACT ON SUICIDE AND SUICIDE ATTEMPTS**

The number of people who have committed suicide in India in the past last few years has been gradually increasing. The number of people who ended their lives by committing suicide in 2014 were 131,66,75 and that in 2016 were 230,314. The ratio of attempt to suicide and successful suicide is 4:6, and by the ratio, we can conclude that in India, 5.75 million people attempted to suicide in 2016 alone.

Up until The Mental Healthcare Act (MHA) was enforced, an attempt to die by suicide was a criminal offence as per Section 309 of the Indian Penal Code, 1860. Although the act

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78. S. 309, The Indian Penal Code, 1860.
decriminalises suicide attempts, it is still vital to recognise the need for mental health interventions for individuals who attempt suicide.

Legal Scenarios from the point of view of Section 309 of the Indian Penal Code:

1. **Accidental or unintentional suicide:** In Emperor v. Dwaaraka Poonja, a man had jumped into a well with the intention to run away from the police, the act could have been fatal, but was not done with the intent to commit suicide, therefore he could not be charged for attempt to suicide under 309. Similarly, if a person impulsively decides to end his life, he cannot be charged, as the the courts ruled that people in such situations deserve sympathy instead of punishment.

2. **Protest or Hunger Strike:** If a person openly declares that he will fast until his death and refuses to consume any nourishment until it gets to the point where he may pass way at any moment and there is imminent danger to his life, he would be guilty of attempt to suicide.

3. **Mental Illness:** The Bombay High Court judgement in the case of Maruti Shirpati Dubal v. State of Maharashtra declares that if an individual is suffering from a serious mental illness, e.g. Schizophrenia, and attempts suicide, he will not be charged for attempt under Section 309 of the Indian Penal Code, 1860. The court suggests that these people need rehabilitation.

4. **Euthanasia:** The landmark judgment on the matter of of euthanasia came with Aruna Ramachandra Shanbaugh v. Union of India. After this case, India allowed “passive euthanasia.” Passive euthanasia is the concept of withdrawing or taking patients off life support when they are in a permanent vegetative state. But the concept of active euthanasia through lethal substances was rejected.

**Legal Implications**

Attempt to commit suicide is mentioned in Section 115 of MHA 2017. The section states, “Notwithstanding anything contained in Section 309 of the Indian Penal Code, 1860, any person who attempts to die by suicide shall be presumed, unless proved otherwise, to have severe stress

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79 Emperor vs. Dwaarka Poonja, 1912 (14) BOMLR 146.
80 Supra 81.
81 Queen Empress v. Ramakka, ILR (1884) Mad. 5.
83 Aruna Ramachandra Shanbaug vs. Union of India (UOI) and Ors., 2011(1) RCR (Civil) 854.
and shall not be tried and punished under the said Code.” Someone who commits such an act, is doing so because he finds life so unbearable that death seems like a better option, if such an individual fails to successfully attempt suicide, to inflict punishment on them would be unreasonable, and almost inhumane.84

In State v. Sanjay Kumar Bhatia,85 the Hon’ble High Court of Delhi held that, “The continuance of Section 309 IPC is an anachronism unworthy of a human society like ours. The provision like Section 309 IPC which has no justification has no right to continue to remain on the statute book.” Suicide attempts are decriminalised by Section 115 of MHA 2017, superseding Section 309 of IPC, 1860.86

6. CONCLUSION

The inadequacies of mental health services in developing countries are often attributed to the lack of awareness, acceptance, and adequate legislation for the same. There are many instances of progressive policies that are created with the right intentions, the not get implemented properly. The Act is intended to change the fundamental approach that the Indian citizens have on mental healthcare issues. It includes patient-centric health care implementation. The MHA 2017 is unique in its purpose, as its objective is to provide easy access to mental healthcare, with developing policies. The Act is a comprehensive attempt to align the national mental healthcare legislation with those of global acceptance. It is a significant step towards acceptance of the mentally ill, and to provide them with rights.

Something extremely pivotal that the Act introduced was the concept of Advance Directives and Nominated Representatives. They come with their own pros and cons, and will only truly be positively effective if implemented meticulously. This Act also plays a pivotal role in making sure that women and elderly patients undergoing mental illness treatment are not exploited. Although some aspects are not fully clarified and still leave a blank space, it is still moving in a positive direction, when it comes to insuring that the rights of these groups are safeguarded. But, some aspects of the Act are ambiguous, and due to the ambiguity sections of the act that could be beneficial become ones against individual liberty.

84 Supra 80, at S753.
86 Supra 80, at S754.
It is thus, concluded that the implications of the Mental Healthcare Act, 2017 on individuals with mental illness could be positive, if there is proper implementation and enforcement of its provisions in the near future, along with some amendments to clarify its ambitious nature.
THE CASE THAT SHOOK AND GAVE BIRTH TO YELLOW JOURNALISM IN INDIA

Stuti Sanghamitra¹

CASE COMMENTARY ON: K.M. NANAVATI V. STATE OF BOMBAY
(AIR 1961 SC 112)

Before: Sinha, Bhuvneshwar P. (CJ), Kapur, L., Gajendragadkar, P.B., Subbarao, K., Wanchoo, K.N. JJ

Decided On: 05.09.1960

PARTIES
Appellant: K.M. Nanavati (Represented by- S. N. Andley, J. B. Dadachanji, Rameshwar Nath and P. L. Vohra)


FACTS AND RECORD OF PROCEEDINGS
Kevas Manekshaw Nanavati, an Indian naval officer shifted to Bombay in March 1959 along with his family and got to meet Prem Bhagwandas Ahuja, a businessman in Bombay. While he was out of Bombay for his duty as a Second in Command of I.N.S. Mysore which came to Bombay at the beginning of March 1959., Sylvia, his wife, developed an extramarital relationship with Prem Ahuja. He was then confronted with the confession of his wife when she opened with her relationship with Ahuja. Further, within the heat of his agony, he visited his ship to obtain a loaded revolver and drove himself to Prem Ahuja’s office. On not finding him at his workplace, he then drove to his residence. After an altercation, at his residence, two shots went off accidentally and hit Ahuja. The jury voted in favour of the accused. ²

The case was brought up Hon’ble Supreme Court under Section 307 ³ of The Code of Criminal Procedure. The Division Bench of the Supreme Court went on to declare the accused guilty under Section 302 of IPC.

¹ BBA LLB (Hons) Semester 7, Amity Law School, Jaipur
³ 307. Power to direct tender of pardon. At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.
On the same day itself day when the high court pronounced its judgment the Governor of Bombay passed an order under Art. 161 of the Constitution of India suspending the sentence gone by the High Court of Bombay on the petitioner until the appeal intended to be filed by him within the Supreme Court against his conviction and sentence was disposed of and subject meanwhile to the condition that he shall be detained within the Naval Jail custody. A warrant for the arrest of the petitioner which was issued in pursuance of the judgment of the supreme court was returned unserved with the report that it couldn't be served in sight of the order of the Governor suspending the sentence passed upon the petitioner.

An appeal was finally decided by the Supreme Court. The judicature held that there have been misdirections within the session’s court. In course of the hearing of an application for special leave to appeal (SLP) to the Supreme Court filed by the petitioner in the matter of the unexecuted warrant was placed before it and a Special Bench of the Supreme Court after examining the validity of the action taken by the Governor came to the conclusion that the order gone by the Governor wasn't invalid, that the order for detention of the petitioner in naval custody wasn't unconstitutional which the sentence passed on the petitioner having been suspended the provisions of Order. XXI, Rule. 5, of the Supreme Court Rules, failed to apply, and it had been not necessary for the petitioner to surrender to his sentence.

Thereafter the petitioner filed an application for special leave within the Supreme Court and also another application praying for exemption from compliance with the aforesaid rule and for the hearing of this said application for special leave without surrendering to his sentence. His plea initially was that as he was not a free man it had been impossible for him to accommodate the necessities of Order. XXI, Rule. 5, of the Supreme Court Rules; but he subsequently amended it to the effect that the aforesaid Rule did not apply to his case insight of the Governor's order. On a reference of this matter by a Division Bench of this Court to the Constitution-Bench for hearing, it was held, that the Governor had no power to grant the suspension of sentence for the amount during which the matter was sub-judice during this Court. The Governor's order suspending the sentence could only operate until the matter became sub-judice during this Court on the filing of the petition for special leave to appeal whereupon this Court being in seisin of the matter would consider whether Order. XXI, Rule. 5 should be applied or the petitioner should be exempted from the operation thereof as prayed for. it might then be for this Court to pass such orders because it thought fit as to if the bail should be granted to the petitioner or he should surrender to his sentence or to pass such other order because the court deemed slot in the circumstances of the case.
LOWER COURT DETAILS

Sessions Court- The jury in the Greater Bombay Sessions Court pronounced Nanavati as not guilty, with an 8-1 verdict. Hon'ble Mr. Justice Ratilal Bhaichand Mehta (the Sessions Judge) was of the opinion that the acquittal was not justified because the jury was heavily influenced by the media and referred the case to the High Court.

High Court of Bombay- The High Court dismissed the Jury’s verdict on the basis of the following arguments made by the prosecutor-

1. The burden of proof or the onus of proving that the death of Mr. Ahuja was an accident and not premeditated murder was on Mr. Nanavati.
2. Mrs Nanavati's confession, or any specific incident that happened in Mr. Ahuja's bedroom, or both did not amount to a grave or sudden provocation or both.
3. The Sessions Court Judge had wrongly told the jury that such provocation can also be initiated from a third person.
4. The jury was not instructed that Mr. Nanavati's defense had to be proved, to an extent that there has to be no reasonable doubt in the mind of a reasonable person.

ISSUESPOSED TO THE APEX COURT

1. Whether SLP can be entertained without fulfilling the order under Art. 142?
2. Whether the Governor can issue pardon (Art. 1614) and can it be entertained without fulfilling the order under Article 1365 (Harmonious Construction)

CONTENTIONS IN THE INSTANT CASE

1. Whether SLP can be entertained without fulfilling the order under Art. 142?

The petitioner filed his petition for special leave in this court on April 20, 1960, and also made an application on April 21, 1960, under Order 45, Rules 2 and 5 of the

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4Article 161. Power of Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain cases

The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends

5Article 136. Special leave to appeal by the Supreme Court

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces

62. Application to Court whose decree complained of.—
Supreme Court Rules for exemption from compliance with Order 21, Rule 5 of those Rules. It was stated in the petition that, soon after his arrest, the petitioner throughout the trial before the Sessions Court and the hearing of the reference in the High Court, had been in naval custody and continued to be in that custody, that he had been throughout of good behaviour and was ready and willing to obey any order of this court, but that the petitioner “not being a free man it was not possible for him to comply with the requirements of Rule 57 of Order 21 of the Supreme Court Rules....” He, therefore, prayed that he may be exempted from compliance with the aforesaid Rule and that his petition for special leave to appeal be posted for hearing without his surrendering to his sentence.

On July 6, the petitioner swore an affidavit in Bombay to the effect that his application aforesaid for exemption from compliance with the requirements of Rule 5 of Order 21 of the Rules had been made under a misapprehension of the legal position and that the true position had been indicated in the judgment of the Special Bench of the Bombay High Court to the effect that Rule 5 of Order 21 of the Rules would not apply to his case in view of the Governor's order aforesaid and that, therefore, his special leave petition be directed to be listed for admission. It is apparent that this change in the petitioner's position as regards the necessity for surrender is clearly an afterthought. Certainly, it came after the Division Bench had directed the constitutional matter to be heard as a preliminary question.

The learned Advocate-General of Bombay, and the learned Additional Solicitor-General on behalf of the Union of India, Shri, J.B. Dadachanji; Advocate for the petitioner spoke about whether the petitioner was prepared to get himself released from the Governor's order in order to present himself in this Court so that the hearing of his special leave petition might proceed in the ordinary course, but he was not in a


[(1)] Whoever desires to appeal [the Supreme Court] shall apply by petition to the Court whose decree is complained of.

(2) Every petition under sub-rule (1) shall be heard as expeditiously as possible and endeavour shall be made to conclude the disposal of the petition within sixty days from the date on which the petition is presented to the Court under sub-rule (1).

5. Mode of transfer.— Where a decree is to be sent for execution to another Court, the Court which passed such decree shall send the decree directly to such other Court whether or not such other Court is situated in the same State, but the Court to which the decree is sent for execution shall, if it has no jurisdiction to execute the decree, send it to the Court having such jurisdiction.]
position to make a categorical answer and preferred to have the constitutional question determined on its merits.

But it has been argued that, even as the terms of Article 161 are without any limitation, the provisions of Section 401 of the Code of Criminal Procedure are also in similarly wide terms, and do not admit of any limitations or fetters on the power of the Governor; the Governor could, therefore, suspend the execution of the sentence passed by the High Court even during the period that the matter was pending in this court. In other words, the same power of dealing with the matter of suspension of sentence is vested both in this court as also in the Governor.

It is noteworthy that the reprieve granted in that case covered only the period until the grant or refusal of the petition for leave to appeal and did not go further so as to cover the period of pendency of the appeal to the Privy Council, unlike the order now impugned in this case. The power which was vested in the Crown to grant special leave to appeal to convicted persons from India has now been conferred on this court under Article 136. The power under Article 136 can be exercised in respect of “any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India”. Mr Seervai's argument is correct that the pendency of a special leave application in this court makes no difference to the exercise of the power by the executive under Article 161, then both the judiciary and the executive have to function in the same field at the same time. Mr Seervai however contended that there could never be a conflict between the exercise of the power by the Governor under Article 161 and by this court under Article 142 because the power under Article 161 is executive power and the power under Article 142 is judicial power and the two do not act in the same field.

2. Harmonious Construction: The argument of Mr Seervai at the time was that, though this court had the power to suspend sentence or grant bail pending hearing of the special leave petition, that would not affect the power of the executive to grant a pardon, using the term in its comprehensive sense, as indicated above. Reference was in this connection made to Balmukand v. King-Emperor [(1915) 42 IA 133]. That was a case where a convicted person had moved His Majesty in Council for special leave
to appeal and the question arose as to the power of the executive to suspend the sentence. In that connection Lord Haldane, L.C., made the following observations:

“With regard to staying execution of the sentence of death, Their Lordships are unable to interfere. As they have often said, this Board is not a court of Criminal Appeal. The tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the Executive Government and is outside Their Lordships' province. It is, of course, open to the petitioners' advisers to notify the Government of India that an appeal to this Board is pending. The Government of India will no doubt give due weight to the fact and consider the circumstances. But Their Lordships do not think it right to express any opinion as to whether the sentence ought to be suspended.”

It was argued that the power of the court under Articles 142 & 145 and of the Governor under Article 161 are mutually inconsistent and therefore the power of the Governor does not extend to the period the appeal is pending in this court because law does not contemplate that two authorities i.e. executive and judicial should operate in the same field and that it is necessary that this court should put a harmonious construction on them. Article 142 of the Constitution, it was contended, is couched in language of the widest amplitude and comprises powers of suspension of sentences etc. The argument that the power of the executive to suspend the sentence under Article 161 and of the judiciary to suspend the sentence under Article 142 and Article 145 are in conflict ignores the nature of the two powers.

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CONTENTION WISE JUDGEMENT

1. On April 25, 1960, the special leave petition along with the application for exemption aforesaid was placed before a Division Bench which passed the following order:

“This is a petition for special leave against the order passed by the Bombay High Court on reference, convicting the petitioner under Section 302 of the Indian Penal Code and sentencing him to imprisonment for life. Along with his petition for special leave an application has been filed by the petitioner praying that he may be exempted from surrendering under Order XXI, Rule 5, of the Rules of this court. His contention in this application is that he is ready and willing to obey any order that this court may pass but that as a result of the order passed by the Governor of Bombay under Article 161 of the Constitution he is not a free man to do so and that is put forward by him as an important ground in support of his plea that he may be exempted from complying with the relevant Rule of this court. This plea immediately raises an important constitutional question about the scope and extent of the powers conferred on the Governor under Article 161 of the Constitution and that is a constitutional matter which has to be heard by a Constitution Bench of this court. We would accordingly direct that notice of this application should be served on the Attorney-General and the State of Bombay and the papers in this application should be placed before the learned Chief Justice to enable him to direct in due course, in consultation with the parties concerned, when this application should be placed for hearing before the Constitution Bench.”

The court with the assistance of Mr C.B. Aggarwala, who very properly volunteered his services as amicus curiae to represent the other viewpoint. In this court also the situation was the same as in the High Court, namely, that unless there was an amicus curiae to represent the opposite viewpoint, the parties represented before us were not contesting the validity of the Governor's order. Both here and in the High Court, it was at the instance of the court itself that the matter has been placed for hearing on the preliminary question before dealing with the merits of the petitioner's case.
In the present case, the question was limited to the exercise by the Governor of his powers under Article 161 of the Constitution suspending the sentence during the pendency of the special leave petition and the appeal to this court; and the controversy has narrowed down to whether for the period when this court is in seizin of the case the Governor could pass the impugned order, having the effect of suspending the sentence during that period. **There can be no doubt that it is open to the Governor to grant a full pardon at any time even during the pendency of the case in this court in exercise of what is ordinarily called “mercy jurisdiction”.** Such a pardon after the accused person has been convicted by the court has the effect of completely absolving him from all punishment or disqualification attaching to a conviction for a criminal offence. **That power is essentially vested in the head of the Executive, because the judiciary has no such “mercy jurisdiction”**. But the suspension of the sentence for the period when this court is in seizin of the case could have been granted by this court itself. **If in respect of the same period the Governor also has power to suspend the sentence, it would mean that both the judiciary and the executive would be functioning in the same field at the same time leading to the possibility of conflict of jurisdiction.** Such a conflict was not and could not have been intended by the makers of the Constitution. If that is the correct interpretation to be put on these provisions in order to harmonise them it would follow that what is covered in Article 142 is not covered by Article 161 and similarly what is covered by Section 426 is not covered by Section 401. On that interpretation Mr Seervai’s argument was held to be right in his contention that there is no conflict between the prerogative power of the sovereign state to grant pardon and the power of the courts to deal with a pending case judicially.

2. **HARMONIOUS CONSTRUCTION:**

(p. 19) Mr Seervai contended that there could never exist such a conflict between the exercise of the power by the Governor under Article 161 and by this court under Article 142 because the power under Article 161 is executive power and the power under Article 142 is judicial power and the two do not act in the same field.

That in the judges’ opinion was considered as mere over-simplification of the matter. They held that although
“it is true that the power under Article 161 is exercised by the executive while the power under Article 142 is that of the judiciary; but merely because one power is executive and the other is judicial, it does not follow that they can never be exercised in the same field. The field in which the power is exercised does not depend upon the authority exercising the power but upon the subject-matter”.

……..emphasis supplied.

What is the power which is being exercised in this case?

It was also the opinion of the justices that the power that is being exercised by the executive to suspend the sentence; that same power can be exercised by this court under Article 142. It is significant that the Governor's power has been exercised in the present case by reference to the appeal which the petitioner intended to file in this court. The opinion held by by the judges in the instant case regarding harmonious construction was:

“There can therefore be no doubt that the judicial power under Article 142 and the Executive power under Article 161 can within certain narrow limits be exercised in the same field. The question that immediately arises is one of harmonious construction of two provisions of the Constitution, as one is not made subject to the other by specific words in the Constitution itself. As already pointed out, Article 161 contains no words of limitation; in the same way, Article 142 contains no words of limitation and in the fields covered by them they are unfettered. But if there is any field which is common to both, the principle of harmonious construction will have to be adopted in order to avoid conflict between the two powers. It will be seen that the ambit of Article 161 is very much wider and it is only in a very narrow field that the power contained in Article 161
is also contained in Article 142, namely, the power of suspension of sentence during the period when the matter is sub judice in this court. Therefore on the principle of harmonious construction and to avoid a conflict between the two powers it must be held that Article 161 does not deal with the suspension of sentence during the time that Article 142 is in operation and the matter is sub judice in this court.”

……..emphasis

Similarly, the justices gave an opinion a by citing another example -

“(p.20) In this connection it is well to contrast the language of Section 209(3) and Section 295(2) of the Government of India Act, 1935. Section 209(3) gave power to the Federal Court to order a stay of execution in any case under appeal to the court, pending the hearing of the appeal. Section 295(2) provided that nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishments. It may have been possible to argue on the language of section 295(2) that the prerogative exercised by His Majesty transcended the power of the Federal Court under Section 209(3); but when we compare the language of Articles 72 and 161 with the language of Section 295(2) of the Government of India Act, we find no words like “Nothing in this Constitution” or “Notwithstanding anything contained in this Constitution” in them. Such words have been used in many articles of the Constitution: (See for example, Article 262(2) which provides specifically for taking away by Parliament by law the power of this court in disputes relating to water and begins
The absence, therefore, of any such qualifying words in Article 161 makes the power of this court under Article 142 of the same wide amplitude within its sphere as the power conferred on the Governor under Article 161. Therefore, if there is any field where the two powers can be exercised simultaneously the principle of harmonious construction has to be resorted to in order that there may not be any conflict between them. On that principle the power under Article 142 which operates in a very small part of the field in which the power under Article 161 operates, namely, the suspension and execution of sentence during the period when any matter is sub judice in this court, must be held not to be included in the wider power conferred under Article 161.

The fact that the powers invoked are different in character, one judicial and the other executive, would not change the nature of the field or affect its identity. We have given our anxious consideration to the problem raised for our decision in the present case and we feel no hesitation in taking the view that any possible conflict in exercise of the said two powers can be reasonably and properly avoided by adopting a harmonious Rule of construction. Avoidance of such a possible conflict will incidentally prevent any invasion of the Rule of law which is the very foundation of our Constitution.

Both Articles 72 and 161 give the widest power to the President or the Governor of a State as the case may be and there are no words of limitation indicated in either of the two articles. It was argued that under Articles 142 and 145(1) of the Constitution certain powers are conferred on the Supreme Court and if the articles conferring powers on the President and the Governors are read along with the power given to the Supreme Court they create a conflict and therefore to give a harmonious interpretation to all the four articles it is necessary to cut down the amplitude of the powers conferred by Articles 72 and 161 of the Constitution. In regard to suspension of sentences it will be fruitful to trace the legislative history of the relevant powers of the executive and the judiciary which arise for construction.
RULE OF LAW HELD

1. The given SLP was dismissed by the Supreme Court, by majority, on account of holding that the Appellant’s SLP could not be listed for hearing unless he surrenders under Art. 142 (as per the Judgement of HC).

2. The widely discussed rule of law was the harmonious construction of Art. 161 and Art. 142 (Enforcement of decrees or orders of SC). Article 161 is the pardoning of the petitioner’s sentence by the Governor. This order was passed by the Governor of Bombay (Vijaylakshmi Pandit) when the matter was still going on before the Supreme Court (‘sub judice’).

No rule of construction are required when the words of a statute convey a very clear meaning, it shall be necessary to introduce another part of the statute which speak with less clarity and of which the word may be capable of such construction and diminish the efficacy of the other provision of the Act. Under Art. 142 unless the order of lower court doesn’t follow. SC may decide to not entertain any SLP and under Art. 145 the Hon'ble Court has all power to make the Law to give justice. It was finally decided that the governor cannot use the power conferred under Article 161 when the matter is sub judice. Art. 142 given effect to, meaning, SLP and pardoning power cannot operate together as both are very different. If an SLP is filed, then the power of the governor in such condition will be ceased.

DISSENTING OPINION

Justice Kapur gave a dissenting opinion that the language of Art. 161 is of the widest amplitude. It is plenary and an act of grace and clemency and may be termed as benign prerogative of mercy; the power of pardon is absolute and exercisable at any time. Rules framed under Art. 145 are subordinate legislation and cannot override the provisions of Art. 161 of the Constitution itself. While the Governor's power to grant pardon is a power specially conferred upon him as was vested in the British Governor in British days, the power given to the Court under Art. 142(1) is a general power exercisable for doing complete justice in any cause or matter, and if they deal with the same matter then Art. 161 must prevail over Art. 142(1). The two powers may have the same effect but they operate in distinct fields on different principles taking wholly irreconcilable factors into consideration. The action taken by the executive being the exercise of overriding power is not subject to judicial review. It could not have been the intention of the framers of the Constitution that the amplitude of executive power should be restricted as to become suspended for the period of pendency of an appeal in the Supreme Court.
ANALYSIS

My viewpoint on this is in favour of J. Kapur’s dissenting opinion. It has been strenuously urged before that the power of granting pardon is wide and absolute and can be exercised at any time, that is to say, it can be exercised even in respect of criminal matters which are sub judice; and the argument is that the power to suspend sentence is part of the larger power to grant pardon, and is similar in character and can be similarly exercised. According to me, this argument rejected by J. Kapur considering it to be fallacious is absolutely correct; it carelessly disembarks the significant difference between the general power to grant pardon etc. and the power to suspend sentence in criminal matters pending before this court. The first is an exclusively executive power vesting in the Governor under Article 161; it does not vest in this court; and so the field covered by it is exclusively subject to the exercise of the said executive power; and so there can be no question of any conflict in such a case; conflict of powers obviously postulates the existence of the same or similar power in two authorities; on the other hand, the latter power vests both in this court and the Governor, and so the field covered by the said power entrusted to this court under Article 142 can also be covered by the executive power of the Governor under Article 161, and that raises the problem of a possible conflict between the two powers.

Since this matter was sub judice in this court on the filing of the petition for special leave to appeal, after the filing of such a petition this court was seized of the case since it was extremely scandalized which could have been dealt with by it in accordance with law. In my opinion, it would then be for this Court, when moved in that behalf, either to apply Rule 5 of Order 21 or to exempt the petitioner from the operation of that Rule. It was very much possible that this court could pass such orders as it thought fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass such other or further orders as this court might deem fit in all the circumstances of the case. It follows from what has been said that the Governor had no power to grant the suspension of sentence for the period during which the matter was sub judice in this court.

It was also argued that the power of the court under Articles 142 & 145 and of the Governor under Article 161 are mutually inconsistent and therefore the power of the Governor does not extend to the period the appeal is pending in this court because law does not contemplate that two authorities i.e. executive and judicial should operate in the same field and that it is necessary that this court should put a harmonious construction on them. Article 142 of the Constitution, it was contended, is couched in language of the widest amplitude and comprises
powers of suspension of sentences etc. This argument that the power of the executive to suspend the sentence under Article 161 and of the judiciary to suspend the sentence under Article 142 and Article 145 are in conflict ignores the nature of the two powers. No doubt the effect of both is the same but they do not operate in the same field: the two authorities do not act on the same principles and in exercising their powers they do not take the same matters into consideration. The executive exercises the power in derogation of the judicial power. The executive power to pardon including reprieve, suspend or respite a sentence is the exercise of a sovereign or governmental power which is inherent in the State power. It is to be exercised on the ground that public good will be as well or better promoted by suspension as by the execution but it is not judicial process. The exercise of this power lies in the absolute and uncontrolled discretion of the authority in whom it is vested.

If the argument as to want of the power of suspension during the period of pendency of an appeal is sustainable then the power to commute must equally be so affected because what is commutation when exercised by the executive is called reduction of sentence when ordered by the court. The two are neither different in nature nor in effect.

The reference which was made was made to Section 295 of the Government of India Act of 1935 whereby the prerogative of the King and of the Governor-General as his delegate was specifically saved. Reference was also made to section 209(3) of that Act which gave to the Federal Court the power of stay in any case; the argument being that the prerogative power of the King and his delegate the Governor-General would not be unlimited but for its being expressly saved by Section 295(2). When you look at it closely, the examination of these provisions and the application of Rules of interpretation do not support the soundness of this argument.

Hence in my opinion, the application rule of harmonious construction was not necessarily required to be posed in front of the Hon’ble Supreme Court, I believe owing to the huge scandalization of the case, this petition was a futile attempt to further drag this case in order to waste the hon’ble court’s time and space only for a publicity stunt so as to acquit the plaintiff of the charges. Although pardon is not exercisable when the matter is sub judice, it was exercised post trial of the Hon’ble HC of Bombay. The same SLP could have been recused after obtaining pardon, since there was no appeal in terms from the State of Bombay (Maharashtra), although it is well withing his right to file an appeal, but in the instant case, he was already pardoned and hence, not aggrieved. This entire fiasco makes it a bit
imperative and obvious that the case was filed to the Supreme Court to merely publicise the case.
THE AMBIT OF DEFAMATION UNDER ARTICLE 19 WITH RESPECT TO SHREYA SINGHAL V. U.O.I.

*TANYA SEHGAL

ABSTRACT

The fundamental rights have been entrusted upon every citizen of India by the virtue of the Constitution of the country. These rights provide individuals with certain freedoms which can be exercised by them. One of the most significant among it is the privilege to the right to speak freely under Article 19(1)(a), it empowers the people to communicate their assessment uninhibitedly with certain sensible limitations. Defamation, that is injury to the reputation of an individual is one such restriction provided under Article 19(2). The judgement of Shreya Singhal v. UOI struck down Section 66A of IT act,2000 as it was ultra vires of Article 19 and did not come under the umbrella of a reasonable restriction (defamation as a ground). The author in this research paper analyses the purview of defamation as a reasonable restriction under Article 19 in view of Shreya Singhal’s case.

INTRODUCTION

The Preamble to the constitution guarantees to us the freedom of thought and expression. The right to freedom in Article 19 guarantees the freedom of speech and expression which was acknowledged by the apex court in Maneka Gandhi v. UOI, where the court held that freedom of speech and expression has no geographical limitation and it moves with the right of a citizen to collect information and exchange thought with others. The zest of Article 19 says “everyone has a right to freedom of opinion and expression, this right includes the freedom to hold opinion without interference and to pursue, receive and promulgate information and ideas through any media”. The supreme court further in the case of Union of India v. Association of Democratic Reforms and Anr. held that freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions. In Sakal Papers v. UOI it has been observed that freedom of speech and expression is one of the most important principal under a democratic constitution. Similarly,

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1 (2013) 12 SCC 73
2 AIR1978 SC597
4 (2002) 3SC 294
5 (1962)3 SCC842
in Khushboo v. Kanniamal and Anr., the apex court observed that freedom of speech and expression even not absolute in nature is essential as we need to tolerate unpopular opinions and its free flow.

Article 19(1)(a) confers upon us the fundamental right of freedom of speech and expression but this right at the same time has been curtailed with the imposition of Article 19(2) that provides for reasonable restrictions to this freedom on grounds namely:

- Public order
- Decency and morality
- National security
- Defamation
- Sovereignty and integrity of India
- Friendly relations with foreign States
- In relation to contempt of court
- Incitement to an offence

The present Research Paper is based on emphasis of defamation as a reasonable restriction. For the better understanding of the readers only that part is covered in the research report.

**DEFAMATION: - A Reasonable Restriction**

Defamation law goes about as a balance to the established right of free discourse ensured under 19(1) (a). This article has provided a freedom which is not unfettered, as article 19(2) allows the state to enact laws that impose reasonable restriction on such freedoms. The leeway granted along with criminal provisions (S.499 and S.500 of IPC,1860) allow for

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6 (2010)5 SCC600
8 Defamation.—Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person. Explanation 1. —It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living and is intended to be hurtful to the feelings of his family or other near relatives. Explanation 2. —It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. Explanation 3. —An imputation in the form of an alternative or expressed ironically, may amount to defamation. Explanation 4.—No imputation is said to harm a person’s reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.
9 Punishment for defamation.—Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.
both civil and criminal defamation to be litigated in India. An offence of defamation is when a person “Makes or publishes” an imputation about another person, with intent, knowledge, or with reason to believe that it will harm the other’s reputation.” The apex court on 13th may, 2016 in the case of Subramanian Swami v. Union of India rejected the pleas from top politicians and public intellectuals including BJP Leader Subramanian Swami, Delhi Chief Minister Arvind Kejriwal facing criminal defamation cases that the British era provision (S. 499 IPC) was an outdated idea that undermined free speech. The court thus ruled that criminal defamation would continue to stay in India. It was construed that S.499 and S.500 of IPC,1860 are constitutionally valid. The court has held that the law relating to defamation protected the reputation of every individual in the perception of public at large. So, it has been ruled that criminal prosecution on account of defamation did not negate the right to free speech and expression.

In the case of Chintaman Rao v. the State of Madhya Pradesh, the court observed that the word reasonable implies intelligent care and deliberation, that is choice of a course which reason dictates legislation which arbitrarily invades the right cannot be said to contain the quality of reasonableness.

SHREYA SINGHAL v. UNION OF INDIA (2013) 12 SCC 73

HISTORICAL BACKGROUND

Transforming of pictures, criticism, stalking, spamming spontaneous messages, danger to cause damage to have entered in this society with the assistance of digital innovation. Because of this the government had inserted Section 66A to the IT act, 2000. The section reads as follows: -

“Any person who sends, by means of a computer resource or communication device: -

a. Any information that is grossly offensive or has menacing character; or

b. Any information which he knows to be false but for the purpose of annoyance, inconvenience, danger, insult, injury, enmity, hatred or ill will, persistently by making use of such computer resource or communication device; or

11 (2016) 7 SCC221
12 Dr. Suresh Chandra v. Panbit Goala AIR1958 Cal 176
13 AIR 1958 SC1340
14 Dheerendra Patanjali 2007, Freedom of Speech and Expression, Indian Law Journal, last visited 8th November 2019 at 5:00 P.M.
c. Any E-mail for purpose of causing annoyance or inconvenience or to deceive or to mislead addressee or recipient about the origin of such messages shall be punishable for an imprisonment which may extend to 3 years and with fine.'

This section was first time used to block a site in the case of defamation in the Delhi High Court case of **E2labs v. Zone – H. Org.** In this case remedy sought was shutting dawn of a website which allegedly hosted some defamatory content. As the defendant did not reply to the notices an interim order of shutting dawn was passed and the same was not challenged. This case created a notion that section 66 A can be used for defamatory matters posted online and is not restricted to constitutional rights under Art 19(1)(a).

Tabular representation of incidents whereby Sec 66 A was misused at the hand of few untrained cyber law authorities who interpreted it in a subjective manner and misread the section:

<table>
<thead>
<tr>
<th>ARRESTS</th>
<th>MATTER</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Aseem Trivedi,</td>
<td>Displaying cartoon on his website and fb page that mocked parliament and corruption in high places.</td>
</tr>
<tr>
<td>Arrested in Mumbai</td>
<td></td>
</tr>
<tr>
<td>Date: September, 2012</td>
<td></td>
</tr>
<tr>
<td>2 Businessman, Ravi Srinivasan</td>
<td>Posting offensive messages on twitter that karti Chidambaram, son of P. Chidambaram was corrupt.</td>
</tr>
<tr>
<td>Arrested in Puducherry</td>
<td></td>
</tr>
<tr>
<td>Date: October, 2012</td>
<td></td>
</tr>
<tr>
<td>3 Ambikesh and Subrata,</td>
<td>Forwarding and circulating a cartoon that lampooned West Bengal CM Mamta Banerjee.</td>
</tr>
<tr>
<td>Arrested in Jadavpur</td>
<td></td>
</tr>
<tr>
<td>Date: April, 2012</td>
<td></td>
</tr>
<tr>
<td>4 Kamal Bharti,</td>
<td>Posting a message on FB that criticized the UP govt. for Suspending IAS officer who had cracked dawn on the sand mafia.</td>
</tr>
<tr>
<td>Arrested in UP</td>
<td></td>
</tr>
<tr>
<td>Date: August ,2013</td>
<td></td>
</tr>
<tr>
<td>5 A teenage student of class 11 UP was sent to jail</td>
<td>Posted on FB objectionable comments attributed to UP Minister Azam Khan</td>
</tr>
<tr>
<td>Date: March ,2015</td>
<td></td>
</tr>
</tbody>
</table>

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15 The Information and Technology Act, 2005
16 'The Utilitarian critique of E2 labs V Zone H’ last visited at 11:50 P.M. 8th November,2020
17 The data has been taken up from the National Crime Records of India (last visited at 12:00 P.M. 9th November,2020.)
It was because of these incidents which were recurring in nature and an unfettered use of power by the police that the validity of Section 66 A was challenged in *Shreya Singhal v. Union of India*.

**FACTS OF THE CASE**

Mumbai police arrested two girls Shaheen Dhada and Rinu Srinivasan for communication their dismay at a Bandh brought in the wake of Shiv Sena boss Bal Thackery’s demise. The girls posted their remarks on Facebook. The arrested girls were discharged later, and it was decided to drop the criminal charges against them, yet the protests were pulled across the country. It was presumed that the police have abused its authority by involving Section 66A at the same time it was a breach of freedom of speech and expression.

In 2013, the Central Government came with an advice under which no person can be arrested without the police having prior approval of Inspector General of Police. The Supreme court called for the entire petition related to the constitutional validity of IT act or any other section under a single Public Interest Litigation in the present case.

**ISSUES RAISED**

A Constitution validity of Sec 66 A, 69 A and 79 was challenged in the instant case.

B Whether or not Section 66 A is curtailing freedom of speech and expression.

C Whether Section 66 A is saved under Article 19(2).

**ARGUMENT OF THE PETITIONER**

The petitioner argued that Section 66 A of the IT act, 2000 takes away the freedom of speech and expression and is not saved by article 19(2). The causing of annoyance, danger etc. falls outside the purview of Article 19 (2). They also argued that the law was unconstitutionally vague as it fails to specifically define its prohibition. In addition, they contended that the law has a chilling effect on the right of freedom of speech and expression as to cover any views on any subject.

**ARGUMENT OF THE RESPONDENT**

The government contended that legislature is in the best position to fulfill the needs of the people and the courts will only step in when a law is clearly violative of the fundamental right and there is a presumption in favor of constitutionality of law in question . It was further contended that mere presence of abuse may not be a ground to declare it unconstitutional.
Also, vagueness cannot be a ground to declare a statute unconstitutional if it is otherwise non-arbitrary.

**JUDGMENT**

1. Section 69 A and IT (procedure and safeguard for blocking for access of into by public) rules were held to be all constitutionally valid.
2. Section 79 was declared valid subject to reading down of Section 79 (3) (b).
3. Section 66 A was struck down in its entirety being violative of Article 19(1)(a) and not saved under the ambit of article 19(2) that is reasonable restrictions.

**POINTS DISCUSSED TO ARRIVE AT THE JUDGEMENT**

- The court first discussed three fundamental concepts in understanding freedom of speech: Discussion, advocacy and incitement. Mere discussion and advocacy is a part of Act 19(1)(a) As applied to the case in hand, the court found that Section 66 A is capable of limiting all forms of internet communication as no distinction is made between these three aspects.
- As to whether Section 66 A was a valid attempt to protect individuals from defamatory statement through online communication the court noted that the main ingredient of defamation is injury to reputation. It has been held that the law does not concern this objective because it also condemns offensive statement that may annoy without affecting reputation.
- As to the challenge of vagueness, the court found that section 66A leaves many terms open ended and undefined, making the statute void for vagueness. In *Kartar Singh v. State of Punjab*¹⁸, it was observed that it is one of the core principals of legal jurisprudence that the law must be void of vagueness.
- The court also addressed whether Section 66 A is capable of imposing a chilling effect on the right of freedom of expression. It held that because the provision fails to define terms clearly for the interpretation of the user it can impose a chilling effect on the fundamental right of freedom of speech and expression guaranteed by the constitution of India.
- Section 66A cannot possibly be said to frame an offence which comes within the expression decency and morality as the word obscene is missing in the provision and what is grossly offensive in not necessarily obscene.

¹⁸ 1994 SCC (3) 569
Based on the foregoing reason, the court invalidated section 66 A of IT act, 2008.

**POSITION AFTER THE JUDGEMENT**

In *Dream Developers Pvt. Ltd. v. State of West Bengal*[^19] the law as declared in *Shreya Singhal v UOI* in (2013)12 SCC 73, prosecution for dissemination of offensive material in electronic mode is no longer an offence. So, the prosecution to the effect that the petitioners had created email accounts and sent mails to injure the reputation was quashed and no prosecution under Section 66 A could be brought up. The injured party would now have to resort to other similar remedies provided by the existing laws in force.

**RELATION BETWEEN DEFAMATION AND SECTION 66A**

- The distinction between Section 66A of IT Act, 2000 and defamation is blurred. In order to understand the relation between the two provisions, it is important to jot down the basic features of both.
- Section 66A had criminalized any communication which was grossly offensive, or has menacing character, or any information which is known to be false, but is communicated for causing annoyance, hatred etc. On the other hand, defamation is in itself criminal and civil wrong.
- Section 66A does not come within the ambit of defamation and as such does not cause to be a part of reasonable restriction as both constitute separate offences.
- No relation as to elements of both can also be built up as the extent of punishment also differs. Defamation is a non-cognizable offence and offences under section 66A are cognizable offences.
- In respect of freedom of speech and expression:
  1. Defamation is a reasonable restriction under Article 19(2) as it curtails the freedom of speech and expression. However, section 66A of the IT act provided vague and arbitrary restriction on this fundamental right.
  2. There are various ingredients that need to be fulfilled for a statement to be defamatory such as presence of defamatory statement, publication and indicative to harm the reputation of the plaintiff. However, a message to be offensive under section 66A requirement was that it must be perceived as offensive by one person.

[^19]: Decided on 22 April 2016 (Calcutta High Court)
Now, this can be inferred as that a message can be offensive to one but not to the others, one’s opinion may sound offensive to one but not to the others. 

**Illustration:** A truthful statement will not be defamatory but may be offensive and if section 66A would have persisted it would have led to an arrest and prosecution thereby affecting the right to freedom of speech and expression. Thus, it can be clearly interpreted that section 66A is out of the ambit of defamation and hence it is not a reasonable restriction under Article 19(2).

- Also, an inference can be pointed out of the reasoned judgement quashing section 66A that it is dangerous to the freedom of free speech. The words ‘grossly offensive’, ‘annoyance’ and ‘inconvenience’ lend themselves to subjective actions which require an independent application of mind by police officers as well. However, this does not happen, and the police and lower judiciary proved incapable of such autonomy.

- In a nutshell, as Justice Rohington Natiman quotes “It's only when discussion or advocacy reaches the level of incitement that article 19(2) kicks in” and no such distinction was made under Section 66A. Thus, it was declared ultra vires of Article 19 of the constitution.

**CRITICAL ANALYSIS**

The decision taken by the Hon’ble Court in the judgement of Shreya Singhal v. UO I is correct and justified. Section 66A, the provision in question in the instant case was vague in its nature. By taking its shield the police officers were arresting innocent people. This provision was draconian as it gives people a weapon to misuse and deprive their (citizen) personal liberty. Thus, not only this provision is violative of Article 19 but also violates Article 21, the right to life and personal liberty. There is no doubt to the fact that people should be cautious to speak lame things about the integrity of the country and the same should be prohibited. Ruling parties and opposition members routinely say unflattering things about each other. This is when Article 19 comes into action as the basic idea behind freedom of speech and expression is to allow divergent critical views with reasonable restrictions (article 19(2)). There are alternative laws for instance the provisions of Indian Penal Code and other provisions of the IT act, 2000 especially after the amendment in the year 2008 (Section 66) provides enough safeguard against defamation, intentional insult leading to breaking the peace, incitement etc. Section 66A being struck down in whole won't be harmful to penalize the offenders as they can be penalized under alternative laws. Also, as these
provisions require subjective interpretation each and every police officer and law enforcement agents irrespective of their post should be provided rigorous cyber-tech training where they may be explained as to the application of information and Technology act provisions.

In a nutshell, the need of the hour is to make stringent provisions so that misuse of powers cannot be done either by the individuals or the officials working in the system.

**CONCLUSION**

The cyberspace is a huge platform where people get connected. They share ideas, opinions and exchange dialogues with one another. Every individual is provided with the fundamental freedom guaranteed by the Indian Constitution whereby they have a freedom of speech and expression. This freedom is further curtailed by the reasonable restrictions provided thereby. An unfettered use of such freedom is not permissible, as it can lead to injury to the reputation of the others. The legislature as such is both a facilitator and a watchdog, it provides the individuals with remedial measures to oppose such disgrace. These provisions should be carefully used as they lend themselves to subjective action. Section 66A, a draconian provision was grossly misused, and it affected innocent individuals as a result of which it was declared to be ultra vires of the Article 19 of the constitution and was struck down in its entirety.

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JUDICIAL INDEPENDENCE IN CONTEMPORARY TIMES

-Anshita Priyadarshini, Student

All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous judiciary.

-Andrew Jackson

Administration of proper justice is one of the exclusive functions of the modern welfare state and today’s judiciary occupies the place of pride among the organs of the government. It is the watchdog of the rights and liberties of the citizen. But the question of judicial independence has been a subject of debate for decades and rightfully so. The concept has been in the minds of legislators, jurists, politicians and the normal citizens of the nation. The concept has both supporters and opponents, each with distinct and powerful arguments. The question of the legitimacy of the concept acquires the limelight whenever the Supreme Court holds a particular Act or particular Clause of an Act passed by Parliament unconstitutional or whenever Government supersedes any person while making appointments of judges. The supporters of judicial independence point out that democracy would fail without an independent judiciary. Independent judiciary safeguards the rights of the people as enshrined in the Constitution and thereby ensure the rule of law in the country. The opponents of the theory however argue that under the Constitution of India, the parliament is supreme and sovereign and not the judiciary. It is the duty of the Parliament to provide the laws and for the judiciary to interpret them. The judiciary should not overpower the Parliament. The judiciary should not strike down any laws for the economic and social upliftment of the people and establishment of a socialistic pattern of society, passed by the parliament.

MEANING OF JUDICIAL INDEPENDENCE

After all the years of its existence, the meaning of the independence of the judiciary is still not clear. The constitution of India talks of the independence of the judiciary through its provisions, but it is nowhere defined what judicial independence actually means. The primary talk on the independence of the judiciary is based on the doctrine of separation of powers. The other meanings of the judicial independence are proclaimed by scholars who have researched on the topic. Scholars have researched “what constitutes the judiciary” to seek the proper meaning of the independence of the judiciary. Scholars define judiciary by explaining the independence of the judges which constitutes the independence of judiciary.
Therefore, for the independence of the judiciary is the independence of the exercise of the functions by the judges in an unbiased manner.

The scholar Shimon Shetreet in his work defines the words “Independence” and “Judiciary” separately. He says that the judiciary is “the organ of the government not forming a part of the executive or the legislative, which is not subject to personal, substantive and collective control, and which performs the primary function of adjudication”. It can be concluded from Shetreet’s writings that the independence of the individual judges and judiciary as an institution both have to go hand in hand as the independence of the judiciary as an institution is not possible without the independence of the individual judges and is the institution of the judiciary is not independent, there is no question of the independence of the individual judges. Judicial independence needs to be kept away from the other branches of government. Courts are not supposed to face improper influence from the other branches of government, or from private or partisan interests. Judicial Independence is an important product of the idea of separation of powers. Judicial Independence creates an environment where judges are free to make decisions or pass judgment without any pressure.

**JUDICIAL INDEPENDENCE IN INDIA**

In ancient India, the King was the head of justice with the responsibility to protect his subjects. He was respected as the Lord of Dharma. So far judicial system during the Hindu period concerned with the king and the pundit of his darbar deciding the disputes between the parties. During the Mughal period minor cases were decided by the Mullan and kazis and main cases were decided by the king. Mayor’s courts were established in Presidency towns during British period. The Superme Court was established in Calcutta in the year 1774. The High Courts were established in the year 1861. They were the highest Courts of appeal in their respective provinces. Before 1947, India was a “Police State” but after independence, the Constitution adopted Federal System and provided for the distribution of powers between the Centre and the States which was absent in the British era. It also gave the judiciary powers to maintain the balance between center and state, acting as an arbiter between them or as an interpreter of the constitutional provisions. Thus, the need for strong and independent judiciary was realized by the framers of the Constitution. During the colonial days, the judiciary was aimed to be the herald of the social revolution advocating equality and liberty that Indian had not gained because the regime was colonial and repressive. The British had also feared that social change would endanger their rule. During British period, Indian had
neither law nor Courts of their own. The Constituent Assembly members, therefore, tried to ensure the independence of the Courts with full power of judicial review. The Assembly devoted more hours of debate to this subject than to any other provision to ensure that the Courts must be independent. If the beacon of the Judiciary was to remain bright, the Court must be beyond coercion and political influences. The attitude of Sapru Committee has greatly influenced Assembly members. This Committee made its recommendation regarding the tenure, salary, allowances, retirement age, removal of judges, appointment and transfer etc., of the judges.

JUDICIAL INDEPENDENCE AND THE INDIAN CONSTITUTION

While the constitution of India was being created, its architects were concerned about the kind of judiciary our country should have. Dr. B.R. Ambedkar felt this unease and responded to the members of the constituent assembly in the following words:

“There can be no difference of opinion in the house that our judiciary must both be independent of the executive and must also be competent in itself.”

The framers of our constitution realized the importance of providing the separate entity to the judiciary and making it self-competent. The very basic reason behind this measure was to secure the stability and prosperity of the society. The framers at that time understood that such a society could be created only by securing the fundamental rights and the independence of the judiciary to defend those fundamental rights. The independence of the judiciary is of absolute importance in maintaining the pillars of the democratic system of a country like India and ensuring a free society. Judicial Independence as the basic structure of the Indian Constitution was cemented by the court in Kesavananda Bharti v. State of Kerela in 1973 and later affirmed in Minerva Mills v. Union of India in 1980. The independence of Indian Judiciary has been given significant attention by the Indian Constitution. Our constitution has provided several provisions to ensure the independence of the judiciary:

- The “Doctrine of Separation of Powers” was derived from Article 13 of the Constitution to check and limit the functioning of all the three organs of the state: Legislature, Executive and the Judiciary, in case of excessive functioning. It sets the

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1 CONSTITUENT ASSEMBLY DEBATES, vol. VIII,258 (May 24, 1949)
3 Minerva Mills v. Union of India, AIR 1980 SC 1789
judiciary to act as a watchdog and to check whether the executive and the legislature are functioning within their limits under the constitution and not interfering in each other’s functioning. If the Judiciary is not independent in itself then this task given to the judiciary to supervise the doctrine of separation of powers cannot be continued in true spirit. The ideals of the doctrine of separation of powers are supported by an independent judiciary. It is theoretically very easy to talk about the independence of the judiciary as for which the provisions are provided for in our constitution but these provisions introduced by the framers of our constitution can only initiate towards the independence of the judiciary.

- Article 50 states that the state shall take steps to separate the judiciary from the executive. This provision directly ensures the independence of judiciary and no interference from the executive.

- Article 211 and 121 lays down that there shall be no discussion in the legislature of the state with respect to the conduct of any judge of Supreme Court or of a High Court in the discharge of his duties. Both the Supreme Court and the High Court have the power to punish any person for their contempt of court.

- The judges of the Supreme Court and High Courts are provided with the security of the tenure. The salaries and allowances is also a factor in the favor for judicial independence as the salaries and allowances of the judges are fixed and are not subject to a vote of the legislature. Parliament can only add to the powers and jurisdiction of the Supreme Court but cannot remove them.

Thus, the framers of the constitution were aware that in future the ambiguity will arise with the provisions of the constitution so they ensured that the judiciary must be independent and self-competent to interpret the provision of the constitution in such a way to clear the ambiguity but such an interpretation must be unbiased i.e. free from any pressure from any organs like executive. Without an independent judiciary, the other organs may pressurize it to interpret the provision of the constitution in a way that benefited them. Judiciary has the power to interpret the constitution in respect to the constitutional philosophy and the constitutional norms which benefits the people. It is expected of the Judiciary to deliver judicial justice and not partial or committed justice.
JUDICIAL INDEPENDENCE: INTERNATIONAL OVERVIEW

Various countries support the concept of judicial independence and have different means of judicial selection. Some countries endorse judicial independence by providing life tenure, which allows the judges make rulings in accordance to the law in force and discretion, such decisions maybe politically unpopular or opposed by powerful interests but they will be supported by the law. This idea of judicial independence was introduced in 18th century England. This concept can be utilized by authorizing action in case the judiciary perceives that a branch of government is refusing to perform a constitutional duty, or by declaring laws passed by the legislature unconstitutional. The Constitutional economics studies provide proper distribution of national wealth including government spending said wealth on the judiciary which is opposed by the executive. This creates a sense of financial dependence of the judiciary on the executive and undermines the principle of judicial independence. The two methods of corruption of the judiciary are on the level of the state and private. In some countries, the constitution also prohibits the legislative branch from reducing salaries of sitting judges.

In Britain, the independence of judiciary depends on a mixture of statutory and common law rules, constitutional conventions and parliamentary practices, supported by professional traditions and public opinion and not on formal constitutional guarantees and prohibitions. In United States of America, the supremacy of judiciary grew independent with the Supreme Court assuming the power to perform constitutional obligation and protect the people and their rights from the State action if its ever needed to do so. It is the duty of every judge in United States to declare any unconstitutional enactment as void since the case of Marbury v. Madison.4 The doctrine of judicial supremacy was established because the court cannot decline the exercise this power. This has been defined by Willoughby as “the fundamental principle of American constitutional jurisprudence is that law’s and not men shall govern”

In USSR justice was administered by the Supreme Court of the USSR, the Supreme Court of the Union Republics, the Courts of the other regional divisions and special Courts. Judges are independent and subject only to the law. Laissez-Faire was the central and dominant political gospel of the nineteenth century was which was born out of the concept of individualism, individual enterprises and self help. But this lead to the stronger exploiting the weaker and putting the common citizen into slums, unhealthy, dangerous conditions of work and wide

4 Marbury v. Madison, 5 U.S. 137 (1803)
spread poverty. This led the State to help improve the conditions of the poor and that gave rise to the political dogma of collectivism, resulting in the concept of social welfare State. Afterwards, the democratic type of Government resulted in having three pillars of the State i.e., the Executive, the Legislature and the Judiciary to run its administration.

**SIGNIFICANCE OF JUDICIAL INDEPENDENCE**

The people of a country must never lose their faith and confidence in the judiciary even though the people of a nation may lose confidence in the Executive or the Legislature. The judiciary defends human rights and civil liberties and contributes in the safekeeping of peace and order by settling disputes between the State and Citizens and among citizens leading to a harmonious and integrated social existence of a country. The measure of its contribution depends upon the people who have to present their problems and to honor its decisions. Accountability to people is an important feature in democratic polity and it is the judiciary that helps to keep the executive and legislature accountable by way of judicial review and judicial activism.

The principle in the Rule of Law professes that the Executive must act under the law and not by its own decree or will. Rule of Law is a basic requirement for a democratic government, and for the maintenance of Rule of Law, the judiciary must be independent and impartial. According to A.V. Dicey in, 1885 The “Rule of law” means, “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence or arbitrariness, of prerogative, or even wide discretionary authority on the part of the Government”. This principle of Rule of Law has been accepted by Article 14 of the Indian Constitution, it lays down that “Every man is equal before the law, no one is above”. In the case of Som Raj v. State of Haryana⁵, it was held that absence of arbitrary power is absolute motive of the principle of rule of law upon which directly the whole Constitution is dependent.

The judiciary is the final interpreter of the Constitution and is the ultimate authority in a Federal Constitution. Thus, it needs to be an impartial arbiter. It has the power to restrain any exercise of absolute, capricious and arbitrary power which hasn’t been sanctioned by the Constitution. Judicial vigilance secures the human rights and counter balances the actions of the legislative and executive. Democracy has no better alternative than the Courts as the

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⁵ Som Raj v. State of Haryana ,1990 AIR 1176
sentinel and the guardian of liberty and freedom in the society. The essence of a Federal Constitution is the division of powers between the Centre and the State Governments. The judiciary, apart from maintaining the constitutional supremacy of the Constitution also safeguards the civil and minority rights and protects the social revolution. Mere enumeration of fundamental rights in the Constitution without any safeguards is useless. The famous maxim “Ubi Jus Ibi Rememdium” means unless, there is remedy, there is no right, and for this purpose, an independent and impartial judiciary helps determining the limits of power of the Centre and States. Thus, the fundamental requirement for the independence of the judiciary rests upon the fact that judiciary acts as a watchdog and makes sure that all the organs of the state function within their areas and follows the provisions of the constitution.

IS JUDICIARY REALLY INDEPENDENT?

It is debated whether things have changed after about 73 years of independence of India or are they still the same. Majority of the judicial community agrees that only the methods have changed. It can be argued that the Judges of higher judiciary are thinking more about their future than their present. There is a brewing competition among the judges to please the government without paying attention to the common man. It can be assumed that the judicial independence has endured some corrosion due to the government’s practice of employing judges after retirement from judicial services. The skills of retired judges may be used for discharging judicial functions and improvement of judicial system in public good. But if the Supreme Court judge has to look forward to government employment after retirement, it is undesirable. A normal citizen or a litigant can easily smell the bias towards the government side, if it is ever a party if a judge wishes to have Government job or any government appointment after his retirement. The Law Commission believes that this practice affects the independence of the judges and should be checked. The members of the judicial services must check their actions which might evolve any control of the executive over them. Their actions should not be of such executive capacity which makes them legal advisors to the executive on the issues which they will deal with, once they go back to their judicial work. There have been instances where, with the consent of the High Court, judicial officers are appointed to post like those of Legal Remembrances etc., under the Executive. These appointments affect the judicial functioning in the country.

Recently, former Chief Justice of India, Justice Ranjan Gogoi was nominated as a member of Rajya Sabha after around 4 months of his retirement by President Ram Nath Kovind. This
nomination has been seen as a payback since Justice Gogoi headed in the cases like the Rafale matter, Ayodhya matter, Kashmir habeas corpus petitions and other key cases in which the BJP led government had important political stakes in. But this is not the 1st time a CJI has become a member of Rajya Sabha owing to post-retirement benefits, there are other such instances of political favourism. The first time Supreme Court judge was nominated to Rajya Sabha was Justice Baharul Islam as he was associated with the Patna Urban Cooperative Bank Scam involving the then Congress Chief Minister of Bihar, Jaganath Mishra. In yet another instance, former CJI Justice Ranganath Mishra was appointed as the chairman of the NHRC after his retirement and became a member of Rajya Sabha in 1998 as a congress member was widely seen as a reward for the relief he provided as the head of the Justice Ranganath Mishra Commission, covering up the guilt of senior congress leaders in 1984 massacre of the Sikhs. All these instances seems like a recompense in quid pro quo.

The Supreme Court in Orissa v. Sudhansu Sekhar Mishra 6 observed: Except for very good reasons, we think the High Court should always be willing to spare for an agreed period the services of any of officers under its control for filling up such executive posts as may require the services of the judicial officer. The Government in its turn should appreciate the anxiety of the High Court that such judicial officers should not be allowed to acquire vested interest in the Secretariat. Judicial independence is dangerously affected by the transfer of judges of higher judiciary. The Constitution provides for the transfer of a judge from one High Court to another High Court without any safeguard against the abuse of this power by the Government. A list of 56 judges was prepared to be transferred without their consent, during the emergency period, but in the situation 16 judges were transferred and the names of the other State judges on the list were looked on purpose for rattling the judges of the High Courts. One s Mr. Justice S.H. Seth, of Gujarat High Court was one of the transferred judges who filed a writ petition against the Union of India and the Chief Justice of India (Justice A.N. Ray). This case is popularly known as Sankal Chand’s case 7. In this case, the Supreme Court by majority declared that prior consent was not necessary to transfer a judge. However, Bhagwati and Untawalia, JJ stated that transfer without consent of the Judge obstructs judicial independence. In the Judges case on March 18, 1982, the law minister issued a circular seeking the consent of additional judges for appointment as permanent judges in other High Courts, and transfer of certain High Court judges whose

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6 The State Of Orissa vs Sudhansu Sekhar Misra And Ors 1968 AIR 647, 1968 SCR (2) 154
7 Union Of India vs Sankal Chand Himatlal Sheth And Anr. 1977 AIR 2328, 1978 SCR (1) 423
constitutional validity was questioned on the plea that the circular was an indirectly affecting transfers and hampered judicial independence. Subsequently, the Supreme Court by majority upheld the validity of the circular as well as the transfers. The Supreme Court also discussed the word ‘consultation’ of legal experts by the executive while appointing judges. The Court held that the ‘consultation’ does not mean ‘concurrence’ and the executive is not bound by it. The Government has the power to overlook and completely ignore the advice of legal experts. This ruling of the Court itself is detrimental towards the independence of Judiciary. This proves the following observation of Justice Holm true: “Judges commonly are elderly men, and more likely to hate at sight any analysis to which they are accustomed, and which disturbed repose of mind, than to fall in love with novelties”. That is why it is alleged there is a nexus of judges and politician in India and both are following the policy of give and take. Judges take actions against the politicians/Government only where their own interest is affected as in the case of Judges Appointment commission case. In the wording of Justice Krishna Iyer “Our judicial system is 18th century old and it puts the horse before the cart” The above remarks shows how the judiciary is independent. The judiciary has bellied the hopes and trusts of the constitution makers and is now losing the faith of the people as people are only getting the next date instead of justice. Judgment of the Courts proves the following wording of Goldsmith true: “Laws grind the poor, and Rich men rule the Law” and “The law locks up both men and women. Who steals the goose from off the common but lets the greater felon loose who steals the common from the goose”.

CONCLUSION

The independence of the judiciary holds an important position when it comes to the institution of judiciary. Historically judicial independence has faced several hindrances especially in relation to the appointment and the transfer of judges. Judicial independence is as sine qua none for the proper functioning of the Constitution and for an understanding of a democratic society based on the rule of law. The concept of Judicial Independence rightfully raised concern about the dangers of the judicial independence and thus the focus shifts towards “Judicial Accountability”. The development in this regard is the recent recommendation of the Law Commission for the inclusion of a whistleblower provision, for protecting those making complaints against judges, in a draft bill dealing with the removal of judges of the Supreme Court and High Courts. The importance of the independence of the judiciary was realized by the framers of the constitution a long time ago, and they made provisions to secure it, which has been accepted by the courts by marking it as the basic feature of the constitution. Therefore, the independence of the judiciary can be achieved practically when all the other state organs function in cooperation, hence the priority is creating a favorable environment for the functioning of the judiciary. To make sure that there is effortless functioning of the system there must be a right blend of independence of judiciary and the restrictions that are needed to be imposed on the judiciary. Judicial independence needs to be defended against the changing economic, political and social scenario and has to be seen as change with the changing dimension of the society. Thus, Judicial Accountability and Judicial Independence have to work hand in hand to ensure the real purpose of setting up of the institution of judiciary: to serve justice.
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SAFEGUARDING THE BREACH OF DUTY BY DIRECTORS: THE BUSINESS JUDGEMENT RULE

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ABSTRACT

The “Business Judgment Rule” is a judicially engendered doctrine that bulwarks directors from personal civil liability for the decisions they make on behalf of a corporation. The business judgment rule therefore becomes a protective measure for directors against liability imputations.

In today’s era of corporate scandals, ecumenical financial meltdowns, and directorial malfeasance, it has become especially paramount in setting the bar, for: directors are congruously responsible to shareholders for their actions. It protects honest directors from liability where a decision turns out to have been an unsound one, and at the same time prevents the stifling of innovation and venturesome business activity. The rule is a ‘standard of non-review of the merits of a business decision corporate officials have made’.

This article provides an analysis of the director’s duty to act with care, skill and diligence and the overall purview of this rule in India. It further seeks to advance the opinion that in determining conformity with the business judgment rule, conformity with both legislative as well as good governance criteria is essential, as it would play a crucial part in the balancing act between dictatorial autonomy and accountability in the present economic climate.

Keywords: Director, Duties, Liability, Business Judgment Rule.
INTRODUCTION

Referred to as the Immunity Doctrine, the Business Judgment Rule is a judicially created doctrine that protects directors from personal liability for decisions made in their capacity as a director, so long as certain disqualifying behaviors are not established.¹ The business judgment rule ensures that decisions made by directors in good faith are protected even though, in retrospect, the decisions prove to be unsound or erroneous.² The business judgment rule is not a rule of conduct, but rather, a principle of judicial review under which the decisions of corporate directors are afforded great deference when those decisions are challenged as violating the standard of care.

In order to maximize shareholder wealth and grow a corporate enterprise, directors must often make business decisions that entail an assumption of risk; very seldom does return exist without risk, and there is generally presumed to be a positive correlation between the two.³

The majority of courts have concluded that the business judgment rule protects the determination of a management not to sue, with the result being that if appropriate procedures are followed, a stockholder's derivative action pursuing a claim of the corporation will be dismissed.⁴ This conclusion follows from the principle that the directors of the corporation are statutorily charged with managing its affairs, and if the directors determine that prosecution of a claim against another is not within the corporate interest, that decision is accorded the protection of the business judgment rule, which operates to abort the shareowner derivative action.

To impose liability on directors for making a ‘wrong’ business decision would cripple their ability to earn returns for investors by taking business risks.⁵ Accordingly, the business judgment rule evolved to give some comfort to directors that they were not being looked to as guarantors for all corporate actions being taken whilst at the helm.⁶ Courts view this rule as a

² Business Judgment Rule, LEGAL INFORMATION INSTITUTE, Available at- http://www.law.cornell.edu/wex/business_judgment_rule
⁵In re Citigroup Inc. Shareholder Derivative Litigation, 964 A.2d 106, 126 (Del. Ch. 2009).
standard of liability as it forms the real test to determine if a director’s conduct gave rise to any personal liability in the course of the employment. The business judgment rule focuses on the mechanisms and procedures used by the board of directors in arriving at its decision, rather than the "after the fact examined" wisdom of that decision. The directors, consequently, are not liable for, and decisions will not be set aside due to, a mere error in judgment. The whole concept of this rule arises when the director is in breach of his fiduciary duty or the duty of care that is expected from him towards the corporation. In order for the business judgment rule to apply all that need be shown is that the “directors employed a rational process and considered all material information available.”

**VIEW OF COURTS ON THIS RULE**

In the case of *Cede v. Technicolor Inc.* 9, the Delaware Supreme Court looked into the applicability of the business judgment rule in the United States. Under this rule, for a business judgment to be protected, it must satisfy two conditions-

1. The duty of loyalty
2. The duty of reasonable care

Satisfying these conditions would create a presumption that the directors acted on “an informed basis, in good faith and honest belief that the action was for the best interest of the company”.

Thus, in the US, if the directors are personally interested in a transaction, they are under no obligation to refrain from participating in the meetings. As long as they disclose their interest truthfully and the transaction is approved by the disinterested directors, the duty of loyalty is not breached and the decision of the board is protected by the business judgment rule. Additionally, even if the rule is rebutted, the directors are not *per se* liable if they can prove that the transaction was conducted in ‘entire fairness’, in terms of fair dealing and fair price.10

In 1985, the Delaware Supreme Court issued a landmark decision in *Unocal Corp. v. Mesa Petroleum Co.*11, which held that in cases involving defensive actions by a target board of

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7 The efficacy of relying upon a review of process has been often criticized. See, e.g., Leo Herzel & Leo Katz, Smith v. Van Gorkom: The Business of Judging Business Judgment, 41 BUS. LAW 1187, 1190 (1986).
9 634 A. 2d 345 (Del. 1993).
10 626 A. 2d 1366, 1993 Del. LEXIS 270.
11 493 a.2d 946 (del. 1985).
directors, the burden of proof shifts to the defendant to show both (1) that the directors reasonably perceived a threat to the corporation, and (2) that the directors’ defensive responses were proportional to that threat.

The 2007-2009 Citigroup\textsuperscript{12} shareholder derivative litigation reflects a very recent application of the business judgment rule, applied directly to the current financial crisis. The Citigroup court summarized the shareholders' claims as attempting to hold the directors personally liable for making, or allowing to be made, business decisions that, in hindsight, turned out poorly for the company. This type of decision making, according to the court, falls within the business judgment rule: —a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. The burden is on the shareholders who are challenging the directors’ decision to rebut this presumption. In dismissing the plaintiffs’ complaint, the court stated that absent an allegation of self-interestedness or disloyalty to the corporation, the business judgment rule prevents a judge or jury from second guessing director decisions if they were the product of a rational process and the directors availed themselves of all material and reasonably available information. The Citigroup court repeated the rationale of the business judgment rule and stated that, discretion granted directors and managers allows them to maximize shareholder value in the long term by taking risks without the debilitating fear that they will be held personally liable if the company experiences losses.

Further, in \textit{In re Dow Chemical Company Derivative Litigation} \textsuperscript{13}, the Delaware Chancery Court emphasized that it is not the substance of a board decision, but only the decision making method, that can be reviewed by a court under the business judgment rule. In 2009, the Delaware Supreme Court examined in detail the good faith requirement under the business judgment rule in the case of \textit{Lyondell Chemical Company v. Ryan} \textsuperscript{14}. Lyondell presents one of the complicating factors associated with the business judgment rule that is the Delaware’s General Corporation Law permits corporations to include in their charter an exculpatory provision protecting directors from personal liability for breaches of the duty of care. To defeat such an exculpatory clause, plaintiffs, like those in Lyondell, must allege that the directors breached their duty of loyalty, which cannot be exculpated. To establish a breach of loyalty, plaintiffs must prove the directors failed to act in good faith. Directors'
failure to act in good faith is most typically shown by: (1) intentional acts with a purpose other than that of advancing the best interests of the corporation; (2) intentional violations of applicable law; or (3) intentionally failing to act in the face of a known duty to act, demonstrating a conscious disregard for their duties.

Where the business judgment rule applies, a director will not be held liable for a decision, "even one that is unreasonable" and results in a loss to the corporation, so long as the director was not grossly negligent in reaching the decision. The plaintiff is required to show gross negligence in order to surpass the presupposition of the business judgment rule. Liability may be avoided in the absence of causation or damages, or where the directors can establish the fairness of the challenged transaction. The decision, in such instances, will be respected, and the directors will not be exposed to personal liability.

THE INDIAN SCENARIO

Coming to the Indian scenario, the scope of Business Judgment rule is still in the budding stage and has to go a long way before being codified under the prevailing statute. The Courts time and again have been always relying on the various duties of the directors which include the duty of care (skill and diligence) and duty of loyalty. The major drawback of the Indian Courts, is that have not interpreted and applied this rule explicitly under the statute and most of the time depend on the foreign precedents available. Thus, the Business Judgment Rule has not been made mandatory and the primary basis that the Courts adopt to understand this is to rely on the various duties that are embodied in the statute.

What the Statute contains-

The introduction of the Companies Act 2013 is indeed a positive step towards the development of company law jurisprudence in India for the purpose of codifying the duties of the directors. The legislature, through this, has tried to make a conscious effort to bring the law in India in line with internationally accepted practices.

Under section 299 of the Companies Act, 1956, there was no requirement of interested directors not participating in the meeting, similar to the US law. However, cases like *Globe Motors Ltd v. Mehta Teja Singh*\(^\text{15}\) showed that when a substantial portion of the board becomes interested in some or the other transaction, even when the interested directors

\(^{15}\) 24 (1983) DLT 214
disclose their interest and do not participate in the decision-making, their presence is enough to incentivize the entire board to indulge in *back scratching*, thereby prioritizing their self-interest over the company’s. Such misappropriation of the company’s assets and breach of fiduciary duty necessitated a higher threshold for ensuring independence of the board. So, if the *Technicolor Case* was to be decided according to the amended Indian law, participation of interested director in the decision-making would itself violate section 184 and render the transaction voidable.¹⁶

These newly introduced provisions by CA-2013 regarding the duties and responsibilities of the directors, including the independent directors, not only provide greater certainty to the directors regarding their conducts and responsibilities, and thus, ensuring better and impeccable corporate management and governance; but also enable and empower the beneficiaries, regulators, and the courts, to judge, regulate, and control the activities and obligations of the directors more objectively and effectively. Ours this well-drafted web-article offers very useful and fertile information exclusively about these new provisions of the Indian Companies Act of 2013, connected with the roles, duties, and responsibilities of the directors and independent directors of public limited companies.¹⁷

The duties and responsibilities of the directors as enshrined in the Indian Companies Act 2013, can be classified into the following two categories: ---

[i] The duty of care, skill and diligence, which requires the director and encourages them to invest their efforts and time to the company affairs and in providing resolutions of various business-related issues which are raised through “red flags”, and in taking decisions which do not put the company under unnecessary risks.

[ii] Fiduciary duties which ensure and secure that the directors of companies always keep the interests of the company and its stakeholders, ahead and above their own personal interests.

The following duties and liabilities have been imposed on the directors of companies, by the Indian Companies Act of 2013, under its Section 166: ---

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¹⁶ Ishani Mookherjee, *Shareholding Patterns and Director’s Duty of Loyalty: Comparative Analysis of India and the US*, July 28, 2019

• Section 166(1): A director of a company shall act in accordance with the Articles of Association (AOA) of the company.

• Section 166(2): A director of the company shall act in good faith, in order to promote the objects of the company, for the benefits of the company as a whole, and in the best interests of the stakeholders of the company.

• Section 166(3): A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

• Section 166(4): A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

• Section 166(5): A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

• Section 166(6): A director of a company shall not assign his office and any assignment so made shall be void.

• Section 166(7): If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one Lakh Rupees but which may extend to five lakh Rupees.\(^{18}\)

Under section 184, a director interested in a transaction, whether directly or indirectly, is under a duty to disclose his interest at the first board meeting in which he participates as a director, the first board meeting in every financial year and the first board meeting held after a change in interest, even if it is subsequent to the transaction. Moreover, to ensure that the collective decision of the board remains neutral and beneficial for the company, it is imperative for the interested director to not participate in the meeting. Along with penalizing

\(^{18}\) Duties of Directors under the New Indian Companies Act, 2013 Available at https://www.hg.org/article.asp?id=33097.
the directors for non-compliance, violation of such provisions renders the transaction voidable by the company.\(^{19}\)

SEBI in his order in the matter of *Pyramid Saimira Theatre ltd. v. SEBI*\(^{20}\) stated that “Duty of care for an independent director calls for exercise of independent judgment with reasonable care, diligence and skill which should be reasonably exercised by a prudent person with the knowledge, skill and experience which may reasonably be expected of a director in his position and any additional knowledge, skill and experience which he has”.

Duty of loyalty requires a director to demonstrate that actions taken were in ‘good faith’ and in best interests of the company. Courts must be convinced that decisions taken by the director were not with a wrong intent or purpose, and hence not in ‘bad faith’. The test of purpose behind a decision is used as a measure. In re *Walt Disney Co. Derivative Litigation*\(^{21}\) the court stated that “To act in good faith, a director must act at all times with honesty of purpose and in the best interests and welfare of the corporation.”

**CONCLUSION**

Thus, with an effort to conclude, the business judgment rule in practice operates both as a restraint on judicial behaviour and a standard of managerial conduct. The rule is properly invoked only when an independent and informed board of directors has made a decision in good faith. Once invoked, the rule imposes a substantial burden of proof on the plaintiff. The primary justification for the rule include that the judges are not business experts and would not be the right ones to decide and differentiate between a well informed decision and an erroneous one. Secondly, this rule encourages the directors to take risks in business with the belief that the rule provides necessary reassurance for the directors. Thirdly, the rule is premised on the existence of an alternative economic remedy for an aggrieved share-holder.

The risk of the director being left accountable to none due to differences in interests is a cause of concern. Moreover, there is also the problem of provisions not being enforced due to lack of enforcement mechanism. Also, it is essential that the Courts now give a clear picture of the situations where the business judgment rule protects the directors and incorporate it statutorily in India. Harmony must be sought to see that the negligent directors are not always shielded under the umbrella of this rule and thus fulfill their duties with due care and diligence that they owe.

\(^{19}\) See supra 16.


\(^{21}\) See supra 20.
towards the company. Thus the courts in India now have been left with the unenviable task of striking such a balance as to finding a middle path in reconciling the two extremes.
GOVERNMENT LIABILITY AND JUSTIFICATION FOR DISCRETION

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INTRODUCTION

The three pillars of democracy perform the most sacred obligations within the contours of a State. Separately but with mutual restraints the Legislature, the Executive and the Judiciary work hand in hand to maintain order in the State and to impart justice. As envisaged by Montesquieu in his famous work, ‘Espirit D’lois’ it is evincible that the aforementioned three organs of the State are to perform their functions within their given area of operation. One shall not interfere into the functions of another. However, it would be pertinent to note that this line of separation drawn between the three organs is neither an impassible barrier nor an area devoid of any right of interference.

Though known to all, it is necessary to unravel a brief note on the functions of the three organs of State. The Legislature creates the law, the Executive executes the law and the Judiciary facilitates the checks and balances i.e. it adjudicates. As far as the topic in hand is concerned, we shall revolve around the Executive. The edifice of the administrative law rests with the executive.

This paper shall make a glimpse into the multifaceted dimensions of administrative law. A scrutiny on the nature and extend of administration encompassed of the liability of the State pertaining to administrative matters and also the justification for conferring discretionary power on the administrative authorities shall occupy the major league of the submission. The elements of history, discretion, constitutional provisions conferring discretionary power on the President, Governor and Prime Minister, liability of State, public authorities, fixation of liabilities, etc. take their seats as pointers of the main theme of submission.

DISCRETION

Exploring the contours of the term discretion, it would be pertinent to note that the ambit of the term is wide.¹ Thereby it is immense difficult to shrink the term

¹Eleanor M. Fox, Rule of Law, Standards of Law, Discretion and Transparency, 67 SMU L. Rev. 795 (2014)
‘discretion’ into a hard and fast definition. In the general sense, discretion means the right to choose between two or more available alternatives.  

DEFINITIONS

Thus, from a meticulous analysis of the above definitions, we can infer a few mandatory and inevitable elements that are embedded in the term ‘discretion.’ At the outset, it is a power to choose. The authority has a right to decide in favour or against a given situation. However, this power is not an unfettered power that authority can exercise according to their whims and fancies. The will in the present situation does not give a connotation on the personal will of the authority. It implicates the power of choice or will exercised by the authority by virtue of his or her official capacity. Further, it is also necessary that the invoking of such discretionary power should be in accordance with the principles of natural justice. Thus, to sum up, discretion is a power conferred on an authority to choose at will, in his or her official capacity by paying heed to the demands of natural justice.

Paraphrasing the words of Lord Coke, discretion is a science to understand the difference between truth - untruth, right – wrong and reasonable & unreasonable. They must not do their work under the influence of personal interest and to fulfill own will.

According to Justice Frankfurter, discretion without a criterion of its exercise is authorization of arbitrariness. It means discretion is choosing one option from amongst alternatives. These alternatives must be based on reasons and justice not according to personal will. This exercise must not be capricious or blurred. It must be legal and regular. This view of Justice Frankfurter on discretion is evincible in Brown v. Allen.

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3 Rajesh Kumar Administrative Discretion & Inclusive Growth in Indian Perspective: Achievements & Challenges, SRJIS, VOL. 3/13 (DEC-JAN 2016)
6 PAUL CRAIG, ADMINISTRATIVE LAW (6th ed.2008)
7 Rajesh Kumar Administrative Discretion & Inclusive Growth in Indian Perspective: Achievements & Challenges, SRJIS, VOL. 3/13 (DEC-JAN 2016)
8 344 US 443 at 446 (1952)
NATURE OF DISCRETIONARY POWER

As far as the discretionary power conferred on the administrative authority is concerned, it is a well settled and widely accepted rule that the Courts have no power to interfere with the actions taken by the administrative authorities in exercise of their discretionary power.9 The words of Lord Halsbury in the renowned case of Westminster Corpn. v. London and North Western Rly Co.10 is germane to the present context. The words are paraphrased, ‘Where the Legislature has confided power to a particular body, with a discretion how it is to be used, it is beyond the power of any court to contest that discretion.’

The decision rendered by the U.S. Supreme Court in Small v. Moss11 is also prominent as the court described administrative discretion as that field into which the Courts may not enter. The importance of administrative discretion is also evincible in the leading case of Roberts v. Hopwood12 wherein the Court envisaged that discretion is a matter in which the Courts are indisposed to question. In spite of the fact that it is the Judiciary with whom the ultimate power of deciding on the correctness and validity of an action lies, Courts choose to refrain themselves in encroaching into the actions of the public authorities in exercise of the discretionary power bestowed on them.13

HISTORY

Justice Benjamin N. Cardozo in ‘The Nature of Judicial Process’ has elucidated the importance of knowing history as ‘history illuminates the past, the present and thereby throws light in the way of future.’14

The importance of knowing History is not confined to the judicial process. In any facet of law it is a pragmatic need to know the History to attain more clarity to the points of analysis. So let us give a quick run through the history of Administrative discretion.

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10 (1905) AC 426 (427)
11 (1938) 279 NY 288
12 1925 AC 578 (606-07)
14 BENJAMIN N. CARDOZO THE NATURE OF JUDICIAL PROCESS (1921)
Administrative discretion is also known as, public interest, public purpose, fair, fit, prejudicial to public safety and security, satisfaction, belief, efficient, expedient, proper, sufficient, and their opposites.\(^{15}\) Administrative discretion is a big problem from the beginning time.\(^{16}\) It has proved that any welfare government cannot do their work without discretionary powers of administrative authorities. However, it is not compulsory only to improve the powers of administrative discretion. But it is compulsory because no one know about future so any certain law may not enact for the future.\(^{17}\) On the other hand it is also true that an absolute discretion may become a cruel owner.\(^{18}\)

**INDIAN POSITION**

The principle of non-interference by the Court in discretionary matters under Administrative law is equally accepted in India as well. Commencing from the historic decision in *A.K. Gopalan v. State of Madras* \(^{19}\) to a long line of cases,\(^{20}\) it is clearly evident that the Supreme Court has time and again held that the Courts shall have no power to interfere with the orders passed by the administrative authorities in exercise of discretionary powers.

**THE COMPONENTS OF DISCRETION**

A meticulous analysis of the abovementioned definitions of administrative discretion unravels the components of discretion. Of the said elements the first one is ‘Choose’. It means that the person exercising discretion can pick.\(^{21}\) The next component is ‘Alternatives’.\(^{22}\) In order to exercise discretion, there should be mandatorily, two or more alternatives. It is from these available alternatives the person or the authority exercises discretion chooses.

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\(^{15}\) C. K. TAKWANI, LECTURES ON ADMINISTRATIVE LAW (4th ed,2010)


\(^{17}\) Id


\(^{19}\) AIR 1950 SC 27


\(^{21}\) C. K. THAKKER, ADMINISTRATIVE LAW (2nd ed,2012)

\(^{22}\) Id
This is followed by the elements of ‘Application of mind’\(^{23}\) and ‘Discard personal whims or fancies’.\(^{24}\) These two components are always read together. This is because, it is necessary that the exercise of discretion mandates a rational thinking. Each cases are to be analysed individually before exercise of discretion and no generalized principles shall serve this purpose. A generalized principle can cause gross injustice and arbitrariness. This application of mind should also discard any whims and fancies so that there shall be no entry of absurdity, unreasonableness, unfairness, injustice or arbitrariness into the picture.

The final and the crucial element in discretion is ‘Official capacity’\(^{25}\). All the above elements are valid and legitimate parts or components of discretion only if the exercise of discretion is by invoking the official capacity of the person or body of persons. Thus administrative discretion is exercised by a person or a body of persons only under their official capacity.

**CRITICISM BY PROF. DICEY**

Criticism is indeed an important element in the way of growth in any field. As stated by the Donoughmore Committee in their report, criticism facilitates an effective guide for a successful investigation. Let us see a criticism to discretion by Prof. A. V. Dicey.\(^{26}\)

According to Dicey, discretion is the source of inequality, discrimination and arbitrary action. It is a clear cut violation of rule of law.\(^{27}\) With the effect of socio-economic typical problems which rise suddenly, it is faced by administration. Lord Hewart, a disciple of Dicey has also elucidated in his work ‘New Despotism’ that discretion threatens Rule of Law and it has the power to transmogrify the servant into Master.\(^{28}\)

\(^{23}\) *id*
\(^{25}\) *id*
\(^{27}\) Eleanor M. Fox, *Rule of Law, Standards of Law, Discretion and Transparency*, 67 SMU L. Rev. 795 (2014)
JUSTIFICATION FOR DISCRETION

After completing a thorough study on the topic of discretion, the author feels that discretion is mandatory on one hand and inevitable on the other hand. The reasons or the factors that justify the conferring of the power of discretion are jotted down as follows.

- Administration faces multifaceted problems which cannot be solved by a single rule.
- A general rule can hardly be applied as most of the problems are new and rise first time. The rule lacks experience.
- Problems are unexpected and unpredictable.
- Every problem is based on a different circumstance. If we will apply a rule to all it can be cause of injustice.
- Smooth functioning of the Organs
- Requires application of mind
- Mechanical proceedings not enough for an ideal administration

PRESIDENT, GOVERNOR & DISCRETION

At the outset, the Constitution itself has certain provisions embedded in it that envisage discretion. According to article 75(1), prime minister of India is appointed by the President. Under article 75(2), all other minister are appointed by President on the advice of Prime Minister. Article 77(1), elucidates that all the executive actions are taken in his name. He allocates business among ministers as per Article 77(3).

The President can also seek any information regarding laws to be introduced in parliament. He can award verdict to an offended person or can decree verdict of court, especially in the case of death penalties. He assigns governors to states & Lieutenant governors to UT, chairman of UPSC, chief justice of Supreme Court and high courts, attorney general, CAG chief, EC chief, ambassadors to other countries. He is chief of all armed forces. He address both houses of parliament (joint sitting) every year(before budget session) and after first time government formation(when

29 C. K. THAKKER, ADMINISTRATIVE LAW (2nd ed.2012)
30 M. P. JAIN, INDIAN CONSTITUTIONAL LAW (7th ed.2016)
32 C. K. TAKWANI, LECTURES ON ADMINISTRATIVE LAW (4th ed.2010)
new government formed). Moreover, declaration of Emergency is also a power exercised by the President, subject to his satisfaction.\textsuperscript{33}

There are also certain legislative powers vested with the President. Any bill passed by parliament becomes law, only when president accepts it. He has the power to dissolve the Lok sabha.\textsuperscript{34} The President can also pass Ordinance, when parliament is not in session and feels that it is of national importance. Further, the President can postpone or summon parliament meetings.\textsuperscript{35}

\textbf{B.K. Pavitra v. Union of India (February 2017 Supreme Court)}\textsuperscript{36}

The above captioned matter is a recent decision of the Supreme Court delivered in February 2017. In this case, the impugned Act is the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of Reservation (To the Posts in the Civil Services of the State) Act, 2002. This Act, inter alia provides for grant of consequential seniority to the Government servants belonging to Scheduled Castes and the Scheduled Tribes promoted under reservation policy.

This was challenged before the High Court wherein the validity of the provisions was upheld. The matter was further taken to the Supreme Court. Unlike the High Court verdict, the Supreme Court went against the same. The Order of the High Court was set aside by the Apex Court. Consequential seniority under Sections 3 and 4 to persons belonging to SCs and STs on promotion against roster points to be ultra vires Articles 14 & 16 of the Constitution as per the Supreme Court verdict.

\textbf{Nabam Rebia and Others v. Deputy Speaker and Others}\textsuperscript{37}

The case was decided on the 13\textsuperscript{th} of July 2016. The case stemmed against the Order of the Governor of the State of A.P. which summoned 16\textsuperscript{th} Session of Assembly and advancing the date. Whether the power exercised by the Governor under Article 163(2)\textsuperscript{38} of the Constitution was a question to be answered here. One argument that came up was that the said provision was already a part of the Constitution when it was

\textsuperscript{33} id
\textsuperscript{34} C. K. THAKKER, ADMINISTRATIVE LAW (2nd ed.2012)
\textsuperscript{35} GRANVILLE AUSTIN, THE INDIAN CONSTITUTION – CORNERSTONE OF A NATION 164 (1999)
\textsuperscript{36} Decided in February 2017
\textsuperscript{37} MANU/SC/0768/2016
\textsuperscript{38} Id
framed and that the basic structure doctrine is not applicable to the provisions of the original constitution. The rationale for stating so was that the original provision by virtue of its very presence from the birth of the Constitution itself forms basic structure. The Constituent Assembly debates were also referred in the matter.\textsuperscript{39} Pandit Jawaharlal Nehru described the function of the Governor under Article 174 as an indirect duty and added that the same thereby amounts to an executive function as the same is under the aid and advice of the Council of Ministers. The Supreme Court set aside the Order of the Governor of A.P. accentuating that the said function is not a discretionary power of the Governor and the same is an executive function which should be mandatorily performed or can only be performed under the aid and advice of the Council of Ministers.\textsuperscript{40}

\textit{Brajendra Singh Yambem v. Union of India and Ors.}\textsuperscript{41}

In the above captioned decision, the Supreme Court deviated from the decision in \textit{State of Madhya Pradesh v. Trimbak}\textsuperscript{42} wherein it was held by the Supreme Court that the power of Judicial review is not available in case of executive exercise of power by the President or the Governor. In the case at hand the Supreme Court held that the said observation is not tenable in law in view of the landmark case of \textit{Kesavananda Bharati v. State of Kerala}\textsuperscript{43} wherein the Supreme Court rightly held that the power of judicial review by the judiciary is a part of the basic structure of our constitution.

\textit{State of Uttar Pradesh and Anr. v. Al Faheem Meetex Private Ltd. and Anr.}\textsuperscript{44}

Another recent decision rendered by the Supreme Court is the above mentioned case where the exclusion of judicial review is evident. This factual matrix spread like this. There was a cancellation of bid by the Bid Evaluation Committee (BEC) in view of the adequate number of valid tenders. Fresh tenders were initiated for construction of modern slaughter house by exercise of their discretionary powers. This triggered the edifice of the case.

\textsuperscript{39} Id
\textsuperscript{40} Id
\textsuperscript{41} AIR 2016 SC 4107
\textsuperscript{42} (1996)2 SCC 305
\textsuperscript{43} (1973) 4 SCC 225
\textsuperscript{44} (2016)4 SCC 766
The Appellant challenged the said decision of the BEC to invite fresh tenders before the High Court and the decision of the BEC was quashed. The High Court directed that the bid of the Appellant should be accepted.

In the appeal, the Supreme Court held that the High Court was not justified in interfering in policy matters. BEC was only a recommendatory body and the matter had not reached competent authority for final decision. As per the subsisting Financial Rules, there ought to be three more bids and hence BEC has recall to make the bid more competitive. Judicial review is excluded from policy decisions.

THE NATURE AND EXTENT OF LIABILITY OF ADMINISTRATION

LIABILITY OF STATE

In the simplest words, liability implicates the accountability or the responsibility of the perpetrator of an act for his actions. Injecting this idea to the framework ‘liability of state’ we can decipher that it is the responsibility of the State to answer any consequence of its action.

Liability of state also unravels another conundrum. It means that not only the State can sue as a Plaintiff before any Court of law but also the State can be sued before any Court of law as a Defendant too. In India Article 300 of our Constitution elucidates the same.

LIABILITY OF PUBLIC AUTHORITIES

As stated in the previous segment, liability indicates a sense of responsibility or answerability. Thus liability of public authorities means the accountability of the public authorities in discharge of any of their functions performed by virtue of their official power and capacity.

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49 Michael Wells, Constitutional Torts, Common Law Torts, and Due Process of Law, 72 Chi.-Kent. L. Rev. 617 (1997)
For instance, in the *Kasturi Lal case*, gold was misappropriated by the Police officer. The officer was held liable for his act. The act incurred no protection under the umbrella of sovereign immunity.

**KING CAN DO NO WRONG**

At the outset, it would be pertinent to unveil the gravamen of *King can do no wrong* as prevailed in United Kingdom. Government is never an honest man according to the views in Britain. Bracton explicated that the King is not under the man by under God and under the law because it is the law that makes the King. This concept was theoretically ideal but disheartening to note that the same is lame when it comes to the practical application.

The difficulty that blocks the way of the practical implementation is that there was no human agency to hold King liable. The King can be a Plaintiff in a case but he cannot be sued as the Defendant in any case. All Courts in the country are the King’s Courts. Henceforth, the King cannot be sued in his own courts. A writ could therefore neither be issued nor be enforced against the King.

Another aspect to be noted is that, even if the administration is badly carried out, the King is not at fault. This is because, the Ministers rendered faulty advice to the King. Thus even during such circumstances, the King is liable to be blamed or incurs no responsibility or accountability.

A shift in the said view is evident from the advent of the Crown Proceedings Act of 1947. By virtue of the said enactment, the Crown can now be placed in the position of an ordinary litigant.

**INDIAN POSITION**

What was India’s take on this subject? This is the question the author wishes to answer now. The concept ‘*king can do no wrong*’ was never accepted in India. According to the settled framework of law, Union and States are legal persons. They

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50 Kasturi Lal Ralia Ram v. Union of India, AIR 1965 SC 1039
53 Id
54 Id
55 Id
can file suits as well as suits can be filed against them. They can be held liable for breach in Contract and Tort. Article 300 of the Constitution of India elucidates the same.

In Union of India v. Jubbi, it was clarified by the Supreme Court that a statute applies to a State as much as it does to a citizen unless it expressly or by necessary implication exempts the State from its operation.

Further, in State of Maharashtra v. Indian Medical Association the Supreme Court held that the provision requiring application for permission to open a Medical College through University to the State Government did not apply to the Government itself to open and to run a Government college. The term Management under Section 64 was interpreted by the Supreme Court to a limited scope wherein it was confided to private management and not to the State. This was elucidated so by the Supreme Court because, the State was already bound by the law.

**DOCTRINE OF PUBLIC ACCOUNTABILITY**

The doctrine of Public Accountability simply indicates that all the three organs of the government are subject to public accountability. The best illustration is evident in the words of Justice Best.

In Henly v. Lyme, Best CJ accentuated that every action of the State is reviewable. If a public officer, abuses his power either by an act of omission or commission & the consequence thereof is an injury to an individual, an action may be maintained against such public officer. Public Offices are sacred trusts. Hence, State being the trustee are bestowed with the highest duty to the public or the people of Country which is nothing but paying heed and acting for public good.

**T. K. S. Elangovan v. State of Tamil Nadu (December 2016 Madras High Court)**

The above captioned judgment is a recent decision of the High Court of Madras decided in December 2016. The minimal factual matrix of the case involves the

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57 Id
58 AIR 1968 SC 360
59 AIR 2002 SC 302
60 JAY P. DESAI, THE POWER OF PUBLIC ACCOUNTABILITY (2009)
61 PAUL CRAIG, ADMINISTRATIVE LAW (6th ed.2008)
62 (1858)5 Bing 91
63 Decided 2016 December
vacancies for the posts of Members of the Tamil Nadu Public Service Commission being filled by party loyalists without any merit or qualification. This appointment was under challenge.

The principles of public accountability and transparency in the functioning of an institution are essential for its proper governance as per the decision. The Court also emphasized that it should also be preceded by men of high integrity, merit, rectitude and honesty to be appointed to the posts. Hence the Court decided against the administrative actions in question.

**CONCLUSION**

From my research, I am completely inclined to put forth that no man is above law but all are under law. As Cicero said, law is the highest reason implanted in nature. Hence, even the State is accountable for its deeds. The framers of our Constitution has unerringly accepted this notion and rightly embedded the provisions to make the State liable for their deeds within the contours of the Constitution of India.

Next is discretion. Discretion is an inevitable facet of the modern day administration. Though the power was evident from the beginning we can rightly conclude that the said power snatched its momentum as time progressed. The New Despotism of Lord Hewart criticized discretionary powers of the Executive. But the Donoughmore Committee suggestions cured the lacunae to a great extent.

Separation of powers propounded by Montesquieu is a doctrine that can fit into the frame of ‘tale as old as time’. The doctrine mandates that every organ of State shall function in its own operational area without interfering with or hampering the functions of the other organs. However, Montesquieu did not propound a theory that created impassible barriers or unalterable frontiers but a theory of mutual restrains which is commonly known as ‘checks and balances’. Judicial review is both a power breaking and power releasing function. Together, the organs can administer good governance.
INDIA’S STRUGGLE TO FIND BALANCE BETWEEN COMPLETE FREEDOM OF SPEECH AND CONTEMPT OF COURT.

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ABSTRACT

Through this article I have attempted to elucidate how India continues to struggle to find a balance between freedom of speech and contempt of court. This article primarily concerned with contempt of court as it affects freedom of expression, namely contempt laws which restrict comment on judicial functionary and criticism of judges and courts. The article involves genesis of contempt of court and deals with section 2 & 3 of Contempt of Court Act, 1971 as it refers to criminal contempt in the definition of administration of justice. At the same time it highlights significance of most cherished right of human being especially in a democratic country i.e. Right to freedom of free speech and expression. It has also presented reasonable restrictions given under 19(2) of Constitution of India as it refers contempt of courts as one of the restrictions to freedom of free speech and expression.

Furthermore, the article also analysis the Prashant Bhushan’s case in which Supreme Court took suo moto cognizance and held Prashant Bhushan guilty of criminal contempt of court. In the end of the article, I have elucidated how do one of most prominent democratic countries in the world (UK, US) deal with contempt of court and right to freedom of speech. As the analysis of global scenario illustrates, significant tension between contempt of court and freedom of speech which ultimately determines how democratic countries in the world struggle to find balance between the same.

Key words: Contempt of court, Article 19(1)(a), restrictions under 19(2), suo moto cognizance, criminal contempt, freedom of free speech and expression, democracy, US, UK, etc.
INTRODUCTION

“Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.” John Milton

Speech is the god’s gift to mankind. Article 19(1)(a) of the Constitution of India states that, all citizens shall have the right to freedom of speech and expression. Freedom of speech is guaranteed not only by the Constitution or statues of various states but also by various international conventions like Universal Declaration of Human Rights, European Convention on Human Rights and Fundamental Freedoms, International Covenant on Civil and Political Rights, etc. These declarations expressly talk about protection of freedom of speech and expression. At the same time, Article 19(2) permits reasonable restrictions to be imposed by statute for the purpose of various matters including ‘Contempt of Court’. Article 19(2) does not refer to ‘administration of justice’ but interference of the administration of justice is clearly referred to in the definition of ‘criminal contempt’ in Section 2 of the Contempt of Courts Act, 1971 and in Section 3 thereof as amounting to contempt. On the one side of the coin the Constitution provides freedom of speech and expression and on the other side of the coin provision of Contempt of Court restricts people’s Freedom to speak against the courts functionary.

WHAT IS CONTEMPT OF COURT?

There is no doubt that the Court like any other institution does not enjoy immunity from fair criticism. Now question arises as to what is contempt of Court. It is defined as any act which is calculated to embarrass, hinder or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity. The contempt jurisdiction allows the Court of records to punish the contemnor for scandalizing the judiciary and for disobedience of its orders.

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3 R.C. Cooper v. Union of India AIR 1970 SC 564
4 The law.com Law Dictionary & Black’s Law Dictionary, 2nd Ed.
5 In Indian Constitution, Article 129, makes the Supreme Court the ‘Court of record’. A court of record is one whose records and judicial proceedings are preserved for perpetual memory having evidentiary value binding on all other courts.
In words of Holmes J, firstly, freedom of expression is ‘the best of truth is the power of the thought to get itself accepted in the competition of the market.’ Secondly, the freedom of speech is the lifeblood of democracy. However, the right to free speech is threatened in case a person is charged with criminal contempt under Contempt of Court Act, 1971 and is punishable by up to six months in prison. Because the Constitution vests courts with a special and specific power to take action for contempt not only of itself but of the lower courts and tribunals, that power is obviously coupled with duty to protect all the limbs of the administration of justice from whose action create influence with or obstruction to the courts of justice.

At the same time contempt jurisdiction has to be exercised with scrupulous care and caution, restraint and circumspection. Moreover, long ago, in Queen v. Grey, it was said that judges and courts are alike open to criticism and if reasonable argument is offered against any judicial act as contrary to law or to the public good, no court could or would treat it as contempt of court. Similar observation had been made by Krishna Iyer, in case of Baradakanta Mishra, ‘if a constructive criticism made in order to enable systematic correction in the system, it would not invoke the contempt jurisdiction.’

Any and every criticism is not contempt. One of the tests is, to use the words of Mukherjee, J, in Brahma Prakash Sharma v. The State of Uttar Pradesh,

1. Whether the criticism is calculated with the due course of justice or proper administration of law;
2. Whether it tends to create distrust in the proper mind and impair confidence of people in the Courts of law.

This test has been part of the meaning of the expression contempt of court.

8 As per the Contempt of Courts Act, 1971, Contempt of court includes both civil and criminal contempt.
9 Under Article 129 and 215 of the Constitution of India, Supreme Court of India and High Court of States respectively are empowered to punish people for their respective contempt.
10 Re Vinay Chandra Mishra AIR 1995 SC 2348: wherein the court suspended the license of the practision advocate who was guilty of Criminal Contempt; Chief controlling Revenue Authority and Superintendent of Stamps v Maharashatra Sugar Mills Ltd 1950 SCR 536.
11 M/S Chetak Construction v. Om Prakash & Ors AIR 2003 MP 145
12 Grey v The Queen (2001) HCA 65
13 Baradakanta Mishra vs The Registrar of Orissa High Court 1974 AIR 710.
14 Brahma Prakash Sharma v. The State of Uttar Pradesh 1954 AIR 10, 1954 SCR 1169
ANALYSIS OF PRASHANT BHUSHAN’S CASE

Recently, the Supreme Court of India (SC) initiated *suo moto* contempt proceedings and held Advocate Prashant Bhushan liable for the offence of criminal contempt for publishing two tweets on his twitter handle. The court observed that his posts criticising the Chief Justice of India (CJI) and other previous Chief Justices where calculated as interference with the due course of justice or the administration of law by the court. The top court observed that, “Rule of law” is the basic principle of governance of any civilized and democratic society. The truth, faith and confidence of the citizens of the country in the judicial system is *sine quo non* for existence of rule of law. An attempt to shake the very foundation of Constitutional democracy has to be dealt with an iron hand. Supreme Court passed a lengthy reasoning in 108-page order, for holding the tweets as “false, malicious and scandalous”.

Furthermore, Prashant Bhushan filed a supplementary statement, where he noted: “If I retract a statement before this court that I otherwise believe to be true or offer an insincere apology, that in my eyes would amount to the contempt of my conscience and of an institution that I hold in highest esteem.” A week later, on 31st August 2020, the Court fined Bhushan nominal amount of INR 1. He is required to pay this before 15th September 2020. Further, in the event of non-compliance Bhushan would be punished with 3 months imprisonment and debarred from practising law for 3 years. In this way Indian court handed down symbolic sentence for outspoken lawyer.

HOW DO ONE OF THE PROMINENT DEMOCRACIES (UK & USA) IN THE WORLD DEAL WITH CONTEMPT OF COURT?

In the United kingdom, contempt of court is regulated by the Contempt of Court Act, 1981 and is a strict liability offence.

The liability test is set out in Section 2(2) which states: The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. In common law jurisdictions, perhaps the most significant role of contempt of court law is the application of the sub judice rule: no one should interfere with legal proceedings which are pending. The ambit of contempt law in

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16 Contempt Petition Against Prashant Bhushan, para 10, Supreme Court Observer, [https://www.scoobserver.in](https://www.scoobserver.in)
UK and the one in India is almost similar as both recognise Civil and Criminal Contempt. The one thing which differentiates the two laws is the absence of the term ‘scandalising the court’ when it comes to the Contempt of Courts Act 1981 in UK. Even though the term was inherited in the Indian context from UK, the same was excluded by Section 33 of the Crime and Courts Act, 2013 on the recommendation of law Commission which abolished scandalizing the judiciary as a form of contempt under the common law of England and Wales. In UK the offense of scandalizing the court has become obsolete the last successful prosecution offence was back in 1931.

In the United States, Freedom of speech is enshrined in the First Amendment, as the paramount right that prevails over all others in case of conflict. However, contempt power used against the press and publication only if there is a “clear and imminent present danger” to the disposal of a pending case. Criticism however virulent, scandalous after final disposal of the proceedings will not be considered as contempt. What finally emerge from the “clear and present danger” cases is a working principle that the substantive evil must be extremely serious, and the degree of imminence extremely high, before utterances can be punished.

In the United States of America, Justice Hugo Black Had observed in the case of Bridges in 1941, that American Public opinion could not be silenced in the pretext of Contempt of Court. Instead, it contended that the dignity of the Court will not be established and respected if free discussions about the Court were restricted on the pretext of preserving its duty. The Indian Supreme Court has repeatedly held that this freedom is not absolute. The difference only is that in USA, the principle is of ‘clear and present danger’ while our Constitution permits ‘reasonable restrictions’.

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19 3335 Law Commission of United Kingdom Report, Contempt of Court: Scandalising the Court, (2012)
20 Bithal Sharma, Validity of the offence of Scandalising the Court, Para. 5, Compilation Editor and Shivali Shah, associate Editor, August 16, 2020
21 Schenck v United States, 249 US 47 (1919)
22 Bridges v California, 314 US 252 (1941)
24 Law Commission of India 200th report on trial by media free speech and fair trial under Criminal Procedure Code, 1973, August 2006
CONCLUSION

Jurisprudence of Contempt arose in the monarchical Britain in Common Law. Wherein there was concept of ‘King can do no wrong’, where the king used to pass judgements and if anyone criticise it, he should be in jail. However, this is not the Scenario in India, the Preamble of the Constitution declares that India is a republic State which derives its power directly or indirectly from the great body of people. So, the freedom of speech and personal liberty become very prominent and becomes necessary to strike a balance between freedom of speech and contempt of court. In the name of contempt of court it is not proper to limit the scope of freedom of speech and expression to a fix bounded territory saying that travel beyond this is contemptuous.25 While dealing with contempt of court Lord Denning had rightly pointed out-

“Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.”

-Lord Denning

INTRODUCTION:
Dispute resolution is an irreplaceable cycle for making public activity tranquil. Dispute resolution measure attempts to determine and check disputes, which empowers people and gathering to maintain harmony. It can thus be presumed that it is the *sine qua non* of public activity and security of the social order, without which it might be hard for the people to carry on the coexistence. Alternative Dispute Resolution (ADR) is a term used to depict a few distinct methods of settling legitimate disputes. It is experienced by the business world just as average people that; it is impracticable for some people to document claims and get ideal verdict. Due to the pendency of cases, there is the postponement of year or more for the parties to have their cases heard and finalized. In India, the Parliament has amended the Civil Procedure Code by adding Section 89 just as Order 10 Rule 1-A to 1-C. Section 89 of the Civil Procedure Code deals with the settlement of disputes outside the Court. From the above, the newly added Section 89 has been embedded in the Code so as to accommodate alternative dispute resolution.

ARBITRATION AND ITS TYPES:
Arbitration, a type of alternative dispute resolution (ADR), is a procedure for the resolution of disputes outside the courts, where the parties to a dispute allude it to at least one person – arbitrator, by whose choice they consent to be bound\(^1\). It is a resolution method whereby a third party surveys the proof for the situation and forces a choice that is lawfully obligatory for both the two sides and enforceable. There are restricted privileges of judicial review and appeal of Arbitration award. Arbitration isn't same as Mediation or judicial procedure. Arbitration can be either deliberate or mandatory. As the name suggests, mandatory arbitration can be binding from an agreement that a party is deliberately gone into, where the parties' consent to hold all current or future disputes to arbitration, without essentially

\(^1\) R. Mehran, “An International Arbitrators Point of View”, (1999)
knowing, explicitly, what disputes will actually happen. The benefits of Arbitration can be summed up as follows:

a) It is often quicker than litigation in Court.

b) It can be less expensive and more adaptable for business.

c) Arbitral procedures and arbitral awards are commonly non-public, and can be made off-public.

d) In arbitral procedures the medium of arbitration can be selected, while in judicial procedures the official language of the Court will be consequently applied.

e) There are restricted ways for the appeal to an arbitral award.

**TYPES OF ARBITRATION:**

There are different arbitrations depending upon the terms, topic of the dispute and the law administering the arbitration arrangement. Few types of such arbitrations are given below:

- **Domestic arbitration:** Domestic arbitration means that arbitration, which happens in India, wherein parties are Indians and disputes are chosen as per the considerable law of India.

- **International Arbitration:** When arbitration happens inside India or outside India containing elements of foreign origin in relation to the parties or the topic of the dispute is called as International Arbitration.

- **International Commercial Arbitration:** The term 'International Commercial Arbitration' has been elucidated in Sec 2(1)(f) of the Arbitration and Conciliation Act, 1996. International Arbitration is 'commercial' in the event if it identifies with disputes emerging out of a legal relationship, regardless of whether authoritative or not, considered as commercial under the law in force in India and where at least one of the parties is:

  1. an individual, who is habitually resident or national of any country other than India or
  2. a body corporate, that is incorporated in any country other than India, or
  3. an organization or a company or a body of individuals whose control and central management is done in any country other than India,

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3 ‘Commercial’ ought to be understood extensively having respect to the complex exercises which are a vital part of worldwide trade today (*R.M. Investments & Trading Co. Pot. Ltd. v. Boeing Co.*, AIR 1994 SC 1136).
4. the government of any foreign country.

- **Institutional Arbitration:** When arbitration is led by an arbitral Institution, it is called Institutional Arbitration.

- **Adhoc Arbitration:** Without depending on an Institution, if the parties themselves concur and orchestrate arbitration, it is named as Adhoc Arbitration.

**ADVANTAGES OF AD HOC ARBITRATION:**

Ad hoc arbitration is more moderate than institutional arbitration and is better appropriate for little cases and matters not including substantial number of claims. Ad hoc arbitration puts indeed, weight on the arbitrators), and less significantly upon the parties, to organize and administer the arbitration in an incredible manner. Another inspiration driving why ad hoc arbitration is more reasonable than institutional arbitration is that the parties will simply need to pay charges for the arbitrators, or delegates and the expenses brought about in directing the procedures as opposed to paying fees to an established institution that administers the procedure. To decrease costs, parties and the mediators may agree to lead the intercession at the arbitrator's office. In case of an ad hoc procedure, the authority's expense is chosen by the parties and the arbitrator; while in the event of institutional type of arbitration, the equivalent is chosen by the arbitral establishment which administers the arbitration. The disadvantage here is this can incorporate an uncomfortable talk and, in explicit cases, the gatherings will doubtlessly be not able to organize a savvy continuing. The arbitrators are the judges, also for the circumstance, and no party would wish to unsettle with the judge, especially before the settlement.

- **Specialized Arbitration:** "Specialized Arbitration" will be arbitration directed under the support of arbitral institutions which may have made particular rules to get together the specific requirements for the lead of arbitration in regard of disputes of specific kinds, for instance, disputes as to construction, commodities or specific areas of innovation. "Look Sniff" or 'Quality Arbitrations" are hybrid sort of arbitrations which might be found in specific commodity trade.

- **Statutory Arbitration:** When arbitration is led as per the arrangements of a specific statute, which explicitly accommodates arbitration in regard of disputes emerging on issues secured by that sanctioning, it is called Statutory Arbitration.

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4 Section 2(1)(f), The Arbitration and Conciliation Act, 1996
- **Flip-flop Arbitration**: Flip-flop Arbitration is characterized as being 'A type of arbitration under which the arbitrator puts together his award with respect to the notion he considers generally sensible. It is said, this urges parties to be more sensible in their claims and decreases polarization. Flip Flop Arbitration is also named as 'Pendulum Arbitration'.

- **Fast Track Arbitration**: Fast Track Arbitration, also known as called as “document only arbitration” is time limit bound arbitration, with stricter rules of procedure, which don't take into account any laxity or degree for augmentations of time and postponements. Fast Track Arbitrations are most appropriate in those cases, which can be settled on the submission of the documents, and oral hearings and witnesses aren't that needed.

**ARBITRATION IN INDIA: CHALLENGES**

The Indian Constitution provides an individual with numerous reliefs and means to convey equity, to every citizen. One such alleviation is the process of arbitration that has been given under Arbitration and Conciliation Act, 1996 (A&C Act). Yet, because of the below mentioned reasons, Arbitration in India has not developed appropriately as it is acknowledged to be:

**CUSTOMARY THINKING OF INDIANS:**

In spite of the fact that India is moving towards modernization, it is yet a non-industrial nation. Which implies, a great many people are uninformed towards arbitration and still trust courts more than alternate dispute resolution. This isn't really an awful thing, placing confidence in one's judicial system, however when the residents of a nation are oblivious and are reluctant towards change, this sort of customary reasoning can truly hurt instead of helping anybody.

**ABSENCE OF PROPER LAWS:**

The Arbitration and Conciliation Act was presented in 1996, and last amended in 2019. In India, there is a genuine requirement for presentation of more exhaustive law with respect to arbitration cycle and proceedings. The administrators need to broadly contemplate the issues with respect to the necessities and prerequisites of business hubs, which usually deal with arbitration proceedings. The laws must become exacting and all the more painstakingly expounded so an ever-increasing number of individuals gain confirmation in Arbitration than
the Judicial System. In straightforward terms, the greater part of individuals is as yet not ready to go out on a limb hazards with respect to issues of involving a huge amount of money.

**INTERCESSION OF COURTS IN ARBITRATION PROCEEDINGS:**
The intercession of courts in arbitration proceedings should be least. Because of the intercessions, the individuals who opted arbitration instead of arguing to a court, additionally bring about tendency towards courts. Moreover, individuals here and there think that it's better to move toward the court in the first place. Court intercession ought to be held within proper limits, not only during the proceedings but also after its completion. This implies, there must be a restricted degree to challenge the arbitral award under Sec. 34 of Arbitration Act, 1996. In *White Industries Vs. Republic of India*, two issues emerged: a) Intervention of judiciary and, b) Delay in arbitration. And, so it was very much discussed and concurred that the intervention of the judiciary ought to be limited to a degree.5

**UNAWARENESS:**
One of the significant issues because of which Arbitration isn't filling that void in India is a result of absence of cognizance among the individuals about the arbitration as a mode of dispute settlement. Most of the people in India, have their faith firmly instilled in Judiciary, as it must be! But due to the large pendency of cases, it is very hard for the courts and tribunals to give a final verdict. In this regard, various campaigns and modes to generate the awareness should be made in order to make people fathom the modus operandi of arbitration. Greater the awareness, quicker the void will get filled.

**ARBITRATION IN INDIA: PROSPECTS**
The Law Commission of India's report of August 2014 on the Indian Arbitration Act makes reference that amendments are being recommended to the Arbitration Act to give a "steady business environment and solid pledge to the standard of law, in view of unsurprising and effective systems of resolution of disputes."

Amendments to the Indian Arbitration Act, 1996 were passed by the two Houses of Parliament and consented by the President on December 31, 2015. These amendments apply

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5 *White Industries Australia Ltd v Republic of India*, UNCITRAL, Final Award, 30 November 2011 (J William Rowley, President; Charles N Brower, Christopher Lau), paras 4.3.9 and 10.4.12, available online: www.italaw.com/sites/default/files/case-documents/ita0906.pdf
to all arbitral proceedings started on or after October 23, 2015 however the parties can consent to try and apply these amendments to proceedings initiated before the Amendment Act.\textsuperscript{6}

The commercial courts and commercial divisions have been set up in India to guarantee quick removal of commercial issues which incorporate arbitration. On the off chance that these courts work in the way accommodated in the Commercial Courts, Commercial Divisions and Commercial Appellate Divisions Act, 2015 then the difficulties and enforcement cycle would be quicker. These courts manage claims over a measure of USD 1.5 million.\textsuperscript{7}

For international commercial arbitrations of the worth above indicated, acquiring injunctions, making challenges and enforcement will now go before the commercial division court. An appeal against any verdict passed by the commercial division would go before the commercial appellate court and at last to the Apex court of India. A portion of the significant changes these amendments have achieved are reflected beneath:

There is tension on the arbitrator to pass an award inside year and a half in any case or their mandate gets ended. But the time can be prolonged if an earlier application is made to the court and adequate reason is appeared (Section 29A). It might be that the institutional arbitration rules don't restrict the time frame for finishing an arbitration. There is additionally a fast-track procedure given in the amendments to dispose of the arbitration (Section 29B). It should be noted that the arbitral tribunals bonded to these time limits strictly.

There are timeframes given for removal of applications/petitions before courts with respect to interim reliefs (Section 9), for arrangement of arbitrators (Section 11) and challenges to the award (Section 34).

Challenges to the arbitral award on the ground of public policy have been limited and now a test on grounds of repudiation of the central policy of India won't require a review on merits (Section 48).

To decrease the part of courts, the interim reliefs accessible before the arbitrator are more detailed and the arbitrator’s order has been given the status of a court’s order and is enforceable under the code of civil procedure (Section 17).


\textsuperscript{7} Ibid.
In a foreign seated arbitration, interim reliefs are accessible to parties in India. But parties can quit this arrangement by method of an agreement (Section 2(2)).

There are strict grounds for impartiality by the arbitrator and disclosure of independence. This will influence the capacity of public sector endeavors to delegate their own workers as arbitrators, however this was a fundamental advance given that an arbitrator ought to be autonomous and unprejudiced.

**ENFORCEMENT AND INTERIM INJUNCTIONS IN FOREIGN SEATED ARBITRATIONS:**

For every foreign seated arbitration beginning on or after 23 October, 2015, interim relief (Sec 9), court assistance in taking proof (Sec 27) and advances before court for granting or refusing injunctions (Sec 37) apply except if parties by agreement quit.\(^8\)

Thus, if foreign investors want to secure their intellectual property rights and assets in India, then can decide to hold Sec. 9 in the arbitration clause.

**TWO SIGNIFICANT ANGLES ON ENFORCEMENT:**

First, enforcement will be in front of the commercial division of the HC on the off chance that it is a worldwide commercial arbitration and the worth is above USD 1.5 million. Steps taken by the administration in setting up the commercial courts is an appreciable move. But it appears to be that practically very little has changed as the single judge involving the commercial courts will keep on being troubled by other commercial disputes including arbitration and won't be solely assigned, subsequently weakening the aim of designating a specialist judge exclusively for arbitration.\(^9\)

Second, it is essential to take note of that if an enforcement is permitted by the courts in India, at that point the litigant doesn't have some other cure other than making an immediate appeal before the Apex Court, where the grounds of appeal would be restricted. This arrangement previously existed before the ongoing amendments were made, but went unnoticed. This would be useful in accelerating the process where the enforcement has been permitted by the court.

\(^8\) Dru Miller, ‘Indian Court Expands Its Jurisdiction over Foreign Arbitral Panels’ (2014) 6 Yearbook on Arbitration and Mediation 328

\(^9\) Ernst & Young, Changing Face of Arbitration in India: A Study by Fraud Investigation & Dispute Services, 2011, 9.
ROLE OF ARBITRATION IN SETTLING INTERNATIONAL DISPUTES BETWEEN COUNTRIES:

International arbitration is like domestic court litigation, yet as opposed to occurring under the steady gaze of a domestic court it happens before private adjudicators known as arbitrators. It is a consensual, nonpartisan, authoritative, private and enforceable methods for international dispute resolution, which is normally quicker and more affordable than domestic court procedures\textsuperscript{10}. The alternative of international arbitration hosts advances to permit parties from various legal, cultural and language to determine their disputes in a last and restricting way, ordinarily without the customs of the procedural rules of their own lawful frameworks.

International arbitration is often called a hybrid type of international dispute resolution, since it mixes components of civil law procedure and custom-based law procedure, while permitting the parties a huge chance to plan the arbitral procedure under which their dispute will be settled. International arbitration can be opted to determine any dispute that is viewed as "arbitrable," a term whose extension differs from country to country, however which incorporates most of commercial disputes. Often companies include international arbitration arrangements for their commercial agreements with different organizations, so that if a dispute emerges as for the understanding, they are committed to a third party instead of to seek after conventional court litigation. Arbitration may likewise be utilized by two parties to determine a dispute through what is known as a "submission agreement", which is basically an arbitration agreement that is marked after a dispute has already emerged\textsuperscript{11}.

Typical arbitration arrangements are short. The ICC model arbitration provision, for example, just peruses:

"All disputes emerging out of or regarding the current agreement will be at last settled under the Rules of Arbitration of the International Chamber of Commerce by at least one arbitrator named as per the said Rules."\textsuperscript{12}

Parties likewise as often as possible include rules concerning the law overseeing the agreement, the number of authorities, the spot of arbitration and the medium of arbitration. Arbitration has an imperative and additionally a powerful function in settling the

\textsuperscript{10} Michelle St. Germain, “The Arbitrability of Arbitrability” 2005, 523
\textsuperscript{11} Jagdish Singh v Heeralal, (2014) 1 SCC 479
\textsuperscript{12} https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/ Last visited on 13-11-2020
transnational disputes. This is a direct result of the way that the arbitration has exceptionally progressed highlights than the old traditioned litigation. This can be perceived by the following parameters:

- International Arbitration can resolve disputes more quickly than customary court litigation since there are just restricted appeals to arbitration awards.
- International Arbitration can be more affordable than customary court litigation.
- International Arbitration can give better-quality equity, since numerous domestic courts are overburdened, which doesn't generally permit to make a decision about adequate opportunity to create legitimate choices of high quality.
- Clients can assume a functioning part in choosing an arbitrator who they suppose, to be an expert in International Arbitration matters.
- International Arbitration is adaptable, and the individual gatherings to a dispute assume a critical function in choosing the procedure that is generally suitable for settling their international dispute, settling on whether to incorporate procedures, for example, document production.
- International Arbitration can be private, which is helpful if the parties wish to proceed with their business relationship or to stay away from negative exposure.
- International Arbitration is unbiased. This is significant for cross-border exchanges, since it keeps away from the chance of a "home court" advantage for one party.
- In specific nations, judges don't rule autonomously. In International Arbitration an award must be autonomously made, or it can't be authorized.13
- In specific cases, for example, investor-State disputes, International Arbitration offers the sole solution for the infringement of a legitimate right.

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ABSTRACT-

This paper talks about the abolition of section 497 and honour killing in India, this article elaborates about the introduction of Adultery along with Section-497 and Section 198 CrPC. This paper contains the Adultery in India (Origin and History) with the definition of Adultery. It has Objective, Ingredients, and offence and after that, we have Proposed Reforms in the Present Law of Adultery in India this part includes Fifth Law Commission, 1971, Fourteenth Law Commission, 1997, Justice Malimath Committee, and so many things. Further, we move on the next topic, we found that historical perspective of adultery and comparative study on the laws of adultery which is related to cultural and religious traditions and decriminalization of adultery and good practice.

And the second most important part of this paper is honour killing in India. This part deals with the analysis of honor killing, effects of honor killing in the society, and Manoj Babli's case which is related to honor killing along with Court Judgement. Further, we move on next point talks about adultery-a critical analysis and UN and gender inequality in adultery. And next topic also deals with Case Analysis Joseph Shine v. Union of India 2018, this is known
as the landmark Judgement nowadays. At last, we have the conclusion and suggestion of the paper.

**Key Words**- Adultery, Honor killing, Equal Rights, Sexual- Intercourse, Society, Gender, Religion

**INTRODUCTION**

Adultery is a relationship of consensus between a married couple and it also come under the relationship with their legitimate spouse. It is morally unethical to consider adultery and it is regarded as a punishable crime. In India, the act of adultery is a crime and a punishable crime in the eye of the law. It is also known as heinous crime in the society. *Adultery, also known as infidelity or extra- marital affaire in the society.* Some western countries such as Sweden, Belgium and Finland do not accept that adultery is crime but Indian jurisdiction, it could be considered as adultery is punishable and heinous crime. According to Indian law, it is violation of faith as well trust and sacred marital promises. In India, adultery offence mentioned in the under Section 497 of Indian Penal Code and this law come under the Criminal Law of India includes Chapter XX which talks about the offence related to marriage.

This type of offence is generally committed by only those persons who had completely intercourse with another person’s wife which she had already married with the proper subsequent consent or collusion with other. Most Important part is that wife is not punishable for being an adultery, or even that adultery as an insult to the transgressor. Adultery may not be serious crime but our Indian society is more loyalty toward the spouses and trust of the married couples. Society think that when a person committing offence such as adultery is always aware and trust that he is violation of the basic fundamental laws and norms of the procedure of marriage in the society.

Everyone has right to life and wants to live according to his own will and satisfactions in the society. Honor killing is the known as the killing of a person’s satisfactions, will, and freedom which is given by the laws in the society and who does not fallow the rules and laws of marriage organised by the family. It is also known as the murder of the human beings by the family. The person did not deem to fit to access the power of freedom in the society and such cases it is an offence to violated the so may provision, law in the society. Honor killing also depends on the caste system, grade of class, status in the society of the person.
ADULTERY IN INDIA – ORIGIN AND HISTORY

Sex is the important part of our life. This problem has been faced by the society from the beginning. In the society is also debatable topic now a days.

DEFINITION

The definition of the term ‘adultery’ and its consequences vary between religions, cultures, and legal jurisdictions, but the concept is similar in Judaism, Christianity, Hinduism and Islam. The dictionary defines ‘adultery’ as “voluntary sexual activity between a married man and someone other than her husband” and term comes from the words "ad"(towards) and "alter"(other). Thus, the ultimate crime in the eye of society is adultery or sex, and it is regarded on cultural, religious, moral or legal basis.

The word “adultery” derives its origin from the French word “avoutre”, which has evolved from the Latin verb “adulterium” which means “to corrupt”. The literal definition of adultery is that a married man sexual immorality if he has sex with the woman to whom he has not joined into wedlock.

HISTORY

Section 497 of the Indian Penal Code and it is known as pre-constitutional law that was enacted in 1860. At that time, when this law was made women has no such rights of their husband or it is like to the property of husband. In the history it is also known as the offence and it was considered as a “theft” of property. In 1837 the first draft of Indian Penal Code introduced by the Law Commission of Indian and did not contained word “adultery” as a crime. Lord Macaulay was known as the father of IPC and according to his that adultery or marital infidelity was a personal wrong between the couples in the society and it is also not criminal offence.

OBJECTIVES AND INGREDIENTS

The analysis was that when a married man has sex with a single woman or widow, the married man would completely ruin his life. The aim of the section 497 is to prevent the marriage. Society is not fallow the marital life. In Joseph Shine, the Supreme Court observed that "... is being advocated by the state to protect and preserve the sanctity of marriage, as the obsessive object is not, in fact, the object of section 497..."

1 Encyclopedia Britannica online, “Adultery” Britannica.com
2 Merriam-Webster’s Dictionary of Law © 1996
4 Malimath Committee Report on Reforms of Criminal Justice System, March 2003, Vol 1
INGREDIENTS

Adultery is an offence must be established these points.

1. A husband's relationship with a married woman who doesn't have a husband.
2. A man may know or reason during the sexual intercourse with a married woman to assume that she is another person's wife.
3. Such sexual intercourse may be with his proper consent i.e. it is not amount to rape.

INDIAN PENAL CODE

Section 497. **Adultery.** — Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such a case, the wife shall not be punishable as an abettor.

CRIMINAL PROCEDURE CODE

Section 198. **Prosecution for offences against marriage.**  — (1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the said Code:

The crime of adultery is known as the unknown (meaning a case in which the defendant cannot be arrested without an arrest warrant by a police officer). It is also a bailable criminal offence. It implies that to arrest the accused, the police must follow certain rules, regulations and guidelines.

PROPOSED CHANGES IN INDIA'S CURRENT RULE OF ADULTERY

In the history of the legal community and reform of the law of adultery in the midst of revolution, the different proposal was adopted, but society has not thought or taken up the duty. The proposed amendments roughly fall into two main categories:

5 https://indiankanoon.org/doc/854390/
1. **Spread the context of IPC Section 497 to make a woman in a case of adultery a co-accused.**

**Fifth Law Commission, 1971**

42nd report of the Fifth Commission of India suggest that the inclusion of women and it also recommended that gender inequality to be removed in the law on the part of adultery by take women within the analysing the previous law. It is also stated that the examine of the present and past law and penalty for the same offence. This suggestion based on the change the society, status, and condition of women in the society. The joint Select Committee emphasis that equal guilty or equal punishment for the same treatment of both sexes, but it was ground that the five-year-old sentences should be upheld.

**1. Fourteenth Law Commission, 1997**

Fourteenth Law Commission, 1997 in its 156th Report, recommended that related to Section of the CRPC should also be amended or need to some changes on the reform in the procedure of criminal justice system6. It is also suggested on the part of Indian Penal Code that reform of the criminal law of adultery in the Joint Committee.

**2. Justice Malimath Committee**

Justice Malimath Committee in 2003, held that we need to repeal of Section 479 of IPC which is included women in the offences.

**Analysing of Section 497 of IPC, so state that adultery a civil offence only**

According to school of thought, offence under Section 497 is the consensus matter between two well mature person. It is also known as the civil offence and it is not a crime to change the society. Section 497 deals with adultery as a criminal offence because it only between married couples, it falls under the civil wrong and it is not a slip under the criminal offence.

**R Madhava Menon Panel of January 20077**

R Madhava Menon Committee draft National Commission of Women, NCW Ministry of women and Child Development to the Commission stated that adultery is based on a breach of trust and is also allowed to treat as a criminal offence instead of a civil wrong. The law on

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6 Law Commission of India, One Hundred Fifty Sixth Report; Indian Penal Code, (Govt. of India, 1997) para 9.46, 9.47

7 R Madhav Menon Panel of January 2007
adultery contains both ground constitutional and philosophical ground. According to Libertarian that the government is not interfere in the matter of daily personal life and it should be settled as privately not for the prosecution and it will not be punished according to public entities.

Thus, the main questions at present are:

1. Is it bias continue in present modern society?
2. Should we have any provision or any amendment to correct the biasness of gender in the country’s previous law on the adultery?
3. Should be maintained in such way as to change the lighting the norms in the Indian law on adultery, which was drafted many year ago?

In the case of Yusuf Abdul Aziz, The Supreme Court held that against the sanctity of the marriage home, adultery is wrong and it is the charges against the outsider that breaks the sanctity. It was further held that the woman should be considered a victim because another man molested a woman. The Court notes that the law was not discriminatory and violated the right to equality, and the court upheld the constitutional validity of section 497. The Court stated that "Section 497 is not in breach of Articles 14, 15 and 21 of the Indian Constitution."

The framer of the constitution truly believed in the mid-twentieth century that no one would be discriminated against on the basis of sex.

The specific treatment referred to in Article 15, clause 3, for women is that limited cases relating to certain characteristics or disabilities create differences between men and men as a whole class. In the Indian Constitution, the equality clause states that it violates not only the fundamental criteria of constitutional law, but also the basic principles of interpretation of constitutional law.

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8 Yusuf Abdul Aziz AIR 1954 SC 321
9 Constituent Assembly Debates. Vol. VII. at 650.
10 Durga Das Basu, Commentary on the Constitution of India at 1796 (Wadhwa 8th ed 2007); Srinivasan v. Padmasini.AIR 1957 Mad 622
11 State of U.P. v Deoman, AIR 1960 SC 1125, 1131; See also Basu, Commentary on the Constitution of India at 1796 (cited in note 27).
HISTORICAL PERSPECTIVE OF ADULTERY AND COMPARATIVE STUDY ON THE LAWS ON ADULTERY

Historical prospective laws always against the adultery were made only to prevent women not for the men. At the same time men has no such restriction for maintain sex with any other women (polygamy). We can observe that sex has the basis of the social relation in all the civilized societies. It is also known as history of human civilization related to sex and adultery considered a relative phenomenon depends on the important that govern the sexual morality in the society.

According to European concepts, it is civil wrong and only affected the family. But adultery is a punishable offence under Indian concepts. It is an open concept of gender in most African countries and adultery has not been considered socially prohibited. In most tribes and matriarchal families even, the concept of fornication is almost invisible12.

Durex's global sex survey found that 22 percent of individuals worldwide have extra marital sex13.

CULTURAL AND RELIGIOUS TRADITIONS

In ancient China, who committed adultery were punished by castration mentioned in the ancient laws. According to Zhou dynasty state that “The exact crime was called gong, and referred to "immoral" heterosexual sex between men and women”. We find that very strict laws against adultery are contained in the Greco-Roman definition of the world. The old idea states that the wife was the husband's property. Jus Tori claimed in early Roman law that it was not just a crime for a husband to have sex with a slave or unmarried woman14.

HONOUR KILLING IN INDIA

Honor killing is a dirty mind set of the family member. It is a murder committed by a member of a family. The male member of the family, who has violated the desires and freedom of the family, kills another female member. It is recognised as the family member's pre-planned murder that did not follow the basic rule and law in the family. Most of the actions are done by the society, relative, neighbour and it is also against women who are involve in the sexual and marital crime. According to Indian’s democracy, every person has equal right, freedom and it is not violated the law. Honor killing is based on the choosing the

12Vijaykumar Shrikrushna Chowbe, Adultery – A Conceptual and Legal Analysis, SSRN, 44 Pages
13 https://info.scoop.co.nz/Durex_Global_Sex_Survey
14 Dig., XLVIII, 5-13; Lecky, History of European Morals, page 11-29
different caste, religion of the person by the family member without the consent or will of the couples.

**ANALYSIS:**

Honor killing is an act of murder if, with the exception of arranged marriage, the individual does not kill and marriage is against the will and will of the family. The Supreme Court also stated that it is illegal which is based on honor killing or physical assault on a young man/woman against the will of the family. In India most of the honor killing took place in Punjab, Uttar Pradesh, Haryana, and Rajasthan. The major issue is that honor killing are member of the upper caste who do not agree to interracial marriage to maintain their caste system.

**HONOUR KILLING –HENIOUS CRIME**

According to Sati, it is the practice of female wife will be jump into the fire alive when his husband is dead, the wife must end her life on her own will or consent. Without her husband, she would not be able to face society. It is regarded as separate ominous murder because in society women and men hold the family's status and tradition follow the sati. After that it is completely ban on the practice of Sati in India but honor killing is also progress in the society till now.

**ROLE OF LAW IN INDIA**

The Indian Constitution has so many laws and regulations that every person is spared. Some of the sections breaching the offence include Articles 14, 15(1), 15(3), 19 and 21 of the Indian Constitution. Article 14 and 15 talks about the equality and equal rights before the law, it means that every person or citizen of is equality based on the caste, sex, race, etc. Article 19 and 21 contains freedom of speech and expression, right of life and personal liberty.

**MANOJ-BABL15 CASE**

This case based on the honor killing.

**FACTS OF THE CASE: -**

In this case have two victims (Manoj and Babli). Both loved each other and they want to married to each other. Both families did not agree for the marriage and family want to solve the matter with the help of Khap Panchayat. After that Khap Panchayat was also against the

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15 Smt. Chandrapati vs State of Haryana And Others on 27 May, 2011
marriage. Khap Panchayat stated that both are belonging to different cast. This verdict was based on the religious-caste and also benefit for the society. As a result of honouring the family, Alsubah was involved in killing the victim. Babli's grandfather was the Khap King, and the relatives of Babli were involved in Babli's grandfather's murder. Further victims were kidnapped and killed.

**JUDGEMENT:**

The Court held that this is the first honor killing case and life sentence to accused. The driver also involved in the kidnapping and he is also imprisonment for the seven years.

**ADULTERY – A CRITICAL ANALYSIS**

Section 497 have so many criticisms and it is totally based on the gender bias for which a married woman known as husband’s property. But according to law that actions only can be taken as against the man, he also punished of the offence and woman is not liable for the same offence. This section talks about that the wife cannot be liable as an abattoir in the case of *W. Kelani v. State Tr. Inspector of Police* 16.

Further in the case of *In Mahesh Patel (Appellant) vs. State of Chattisgarh, (respondent)* 17 Court have same observation that the woman's adultery, which makes her absolutely exempt from the allegation of adultery and she will not be held responsible for a crime.

*Adultery in India as the basis for divorce*

The meaning of adultery in matrimonial law is as follows; "Adultery may be defined as consensual intercourse between a married person and a person of the opposite sex during the course of a marriage" 18.

According to this law, if either of the two couples or partner violating the marital norms and committed such act, they will be applying for the divorce with the consent of partner. On the other hand, adultery is to be consider as criminal offence against the marriage by Indian law as well as martial law.

**ADULTERY AND HINDUISM**

"The woman of day and night should be kept in dependence by the men of her family, and if they attach themselves to sensual pleasure, they must be kept in control of one"

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16 AIR (SC) 497/ (2012)
17 Criminal Appeal No. 1 of 2005, 2011
18 Reydon on Divorce, (10thEd.) 172
MANUSMRITI

According to Manusmriti, Hinduism is also against the extramarital affair and it deals with the social ridicule, public humiliation and also against the society. Most of the Hindu believe that marriage is based on the sacrament theory of relationship. The marriage means that to ensure that both the couples to perform their duties and follow the society’s rule, regulation and traditional law to each other. Marriage is not only based on the sexual relationship, but it must be follow the basic family’s rule, and guidelines in the society.

CASE ANALYSIS

JOSEPH SHINE V. UNION OF INDIA, 2018

FACTS OF THE CASE

Joseph Shine filed a PIL under Article 32 of the constitution of India and also challenged the constitutionality of the offence of adultery which is mentioned under the Section 497 of the Indian Penal Code to read with Section 197(2) of the Criminal Procedure Code. He states that men were always discriminated against and treating by the women like objects only to holding them and men always liable for the extramarital affairs.

His Petition said that “Married women are not a special case for the purpose of prosecution for adultery. They are not positioned differently than men in any way,”

The law, Mr. Shine said, also "indirectly discriminates against women by a miscalculation that women are property of men".

ISSUES RAISED IN THE COURT

1. Is Section 497 of IPC, which deals with the adultery as criminal offence have constitutionally valid?

2. Is violation of Fundamental Rights (14,15 and, 21) and Section 198(2) of Code of Criminal Procedure, 1973?

3. Is Section 497 have excessive punitive law that needs to be decriminalized?

JUDGMENT

The Supreme Court held that the right to prosecution was not dependent on gender neutrality, and her husband could not be punished for marital infidelity under section 497. It is also

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19 Joseph Shine v. Union of India, 2018 SCC Online SC 1676
unfair, discriminate, against the women and violation of Article 14. Article 15(3) says in order to protect and uplift this class of people, the state makes every law in the favor of women and children. Section 497 and Article 15(3) of the constitution cannot be considered a beneficial law.

**CONSTITUTIONAL BENCH PASSED THE ORDER**

(1) It is violation of Article 14, 15 and 21 of the Constitution of India and Section 497 of Indian Penal Code has been considered to be unconstitutional.

(2) The process of prosecution under the Chapter XX of Indian Penal Code and Section 198(2) of CrPC will be unconstitutional only the applicable to the offence of the adultery mentioned in the Section 497.
CONCLUSION

Section 497 of the legislation of the India Penal Code requires some consideration in its present state from Logical approach. If someone else had paid from a logical perspective to assess the requirement of adultery, this would lead to a non. Not only is the Indian Penal Code (IPC) old-fashioned, but its results are also irrational. A plain S. reading. 497 of the Indian Penal Code indicates that the following points are deemed to constitute an offence under the Adultery Clause. This research reveals findings that are very important. They show a clear remarkable ability for the next generation to regard adultery in the existing social structure as a completely unacceptable offence.

The majority of individuals came to light with another fascinating fact. The research indicates that adultery, because of spouses who are adults, should not be considered a felony. Personal laws are fair, operative, efficient and successful today. If someone from the family is also not pleased with both the young man/marriage, women's but all they could do is cut off another social connection with them and not honour the family with murder of honour. But this point is not known by family members. Life is God's creation; birth and death must be determined by him. The family is important, but by killing a member, the family is not important. Because the next moment of life is not predictable, it is good to always live life to the maximum with happiness and joy. It is better, therefore to follow the Live and Let Live policy. The value of every citizen's life on this earth should be brought about by education. People should be trained in rural and urban areas and raise consciousness about the effects of heinous crimes.

The most recent legislative proposals merit substantial and urgent consideration from the legislature. It's indeed open to the legislature, from both extreme different viewpoints, to consider the possibility and come up with a law that is best for the present Indian scenario.
RIGHT TO PRIVACY IN INDIA: REFLECTION INTO IT’S NATURE AND JOURNEY

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Abstract: Intrusion in sleep makes the next day intolerable, similarly intrusion in privacy makes life intolerable. Right to life and personal liberty is a dynamic concept encompassing myriad rights relating to the innate nature of humans, right to privacy is one of them. Confidentiality is a part of privacy and not privacy itself. The constituent assembly after a much-detailed discourse on whether to include right to privacy under part III of the Constitution of India decided not to include it due to the various restraints it imposes in criminal and other fundamental function of the sovereign. But now in the 21st Century with the shift in discourse and the development of technology it is indispensable to include right to privacy within the scope of fundamental rights. Supreme Court in the landmark judgment of K.S. Puttaswami have included right to privacy within part III of the constitution of India. This chapter elucidates the nature and the journey of right to privacy becoming a fundamental right and the various dicta on the right to privacy in India. Right to Privacy is an indispensable right which guarantee freedom of life and no fear of one’s own choices in life.

Keywords: Privacy; Integrity; Judicial Interpretations; Right to Life; Indispensable

I. INTRODUCTION

A modern person’s life consists of many activities that have an implication on his/her privacy. We all use mobile phones for communicating, while we share vast arrays of data, voluntarily or inadvertently, on computers connected to the Internet, buy utilities and avail services from companies that tabulate our preferences and maintain databases on our habits, and we visit medical and legal professionals under the impression that our information is kept secure from the knowledge of others, etcetera. It is thus important to understand the meaning, nature and scope of privacy, starting with the jurisprudential, or legal, viewpoint. But first, let us delve into the world of belief and fiction to make out the contours of privacy in our culture. History and religion are starting places on any discussion, and privacy is a concept with a long historical and religious use. Upanishads, books of India’s ancient wisdom, talk about meditative
practices that are meant to be done in absence of any outside disturbance.\(^1\) Privacy has been recognized in the Quran and in the sayings of the Prophet, the Bible and the Vedas, and in the ways of life all around the world. So has our fictional universe attempted at highlighting the value of various aspects of privacy. George Orwell wrote 1984 depicting the ways a malevolent and oppressive communist dictatorial regime would repress privacy of citizens. Aldous Huxley’s Brave New World and its Revisited edition talk about a society driven by commercial interests and consumerism along-with the use of psychedelic music, psychotropic drugs, regulated sex, and a non-existent sense of privacy (the Revisited Edition gives a chilling account on how our world is moving towards the day talked about in Brave New World at a greater pace than earlier believed by the author). Fahrenheit 451 talks about whole industries devoted to destroying books and encourage disuse of the mental faculties in the society. Jurisprudence and Western philosophy is also replete with references to privacy as a right, or an interest, or even a sphere where law should not intervene etcetera. Aristotle’s works talked about a differentiation of the public sphere of political affairs and the personal sphere of human life. The ancient Greek philosopher, several generations ago, visualized a confidential space of every citizen which could not be encroached upon by government authority. John Austin in his Lectures on Jurisprudence\(^2\) also suggests such a differentiation. This realm has been described as a place reserved for private reflection, familial relations and self-determination.\(^3\) Privacy, thus, can be described as a right against interference and intrusion in the private sphere of a human being, the part of his life that concerns no one other than himself. It also contains reasonable restrictions to the right, where disclosure of the private sphere may be more important than the protection of the private sphere.

In India, the Preamble to the Constitution aspires to form India a secular nation (which has a much wider scope than the traditionally accepted definition of being neutral towards religions)\(^4\) and secures for its citizens the liberty of thought and expression. It seeks to promote fraternity assuring the dignity of the individual. The individual and his sphere of life is central to the fundamental values laid down in the Preamble.

The recent judgment of the Supreme Court in the case of Justice KS Puttaswamy v Union of India has harmonized the disputed position in law regarding the existence of a right to privacy within the rights mentioned in Part III (Fundamental Rights) of the Constitution. With recognition of this right, legal challenges will emerge. The Courts and the Parliament now have

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the responsibility of devising judicial tests and legislative schemes respectively, to ensure the protection of the extent of privacy granted in the judgment and ensuring that it evolves in the right direction at a steady pace.

This chapter attempts to understand the evolution of the right to privacy and attempts to analysis the scope of privacy protecting the individual privacy and ensure the democratic nature of the Internet and society.

II. EARLY REFLECTIONS ON RIGHT TO PRIVACY IN INDIA

Our Indian constitutional jurisprudence recognizes the right to life as embodying a right to dignified human life facilitating a humane and compassionate society. The rights and freedoms that enable a dignified and meaningful life are as important as life itself. It becomes the duty of the state to protect those rights and safeguard the citizens’ ability to take decisions within those freedoms. This is known as the autonomy of the individual. The dignity and autonomy of the individual are in turn made effective by granting a private zone of thought, communication and activity to the individual, which is the substance of the right to privacy. Since the right to privacy can be seen as emerging from the eminence of the individual and his dignity in the constitution, the Court in the case of Justice KS Puttaswamy (Retired) v Union of India saw no reason why it should wait for it to be expressly recognized by an amendment to the constitution and not through judicial interpretation. Determining the extent of state sanction permissible against individual rights is definitely a task of judicial review.

Meanwhile over the years, Article 21 has been understood to include all rights and faculties necessary for the enjoyment of life. Justice, fairness and reasonableness have been read into the requirements of process specified in any law and the substance of any law [the Court differentiated between substantive due process and the requirements of justness, fairness and reasonable-ness in the substantive provisions of the law, and categorically held that substantive due process (on value-judgments on the law by the Court) does not apply to India]. Given the changing times, technology, needs and interests of the people, the inter-relationship of rights has given recognition to other related rights which deserve the same protection as the express rights.

To sum up, objections to the inclusion of a right to privacy came on the grounds that—

1. Making private correspondences so secure would impede the investigation and prosecution of crimes.
   a. It would abrogate the working of the Code of Criminal Procedure.

2. Making provision for reasonable searches and seizures was not found necessary as the Code of Criminal Procedure already covered the area.

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7 Justice KS Puttaswamy (Retd.) v Union of India, SC All WP (C) No 494 of 2012.
Thus, from the objections, it can be seen that it was not concluded that privacy is not an integral element of the guaranteed liberties and freedoms, but only that specific areas of the same, might be unworkable in the Indian scenario.

### III. JUDICIAL INTERPRETATION OF THE RIGHT TO PRIVACY

The right to privacy has been declared a Fundamental Right after the judgment in Justice KS Puttaswamy (Retired) v Union of India. The case overruled the decisions in MP Sharma and Kharak Singh and held subsequent decisions that have decided the issues laying down a right to privacy within the scope of Fundamental Rights under Article 21 as valid in law and affirmed. The judgment in Gobind has served as the basis of these subsequent decisions.

In MP Sharma, a provision authorizing search by police was challenged, on the ground that it violated the guarantee against self-incrimination, in Article 20 (3). The Court answered that a search during which material is seized does not constitute a voluntary testimonial statement, and thus would not attract the protection of Article 20 (3). The Court noted that a compulsory search warrant is different from a voluntary statement in response to a notice issued by a law enforcement or administrative authority to produce documents. A compulsory search warrant was held not to attract the protection under Article 20 (3), while information released on notice was held to be covered under the same and a person could refuse to provide information that could incriminate him/her. It was stated that a right of the kind envisaged under the Fourth Amendment to the US Constitution could not be read into the Indian jurisprudence in the absence of an express right to privacy. The observation regarding the right to privacy in Indian constitutional law was obiter dicta—a by-the-way statement not in any way material to the issues involved in the case. also, the judgment was limited to the scope and extent of Article 20 (3), the decision did not involve a discussion as to whether privacy could be a constitutionally protected right in light of other provisions such as Article 19 and 21.

The judgment in Kharak Singh does not cite MP Sharma as a precedent on the right to privacy. The majority judgment in Kharak Singh can be divided in two parts—one part deals with the constitutionality of nocturnal domiciliary visit (which was held to be unconstitutional) and the other part deals with other provisions of the same regulation which contained the provision for nocturnal domiciliary visits (which were upheld). The first part gives the impression that the provision for nocturnal domiciliary visits by the police is unconstitutional on the ground that they outrage the sanctity of the home. The Court cited the US Supreme Court decision in the case of Wolf v Colorado, which held privacy as being a constitutionally protected right in the

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8 Justice KS Puttaswamy (Retd.) v Union of India, SC All WP (C) No 494 of 2012.
9 MP Sharma v Satish Chandra, AIR 1954 SC 300.
USA. The Court held that sanctity of the home was a component of ‘ordered liberty’ and thus in this part, privacy was held as being a part of Fundamental Rights. Using the backing, the Court held that a protection against nocturnal domiciliary visit was covered under Article 21 as the right to dignified life, much more than a mere animal existence. The right under Article 21 was held to include all those rights that render life meaningful. Thus, the first part of Kharak Singh presents a view harmonizing life, liberty and individual privacy. It reads sanctity of home as a fundamental for ordered liberty in the society, and grounds privacy as having a protection under Articles 19 and 21. The judgment fails to be internally coherent as the second part of the judgment draws from arguments that are inconsistent with the first part discussed above. The majority judgment goes on to uphold the rest of the regulations’ provisions on the grounds that privacy as a right is absent from the scheme under our Constitution. Where the first part hints at a constitutionally protected right to privacy, the second part seems to do away with the suggestion. From a point of law, the two parts of the judgment in Kharak Singh are not logically consistent and cannot co-exist with each other.

Later cases dealing with the right to privacy have all attempted to reconcile the two parts in Kharak Singh and lay down a uniform position of law. But since none of the Benches in the cases were larger than the bench in Kharak Singh, they stopped short of invalidating the second part, even though most of them have relied on the first part of the ruling.

The right to privacy has since then been discussed by the Court in a number of contexts. To start with, surveillance of habitual convicts for prevention of crime was taken up by the Supreme Court in the case of Malak Singh v State of Punjab and Haryana.12 The Court ruled that in absence of adequate procedural safeguards, such a police power cannot be exercised by law enforcement authorities. In this case, the Court hinted at the need for procedural safeguards whenever the government seeks to gather and use individual information. Similarly, wiretapping of private communications has been held to be a violation of the right to privacy of individuals.13 The Supreme Court has also held that truth-techniques like brain-mapping, narco-analysis and mandatory DNA profiling cannot be mandatory for any accused of a crime.14 The Supreme Court ruled that the mandatory administering or use of these techniques is to be avoided as these techniques violate mental privacy of the accused. It’d be interesting to see how the Court would interpret the DNA Profiling Bill if it becomes law, as the legislation calls for creation of a centralized database that would contain the record of all persons who come in proximity to the criminal justice system, missing persons, volunteers, abortion, paternity suits and organ transplants. The Bill does provide for limited access and use of such data and also

13 PUCL v Union of India, (1997) 1 SCC 301.
provides for deletion of records on acquittal. These provisions serve as minor guarantees in the larger picture of privacy rights.

In R Rajagopal v State of Tamil Nadu, the Supreme Court ruled that no privacy rights exist in information that forms part of public record.\textsuperscript{15} This judgment is hailed for its affirmation of the right to privacy in the Indian Constitution, but parts of the ruling may have adverse implications on the right to privacy.

As far as the aforementioned decisions are concerned, the assumptions which find specific mention in several parts of the Kharak Singh decision were not adequately placed in perspective. Gobind has been construed by subsequent Benches as affirming the right to privacy. It is also pertinent to take note of the grounds of restrictions on the right to privacy that the Court have opined to be reasonable. They are, public emergency and public safety, criminal investigations, competing private interests, best interests of the child, public interest, and competing Fundamental Rights.

IV. PRIVACY IS INDISPENSABLE

The Right to Privacy has its basis in the ‘right to be let alone.’ The idea is to preserve a zone around a human being that is limited to his private activity. A person should be amenable to the state, or fellow private citizens only in the realm of public activity. The private zone is a part of natural rights which enables personal autonomy, civil & political activity, and natural human growth & development. They seek to maintain a civilized and democratic society, by protecting exalted Constitutional values—Secularism, Liberty, and the Dignity of the Individual. Privacy can be understood as a bundle of rights, covering different aspects of the same philosophical zone that is meant to be protected against interference at the hands of any state, non-state actor, commercial interests, or social conditioning. This bundle of rights is composed of the following rights, among others.

The first right is to bodily integrity. A person has a near absolute right to autonomy over his body. This right is protected by criminalizing various acts against the human body, like assault, battery, rape, harassment, unwarranted search & seizures etcetera. The writs of mandamus and habeas corpus can protect citizens from such an invasion by the state. The second right is that of personal autonomy. A person also has a near absolute right over how he chooses to live his life, cultivate his interests and preferences, and interact with friends and family. This right is protected through means of Fundamental Liberties under Articles 19 and 21 among others. A person also has a right to privacy over his private premises. A person has the liberty to engage in any lawful activity without the interference of society and state on his private premises.

A person, obviously, enjoys greater privacy rights at his private premises than at public places.

\textsuperscript{15} R Rajagopal v State of TN, (1994) 6 SCC 632.
This is protected by the law against trespass to goods and property. There is a reasonable expectation of privacy even in public spaces. The correspondences and acquaintances a person makes in public, and the places he visits should not be tracked or published by private corporations, and state actors. Public activities having no bearing on legitimate public or social interest should be protected from such interference. People also have a right to privacy over personal information that they disclose. This is known as informational Privacy. A person has rights to private information that he discloses for availing services across a wide range of producers, sellers, and marketers, both in the government and private sector. Here, a person has legitimate expectation that the data disclosed is used only for purposes consented to. Such information needs to be protected against accidental leakage and mala fide attacks as well.

The recent Supreme Court judgment on the Right to Privacy  has affirmed the view that privacy constitutes an important facet of the Right to Life and Personal Liberty. The nine judges that heard the matter have categorically and unanimously held that privacy is fundamental, multi-faceted and requires various kinds of protection, both against the states and non-state actors. The judgment is rife with the idea that the Courts unilaterally would be unable to defend the people’s right to privacy in this emerging scenario. And thus, a well-informed, active and robust debate on the issue needs to be undertaken by the civil society and legislators to help in the framing and enforcement of a national legislation and policy to protect the citizens’ privacy rights. This debate will help supplement the judgment, enabling the Court to devise appropriate tests for adjudicating on different kinds of encroachments made by the states and non-state actors.

V. CONCLUSION

The basis for alleging that privacy is paramount over state, public or commercial interests is that privacy is a facet of fundamental civil and political rights. This right is fragile in our age of advanced technology and the internet. Development of the sciences of manipulation combined with a readily available census data of large swathes of population can make it easy for commercial or state interests to condition the exercise of other rights. The problems discussed above are profoundly important and many of the questions regarding cyber-privacy and cybersecurity will shape humanity for a long time to come. The emergence of cyberspace, data processing, vast storage, and mass communication has opened the gateway to a realm which can profoundly influence the social relationships and power structures in the society. Technology should empower us, and give us greater control over our condition, and also ensure greater safety. But technology has always been a double-edged sword—it has opened many evils of its own, and also failed to achieve its objectives. The task of a progressive and

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16 Justice KS Puttaswamy (Retd.) v Union of India, SC All WR (C) No 494 of 2012.
democratic state here is to ensure that this new technological habitat is not prone to the same risks that we seek to prevent in other systems. The task of making law is to ensure that people act and interact in good faith, ensure peace and safety, and be organized in their dealings.

Construing the contours of privacy as laid down in the judgment, people have the right to privacy in person and personal life, at home (or family life), in private premises a person holds, his belongings (or possessions), in communications he participates in and the information divulged by him. All these different contours afford different protections to privacy.