“ONLINE JOURNAL ON SOCIAL-LEGAL ISSUE
BY THE LAW MENTOR”

AN INITIATIVE BY LAW MENTOR TO MAKE OUR READERS AWARE ABOUT SOCIO-LEGAL ISSUES OF UTMOST IMPORTANCE IN INDIA

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INDEX

HATE SPEECH LAWS IN INDIA AND THEIR IMPLEMENTATION ........ 1-5

MARITAL RAPE - PECULIARLY IGNORED SOCIO - LEGAL ANAMOLY.6-8

WHARF AND WEFT OF DEMOCRACY AND RELIGIOUS FREEDOM:
THE NEED TO HAVE BALANCE BETWEEN FREEDOM OF RELIGION
AND OTHER PEOPLE’S RIGHT IN A DEMOCRACY..........................9-11

SURROGACY IN INDIA.................................................................12-15

A BRIEF ANALYSIS ON SABARIMALA TEMPLE ISSUE..................16-20

TRIBAL TREASON..........................................................................21-24

SPORTS AND ARBITRATION.........................................................25-28

SUBSTANCE ABUSE:DRUG ABUSE................................................29-32

UFLIFTMENT OF BAN ON CRYPTOCURRENCY:
A THEMATIC REVIEW..............................................................33-37

DEATH PENALTY ...........................................................................38-42
HATE SPEECH LAWS IN INDIA AND THEIR IMPLEMENTATION

BY Ms. PRATIKSHA DWIVEDI, LLOYD LAW COLLEGE

INTRODUCTION-

When we analyze the recent situation in Delhi, we get to know the role of hate speech for instigating violence between communities. The riots that took place during February happened between the pro-CAA protesters and the anti-CAA protesters. A PIL seeking the registration of FIRs against the leaders for allegedly delivering hate speech is still being heard in the High Court of Delhi. This article focuses on various existing provisions on hate speech laws and its punishment; also highlights major reasons as to why these have a problem in implementation.

WHAT IS CATEGORIZED AS HATE SPEECH?

The meaning of hate speech, in contemporary times, has travelled beyond merely offensive speech; it encompasses speech that is insulting, derogatory, discriminatory, provocative or even such that it incites and encourages the use of violence or results in violent backlashes. 1

Black's Law Dictionary defines hate speech as "speech that carries no meaning other than an expression of hatred for some group, such as particular race, especially in circumstances in which the communication is likely to provoke violence".2

In the Indian law system, we have not defined hate speech but as to for an understanding the words spoken, written, signs or any visual representation qualifies as 'speech'. If these speech offends the racial, religious, ethnic, cultural groups and has the power to incite 'hatred' among these groups are categorized as hate speech.

HATE SPEECH DEFINITION

As of now, the Indian penal code does not define hate speech. In the case of Pravasi Bhalai Sangathan v. Union of India (2014) The Supreme Court had to deal with a case where the

petitioners prayed to the court that the state should take peremptory action against the makers of hate speech. The court expressed the difficulty of ‘confining the prohibition to a manageable standard. The court observed that the implementation of existing laws would solve the problem of hate speech to a great extent. This matter was referred to the Law Commission of India to submit its report answering where it ‘deems fit to define hate speech’. It said that laying down a definite standard/definition to the Hate Speech would lead to curtailment of Freedom of speech and expression. It also said that hate speech cases would be dealt with according to the cases.

**WHY DOES HATE SPEECH NEED STRICTER LAWS?**

Many argue that putting restrictions on speech would render in the freedom of speech and expression guaranteed as a fundamental right under Article 19(2) of the Indian Constitution. Hate speech needs more regulation than it just seems. It does not only have the power to create hatred among the communities but the words have the power to incite violence, thus disrupting public order. Its ‘ability to incite violence’ might be the sole reason to prohibit and regulate hate speeches. But the question arises whether the regulation should be stricter to just the violence-inciting hate speeches or all types of hate speeches. The answer to that is–even speeches that do not incite violence has the potential to marginalize a certain section of the society or any individual. The victims of hate speech lose their sense of security and the right to live with dignity. It is not just the fear of violence but igniting a silent hatred towards a community.

The court in *Shriya Singal v. Union of India (2005)* stated that incitement to violence is essential to constitute hate speech but sometimes violence is not necessary. In the age of technology, the anonymity of the internet allows anyone to spread offensive ideas and false news. These ideas may perpetuate discriminatory attitudes towards society.

**HATE SPEECH JURISPRUDENCE IN INDIA**

Hate Speech can be curtailed under Article 19(2) of the Indian Constitution on the grounds of public order, incitement to offense and security of the State.

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3 Pravasi Bhalai Sangathan v. Union of India AIR 2014 SC 1591
5 Shriya Singal v. Union of India 2005
The standard applied for restricting Article 19(1)(a) is the highest when imposed in the interest of the security of the state. Also, a reasonable restriction under Article 19(2) implies that the relation between restriction and public order has to be proximate and direct as opposed to a remote or fanciful connection.

Many argue that regulating Hate Speech is a violation of their fundamental right of freedom of speech and expression guaranteed under Article 19(1)(a) of the Indian Constitution. In the case of Ramji Lal Modi v. State of Uttar Pradesh, the court held that the expression in the "interest of public order" mentioned under Article 19(2) is much wider than 'maintain of public order'. Therefore, even if an act does not cause a breach of public order, its restriction 'in the interest of public order' will be deemed reasonable.6

EXAMINING RESTRICTIONS ON FREEDOM OF SPEECH AND EXPRESSION-

In Indian Penal Code relevant sections dealing with Hate Speech categorized under three different chapters.

1. Of offenses relating to religion,
2. Of Offences relating against the public tranquillity,
3. Of Criminal intimidation, insult, and Annoyance.

Some of the sections are defined as under:-

1. Section 153A IPC penalizes ‘promotion of enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony’.
2. Section 153B IPC penalizes ‘imputations, assertions prejudicial to national-integration’.
3. Section 295A IPC penalizes ‘deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs’.

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4. Section 298 IPC penalizes ‘uttering, words, etc., with deliberate intent to wound the religious feelings of any person’.

5. Section 505(1) and (2) IPC penalizes publication or circulation of any statement, rumor or report causing public mischief and enmity, hatred or ill-will between classes.

(ii) the Representation of The People Act, 1951

1. Section 8 disqualifies a person from contesting election if he is convicted for indulging in acts amounting to illegitimate use of freedom of speech and expression.

2. Section 123(3A) and section 125 prohibits promotion of enmity on grounds of religion, race, caste, community or language in connection with election as a corrupt electoral practice and prohibits it. Other than these the Protection of Civil Rights Act, 1955, the Religious Institutions (Prevention of Misuse) Act, 1988, the Cable Television Network Regulation Act, 1995, the Cinematograph Act, 1952, the Code of Criminal Procedure, 1973 also penalizes different kinds of Hate Speech with different sections.

Although, the hate speech that falls under the 'public order' and 'sovereignty' and 'integrity' are sections 153A, 295A, 153B, etc.

In the case of Swaran Singh v State (2008) the Supreme court held that calling a member of schedule caste “chamar” in public view would section 3(1)(x) of the Schedule caste and Schedule tribes (Prevention of Atrocities) Act, 1989. The restrictions on the speech here are more justified under 'decency and morality' in Article 19(2) rather than 'public order'.

HATE SPEECH AND SEDITION

There is a major difference between sedition and hate speech. Sedition is an offense directly against the state whereas the offenses under the hate speech affect the state indirectly by disturbing the public tranquility. The provisions of Sedition are defined under section 124 Indian Penal Code, 1860.

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8Swaran Singh v. State 2008
RECOMMENDATIONS BY LAW COMMISSION

While analyzing various provisions of Hate speech we realize that there is no watertight compartment to deal with and they generally overlap. Hate speech poses a complex challenge Freedom of Speech and Expression. the constitutional approach to those challenges has been far from uniform.

The law commission report no. 267 and The Criminal Law (Amendment) Bill, 2017 suggests insertion of new section 153 C (Prohibiting incitement to hatred) and section 505A (causing fear, alarm, or provocation of violence in certain cases).

It also states that the first part of the code i.e. General Conduct should expressly provide a provision that prohibits any kind of speech that promotes, or attempts to promote, feelings of enmity.
MARITAL RAPE - PECULIARLY IGNORED SOCIO - LEGAL ANAMOLY

BY SAMARTH LUTHRA, UNIVERSITY SCHOOL OF LAW & LEGAL STUDIES

INTRODUCTION-

Nirbhaya rape incident on December 12, 2012, stirred a national outrage over the inefficiency and non-effectiveness of the then existing rape laws to act as a deterrent and bring the culprits to justice. The Parliament responded to the yearning of the populace by passing the Criminal Law (Amendment) Act, 20139 hurriedly. The Parliament did not reverberate with all the recommendations of the Justice Verma Committee10 but took enough inspiration from it to revamp the existing laws by extending their scope and introducing offences like ‘Acid Attack’11 which was earlier only considered as ‘Grievous Hurt’12.

The impugned Amendment, though progressive, did not exclude marital rape and again listed marriage of the perpetrator-husband and victim-wife as an exception to rape.13 The sole restriction was that the wife must be 15 years of age. This age of 15 was extended to 18 by the Supreme Court in Independent Thought v. Union of India. The effect of this law is that it puts all wives in a perpetual state of consent and willfulness for sex with their husbands from the time of inception of marriage. This state of perpetual consent includes intoxication, unsound mind, and exists irrespective of the wife’s unequivocal denial and resistance to indulge in sexual activity. Currently, marital rape is considered as an offence only when the husband and wife are separated or when the wife is below the age of eighteen.

9The Criminal Law (Amendment) Act, 2013, a legislation passed by the Lok Sabha on 19 March 2013, and by the Rajya Sabha on 21 March 2013, provides for amendment of Indian Penal Code, Indian Evidence Act, and Code of Criminal Procedure, 1973 on laws related to sexual offences. The Bill received Presidential assent on 2 April 2013 and came into force from 3 February 2013. It was originally an Ordinance promulgated by the President on 3 February 2013. Act no. 13 of 2013.
10 On December 23, 2012 a three-member Committee headed by Justice J.S. Verma, former Chief Justice of India, was constituted to recommend amendments to the Criminal Law. The other members on the Committee were Justice Leila Seth, retired justice of the Delhi High Court and Gopal Subramanium, former Solicitor General of India.
11 Section 326A and Section 326B of the Indian Penal Code, 1860.
12 Section 320 (sixthly) of the Indian Penal Code, 1860.
13 Rape is defined under Section 375 of the Indian penal Code, 1860. Exception 2 of the Section 375 reads as “Sexual intercourse or sexual acts done by a man with his own wife, the wife not being under the fifteen years of age, is not rape.”
In the aforementioned case of Independent Thought v. Union of India, the Supreme Court in 2017 held that the act of a man engaging in sexual activities with his wife of age fifteen to eighteen irrespective of consent not being held as Rape is violative of Article 14, 15 and 21 of the Constitution of India. The Court observed that a rapist cannot be absolved and excused from the offence to become a non-rapist just because of his marriage with the victim. The Supreme Court also observed that creating an artificial class between girl-child rape-victims on the basis of their marriage with the rapist and treating the two differently has no rationale. The Court also observed that a girl’s right to live with dignity, right to reproductive choice, right to bodily integrity and right to deny intercourse which are implicitly enshrined under Article 21 are violated.

It is pertinent to point out that the Apex Court clarified in the first instance that it is only dealing with the issue of girl child aged between fifteen to eighteen vis-a-vis the second exception to Section 375, and not Marital Rape at large. Right to live with dignity, right to refuse intercourse and right not to be violated surely do not wither down with age, so one wonders why the same pronouncement cannot be applicable to marital rape in its entirety. Subsequent to the Supreme Court partially striking down exception two of Section 375 of the Indian Penal Code, numerous petitions have been filed challenging the validity of the entire exception.

Challenges to the impugned exception are viewed as a challenge to the institution of marriage by many, including misinformed religious groups and politicians who continue to exploit the emotions of such groups to extort their votes come the elections. The argument pressed by them is that marriage is a divine and sacrosanct relationship and such a proposed change would nullify the concept of marriage. Such an argument cannot be forced in a society where freedom and individual rights are paramount. In fact, the occurrence of an incident wherein the man violates the body of his wife without consent is what is against the concept of marriage and not the criminalization of it. An informed religious practitioner would, and should believe that marital rape is morally worse because it not only violates the dignity and the body of the victim but also deeply violates the trust and other silent bona fide promises of affection, honesty and care which the concept of marriage brings.

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14Independent Thought v. Union of India (2017) 10 SCC 800.
The concept of marriage is flooded with intrinsic concept of love, trust, honesty and companionship. Being someone’s wife should not be a license to violate her person sexually. In decriminalizing Section 497 of the Indian Penal Code\textsuperscript{15}, the Supreme Court held that the wife is not the property of the husband and cannot be subjected to such treatment; an extension of the same logic would lead the downfall of exception two of Section 375.

In The State of Karnataka v. Krishnappa\textsuperscript{16}, the Supreme Court held that sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. It also held that non-consensual sexual intercourse amounts to physical and sexual violence. In Bodhisattwa Gautam v. Subhra Chakraborty\textsuperscript{17} the Supreme Court said that rape is a crime against basic human rights and a violation of the victim’s most cherished of fundamental rights, namely, the right to life enshrined in Article 21 of the Constitution. In Suchita Srivastava v. Chandigarh Administration\textsuperscript{18}, it equated the right to make choices related to sexual activity with rights to personal liberty, privacy, dignity, and bodily integrity under Article 21 of the Constitution.

A reading of all case laws on the topic including the ones already mentioned would portray different conclusions to different people. Some may be of the opinion that our society and the judiciary is only a step away from criminalizing marital rape and some may question and be wary of the time which has lapsed since that one step is remaining.

The truth however remains intact - that any avoidance and any delay results in the silent suffering of many victims. The silent suffering is not just caused by the act but also reflects its magnitude—that a woman’s own husband is the perpetrator for a crime; a crime which violates her trust and comfort; a crime which violates her fundamental human rights of mental, emotional and physical well-being; and a crime which sadly does not exist.

\textsuperscript{15}Joseph Shine v. Union of India (2018) 2 SCC 189.
\textsuperscript{17}Bodhisattwa Gautam v. Subhra Chakraborty (1996) 1 SCC 490.
\textsuperscript{18}Suchita Srivastava v. Chandigarh Administration, (2008) 14 SCR 989.
WHARF AND WEFT OF DEMOCRACY AND RELIGIOUS FREEDOM:  
THE NEED TO HAVE BALANCE BETWEEN FREEDOM OF  
RELIGION AND OTHER PEOPLE’S RIGHT IN A DEMOCRACY

BY Mr. PRANAV KAUSHAL, BAHARA UNIVERSITY, SHIMLA

PROLOGUE

“I mean to diminish no individual, no society, no association in the history of India when I say that India all round the world is valued for many great things but the most important three things for which India is known all round the world is The Taj Mahal, Mahatma Gandhi and India’s democracy”

- Gopalkrishna Gandhi

“I do not expect India of my dreams to develop one religion that is wholly Hindu or wholly Muslim or Christian but I want India to be wholly tolerant with its religion working side by side with one another”

- Mahatma Gandhi

The above two quotes speak about the importance of democracy and religious freedom and need to have a balance between freedom of religion and other people’s right in a democracy. Democracy refers to the power of people and the most prominent definition of democracy was given by Abraham Lincoln i.e. “Democracy is the government of the people for the people and by the people.” The word ‘religion’ on the other hand has not been defined under the Indian Constitution. Religion is matter of faith of individuals or communities and which is not necessarily theistic. A religion has its basis in a system and doctrines of beliefs which are regarded by those who profess that religion as conductive to their spiritual being. Religion has been defined as a belief which binds spiritual nature of men to supernatural being. It includes worship, belief, faith, devotion, etc. and extends to rituals.19

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The word “Religion” has different shades and colours. Important shade is dharma (duty), duty towards the society and soul.\textsuperscript{20} In \textit{lily Thomas v. Union of India}\textsuperscript{21}, the Supreme Court explained that religion was a matter of faith stemming from the depth of the heart and mind and that religion, faith or devotion were not easily interchangeable. Thus, the essence of democracy and religious freedom are made available to the people of the country so as to keep the nation’s people on the equal pedestal. The ideology behind the calling India to be democratic and secular country is to give people equal rights and chances to participate in the governance of the country and at the same time to give equal chance in the matter of religion.

“In the lap of secular and Democratic country like India it is very important that people express themselves and if they were not allowed to do so they will find some other ways to express themselves that may be by way of communalism”

CHANGING CONCEPT OF DEMOCRACY AND SECULARISM

“Democracy is not a way of governing, whether by majority or otherwise but primarily the way of determining the way who shall govern and to what ends.”R.M MacIver

“Secularism is the basic feature of the Indian Constitution in which state shall treat equally all religions and religious denominations”

The citadel of democracy is based upon the principle that all citizens of the nation are equal and plays a very important role in the governance of the country. The democracy brings political equality but the notion of the democracy has been changed in the recent times and has faced chequered development in the past few years. It was observed by the apex court that “In the government of responsibility like ours where all the agents of the public must be responsible for their conduct everything must be done in the public way by their public functionaries\textsuperscript{22}. In the case of \textit{S.P Gupta v Union of India}\textsuperscript{23} it was observed by the Supreme Court that, “the Concept of open government is the direct emanation from right to know which is an implicit of free speech under Article 19(1) (a) of the Indian Constitution.

\textsuperscript{20} Aruna Roy v. Union of India A.I.R 2002 S.C 3176(India).
\textsuperscript{22} People union of Civil Liberties v. Union of India A.I.R 1997 S.C 568 (India).
\textsuperscript{23}S.P Gupta v Union of India(1981) Suppl. S.C.C 87 (India)
The Supreme Court in the case of **Shaligram Shrivastava V. Naresh Singh Patel**\(^{24}\) observed that “The roots of democracy lay not in the form of government, parliamentary or otherwise. A democracy is a model of associated living. The roots of democracy are to be searched in social relationship, in terms of the associated life between the people who form the society.”

In the Indian context Secularism is the basic feature which embodies the positive concept which separates spiritualism with the individual faith.\(^{25}\) In the case of **Aruna Roy v. Union of India** the apex court observed that the real meaning of secularism is Sarva Dharma Sambhav meaning equal treatment and respect for all religions.

Dr. Bhimrao Ambedkar conception towards democracy and secularism was summarized by the Supreme Court in the following observation:

“**Secularism not only meant that the state should have no religion of its own and should be neutral as between different religions but that any political party which sought to capture or share power should not espouse a particular religion, for, if that party came into power, the religion espoused by it would become the official religion and all other religions would come to acquire a secondary or less favourable position.**”\(^{26}\)


\(^{26}\) Id.
SURROGACY IN INDIA

BY Ms. JANHAVI A. SAKALKAR, SYMBIOSIS LAW SCHOOL

INTRODUCTION-

“There is nothing more beautiful than someone who goes out of their way to make life beautiful for others.”

—Mandy Hale

The gift of motherhood is unfortunately not distributed by God to every woman. The significance of fertility is depended on men and women, their fertility to continue with the lineage, because life persists through procreation. Reproductive problems are seen from a long time, it is not a new concept. For instance, during the epic age of Mahabharata, Pandu and Dhritarashtra adopted the solution of Niyoga since they were facing these problems. Issues like these can also be seen with woman such as ‘Sarah’ who was facing problem with conceiving, therefore, her maid ‘Hagar’ was laid with her husband ‘Abraham’, in order to bear a child for Sarah, which is nothing but surrogacy in today’s time.

This story dates back two thousand years before the birth of Christ. The inability to conceive was considered as personal misfortune and also as a curse for the couple. In countries like India, women are blamed for infertility and it resulted into the social stigma for childlessness, even if it wasn’t the woman’s fault. According to the WHO Report the incidence of infertility across the globe including India is around 10-15 percent.27

The problem of infertility is a serious one in our society and the social stigma involved includes abandoning of wives. Thus, surrogacy is being resorted to widely as a solution to infertility because one or both of the partners may suffer from infertility problems. Surrogacy has emerged as a new level of scientific development, it has provided the couples who are not able to reproduce with opportunities to have a genetically related child through artificial reproduction, IVF method/test-tube baby and surrogacy.

Surrogacy has been widely recognized in all over the world. The word ‘surrogate’ has been derived from a Latin word ‘surrogatus’ meaning a substitute, that is person appointed to act on behalf of another. In Medical parlance- the term surrogacy means using of a substitute in place of natural mother.

Every facet of surrogacy is inspirational, the gestational surrogates are the epitome of altruism, their promise of fulfilling one's dream of having a child is laudable. In the similar manner, the intended parents are not shackled by the hindrances on their way but instead surmount all those with their unshakeable dedication and perseverance towards building a family.

But now a days, child has become a commerce because a new trend has emerged where the surrogates are lured by the monetary gains and hence despite her unselfish concerns she becomes interested in the financial gains and sometimes at the cost of life and health of the reproductive subject. Therefore, this arrangement has resulted as a bait for the poverty-stricken population of India. Surrogacy has therefore become a commercial business in India, the market for surrogacy or “wombs for rent” business is growing here.28 There is a soaring demand for surrogates in India because the foreigners can easily find surrogate mothers in India. The absence of a solid law had made surrogacy a knotty issue in India. Anand city in the State of Gujarat is a hub for surrogate mothers.

Along with Anand, cities like Indore, Pune, Mumbai, Kolkata, Thiruvananthampuram have emerged as surrogacy centres, there is a high demand in these centres from childless foreigners because of the economical prices, lack of restrictive laws and easy availability of poor Indian surrogates. Commercial surrogacy in India has exposed the vulnerable surrogate mothers to unwanted and severe risks. Moreover, they do not have any legal representation, no rights under the contract. The poor surrogates are not owed any compensation whatsoever should they fail to produce a child.

**LAW RELATING TO SURROGACY IN INDIA**

To avert the deception of the surrogate and the intended parents, there is an essentiality of adequate legal regulation for the practice of surrogacy. There was a significant absence of a governing legislation to regulate Surrogacy until 2016. In India, surrogacy is neither banned

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28http://www.stanford.edu/group/womenscourage/Surrogacy/
nor there are any regulations regarding it. Since, the practice of surrogacy is not directly declared to be unenforceable, it is believed to be a legitimate practice and hence it is exercised.

Commercial surrogacy was legalised in 2002 which led to burgeon the surrogacy firms which often act as agent between the foreign couple (intended parents) and the surrogates. But this legalization degraded the practice and eventually turned into a rent-like procedure. To curb this and to bring in an exhaustive legislation, Non-binding National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India were published by the ICMR, the National Academy of Medical Science and the practitioners of ART, the Ministry of Health and Family Welfare in 2005 after years of scrutiny and altercation.

This regulation mandated the surrogate mother to sign a contract before the commencement of the surrogacy procedure, this also stated that the surrogate mother is entitled to a monetary compensation and the amount of this would be decided by the couple and the surrogate mother, additionally, it specified that the mother must relinquish all the parental rights related to the surrogate child.

Even after this, there were inadequate legislations on the part of Government and hence the Assisted Reproductive Technology Bill, 2008 was drafted by the Indian Council of Medical Research, this Bill aimed to regularize and legalise various forms of reproductive technologies, including commercial surrogacy, this Bill also envisaged surrogacy agreements to be treated on par with other legal contracts so that they become legally enforceable which effectively meant that the provisions of the ‘Indian Contract Act’ of 1872 became applicable to a surrogacy agreement.

The Law Commission had submitted the 228th report on “Need for Legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a Surrogacy”. This report stated that the surrogacy agreement will contain the terms which would include the reimbursement of all the reasonable expenses for carrying child to full term, willingness to hand over the child born the commissioning parent(s), etc. The contract should take care of the life insurance for surrogate mothers, it should also provide for financial support if death takes place of the commissioning couple or individual before the delivery of the child.

Later, the Surrogacy Bill, 2016 was introduced in Lok Sabha, the Bill comes at the time when there was a huge demand for a legislation to cover the subject of commercial surrogacy. The bill bans commercial surrogacy and hence prescribes altruistic surrogacy. The Bill primarily
focuses on prohibition of potential exploitation of the surrogate mothers and children born through surrogacy, and preventing the commercialising of surrogacy, this bill provided that the surrogate mother will not be given any kind of monetary benefit or compensation except her medical and insurance expenses during pregnancy.

This Bill had a few cons, right to life under Article 21 enshrines the right to reproductive autonomy which includes the right to procreation and parenthood. The State cannot interfere with such rights as they are our fundamental rights. The Bill is violative to Article 14 of the Constitution as it allows surrogacy only for married couples and it disqualifies other people based on their nationality and sexual orientation, etc. In Devika Biswas v. Union of India, the Supreme Court recognized the right to reproduction as an important aspect of the 'right to life' under Article 21. Thus, restricting ART and surrogacy only to heterosexual relationships within a certain age group and denying reproductive choices to LGBT, single persons and older couples, would be a violation of Article 21. These restrictions also go against the concept of right to equality under Article 14.

The Bill blatantly ignores the fact that surrogacy is source of livelihood for the poor and vulnerable surrogate mothers, a complete ban on commercial surrogacy would deprive them their right to livelihood, it would impliedly mean that they have to undergo labour without any monetary compensation. In the case of Consumer Education and research Centre and Ors. V Union of India, the Supreme Court stated that the expression ‘life’ in Article 21 has a broad approach and it is inclusive of the right to livelihood. This principle came into light in the case of Olga Tellis V Bombay Municipal Corporation.

CONCLUSION:

Taking into consideration, the viewpoints expressed above, it is safe to say that surrogacy is a subjective concept. Every woman has a right over her body and hence it should not be held at stake by the Government completely regulating the reproductive choices for her. To regulate the practice of surrogacy, the Government should enact legislations that are compliant with the fundamental rights of the citizens. At the end, the surrogate should have the choice whether to opt for the practice or not, taking into consideration every important aspect of her life.

\[29^{(2016)} 10 SCC 726\]
\[30^{(1995)} 3 SCC 42\]
\[31^\text{AIR 1986 SC 180}\]
A BRIEF ANALYSIS ON SABARIMALA
TEMPLE ISSUE
BY CHANDRA SAI KUMAR, DSNLU

INTRODUCTION

Sabarimala Temple is one of the most prehistoric and prominent temples in India. It is the ‘Sacred Abode of Lord Ayyappa’ and one of the most important Hindu pilgrim centre in our country. And it is located at Sabarimala inside the Periyar Tiger Reserve in the Perinad Village, Pathanamthitta district, Kerala, India. It is one of the largest annual pilgrimage sites in the world with an estimate of over 40 to 50 million devotees visiting every year. In the past, women devotees of the menstrual age were not allowed to worship here because this ban was respectful of the celibate nature of divinity in this temple. A ruling by the Kerala Supreme Court had legalized this interpretation and had banned women from entering the temple since 1991. In September 2018, a Supreme Court ruling in India established that all pilgrims, regardless of gender, including women in the menstruating age group, entry to Sabarimala should be allowed. The Constitutional Bench of the Supreme Court has ruled that any exception imposed on women for biological differences violates the constitution - that the prohibition violates the right to equality under article 14 and religious freedom under article 25. This led to protests from people who opposed the SC Verdict.

HISTORICAL BACKGROUND

Why women (age 10-50) were barred to enter the Sabarimala Temple?

The temple belongs to Ayappa. Legends say that Ayappa is celibate so that he can focus on answering the prayers of his devotees. And he will remain celibate till the day kanni-swamis (first-time devotees) stop coming to Sabarimala. According to the puranas, Ayappa was born to destroy a female demon who, could only be defeated by a child born to both Shiva and Vishnu.

When Ayappa fulfils his purpose by killing the demon, a beautiful woman emerges from her body. She had been cursed to live as a demon. Later she asks Ayappa to marry her. Ayappa refuses, explaining to her that his mission is to go to Sabarimala where he would answer the prayers of his devotees.
However, he assures her that he will marry her when kanni-swamis stop coming to Sabarimala someday. She now sits and waits for him at a neighboring shrine near the main temple and is worshipped as Malikapurathamma. With hundreds of thousands of new devotees pouring in every year, and the people who are staying there used to say that hers is a long wait. And that is why women do not go to Sabarimala.

It is partly out of empathy for Malikapurathamma and her eternal wait and it’s also out of respect for Ayappa's commitment to answer the prayers of his devotees that women in this age group are traditionally stopped from entering. Since he is celibate, it is believed he should not be distracted by women.

Certain customs are to be firmly observed if one has to undertake a visit to Sabarimala. A pilgrim attending the Mandala Pooja should observe austerities for 41 days. During this period, the pilgrim should refrain himself from non-vegetarian food and bodily pleasures. Unlike some Hindu temples, the Sabarimala temple has no caste or creed restrictions. The temple is open to men of all ages and women who have passed their fertility age and before reaching puberty.

THE LEGAL BATTLE: FAITH VS EQUALITY DEBATE

1990- A petition was filed in the Kerala High Court seeking a ban on entry of women inside the Sabarimala temple.

1991- The Kerala High Court in S. Mahendran vs The Secretary, Travancore had upheld the restriction of women of certain age entry inside the holy shrine of Lord Ayyappa.

2006- A petition was filed in the Supreme Court by the Indian Young Lawyers Association seeking entry of women between 10 to 50 years.

2008- The matter was referred to a three-judge bench two years later.

January 2016- The court had questioned the ban, saying this cannot be done under the Constitution.

April 2016- The United Democratic Front government of Kerala led by Chief Minister

32 AIR 1993 Ker 42.
Oomen Chandy informed the SC that it is bound to protect the right to practice the religion of Sabarimala devotees.

**November 7, 2016**- The Kerala Government had told the Supreme Court that it was in favor of allowing women inside.

**2017**- The Supreme Court referred the case to the Constitution bench.

**September 2018** - In *Indian Young Lawyers Association vs The State Of Kerala*[^33]. A five-judge bench of Supreme Court allowed the entry of women of all ages in the revered shrine. The apex court, by a majority verdict of 4:1, on September 28, 2018, had lifted the ban that forbidden women and girls between the age of 10 and 50 from entering the Ayyappa shrine and had held that this centuries-old Hindu religious practice was illegal and unconstitutional.

The state government sought time to implement the verdict, however even after the entry was allowed a large number of followers camped outside the shrine prevent the entry of women of all ages.

Several review petitions have been filed urging the constitution bench which gave the ruling to review its decision.

**February 2019**- The order was reserved by the Apex court in the case of *Kantaru Rajeevaru vs Indian Young Lawyers Association*[^34].

**ARGUMENTS AGAINST WOMEN ENTRY**

The Respondents contended that the devotees of the Sabarimala Temple satisfy the requirements of being a religious denomination, or sect thereof, which is entitled to the protection provided by Article 26. This is a mixed question of fact and law which ought to be decided before a competent court of civil jurisdiction. The limited restriction on the entry of women during the notified age-group does not fall within the purview of Article 17 of the Constitution.

[^33]: WRIT PETITION (CIVIL) NO. 373 OF 2006.
[^34]: REVIEW PETITION (CIVIL) NO. 3358/2018.
This test was coined by the Supreme Court way back in the year 1954 in the case of *The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt*35. The Court, in this case, mentioned for the first time that what constitutes an crucial part of a religion will be established with reference to the doctrines of that religion itself.

Some believe that such a religious restriction is not strange because it is in the tradition to respect the divinity of the temple; There are also restrictions against men in several important temples, for example in the temple of Brahma, Pushkar. Sai Deepak, the lawyer who represents two groups of women and a Sangam supporter in the Supreme Court case, argued that the Ayyappan deity should be viewed as a person and that the constitutional right to privacy should be granted in accordance with Article 21. Some women choose not to enter the temple because they believe that this would be an insult to the love and sacrifice of Malikappurathamma. In the case of *Collector of Madura v. Moottoo Ramalinga Sethupathy*36, it is held that custom is one of the most important sources of Hindu law and Custom will prevail over the written law.

**ARGUMENTS IN FAVOR OF WOMEN ENTRY**

Those who agree to allow women to enter the Sabarimala temple argue that menstruation is not unclean and that women have the same right to enter the temple. Some argue that women are admitted to other Ayyappan temples, so the exception for Sabarimala is rare and inconsistent. A common criticism is that the claim that women are impure due to the physiological process of menstruation is gender discrimination.

According to left-wing historian Rajan Gurukkal, there is "neither ritual holiness nor scientific justification" for the dispute over menstrual pollution. They crowded into the temple with their wives and children of all ages until the 1960s.

From a legal point of view, all deities are considered artificial persons in the eyes of the law and have their own rights. However, the court ruled that these rights are not equivalent to those of natural citizens. In particular, that the constitutional fundamental rights of a natural citizen cannot extend to a deity. **A deity has no constitutional rights: Justice Chandrachud**

35 1954 AIR 282.
36 (1868) 12 M.I.A. 397
CONCLUSION

Finally, the Real goddess is allowed inside the temple.

To this end, the SC has come out with a landmark judgement, where they state that the interference of law discriminating against any section of society on the basis of religious customs cannot be taken into consideration. This should be taken as the beginning of the end of the interfering of the state in matters of faith, and should be seen positively.

Still Protests and hartals are going on regarding the sabarimala women entry. And there are some failed attempts for women while entering the sabarimala temple even after the SC verdict is delivered.
TRIBAL TREASON

BY SIMRAN DHANER & ANANYA PANDE, HNLU

“GRIEVANCES UNSPOKEN, BURDENS UNPROTESTED, DESTINY SUBMITTED”

INTRODUCTION

It’s a sad reality that tribals or Adivasis in our country are caught between two fires, neither they are able to totally depart from their old culture nor they are able to completely adapt the new ones. This is the biggest Treason ever committed not against only them but to the whole of the humanity. Tribal’s are the first ever human social group that ever existed. There are multiple definitions given by scholars for the term ‘tribe’ and ‘tribal’ but some of the common features of these definitions would be common ancestors, ‘collection of families bearing a common name, speaking a common dialect, habituating a common territory etc. The tribal population in the country, as per 2011 census, is 10.43 crore, constituting about 8.61% of the total population. Madhya Pradesh has the largest number of Scheduled Tribes (STs) contributing 14.69% to the total percentage of ST population.

ABSTRACT:

The tribal community is one of the most vulnerable communities in India. Poverty, infringement of rights, poor healthcare and isolation are just some of the many hurdles in the life of the tribal’s. Some other important problems pertaining to STs in India are identity crisis, reluctant urbanization, political absence, and exploitation of resources, forced conversion-reconversion (Ghar Waapsi) and more. And responsibility of these treasons is on no one else’s but our shoulders. Yes, there is no particular individual to blame for this but us only. Not to mention these take a heavy toll on the tribal population and it’s the affect of this betrayal only that they are led towards Naxalism and other serious crimes, this is trespass of their culture and they are incapable of becoming a part of the mainstream.

IDENTITY CRISIS-

It is seen from the inception of the modern era that the tribes have always been struggling to have their own unique identities but at more than one point of time it is seen that these identities are imposed on them. They are not a direct part of Hinduism but since our Constitution says that any person who is not a Muslim, Christian, Jew or Parsi will be considered a Hindu, so we
refer to them as Hindus. If we look way back to the line of our ancestors, we’ll find that at some point of time we all belonged to some tribe and that was the inception. The Constitution of India refers to tribes as Scheduled Tribe and defines it under its Article 366 (25). People think that Scheduled Tribes and Scheduled Castes have a little difference because both the terms have often been used together. This notion is completely wrong; as people fail to understand that the tribals do not belong to any caste and are not the SCs who were referred to as untouchables during the early period in India. Tribals are not any Jati but Janjati, not Dalits but Adivasis. They were never the part of the Varna Dharma of Hindus. They need to be identified properly, this crisis must end.

RELUCTANT URBANISERS-

Due to globalization and industrialization in such a vast scale, there have been drastic changes in the lives of the tribal people. These all changes for the sake of development of the nation has led to the urbanization and has made the tribal people reluctant urbanizer. They have a destitute standard of living and in the need of money they are forced to come out of their conventional living conditions. They are offered fanciful job opportunities as bait and they fall for it. They are trafficked or employed as sex workers, beggars and some are even subjected to sexual assault and forced surrogacy. They are forced to leave their native home in forests and become a part of the urban society where they feel out of the place. They are neither able to adapt to the urban society nor go back to their original habitat. They are stuck with no sense of belonging anymore.

POLITICAL ABSENCE:

We can very well question the existence of tribals in daily life, forget about them being represented politically. The tribals have always felt the lack of political representation, much needed in our country. They need some political leaders who can express the opinions of the tribes and put forth their demands and needs. They need representation so that their rights are not infringed and their issues get resolved through the judicial courts of the country. But we can very well see that there is paucity of powerful political leaders who belong to tribal background and even those who are actually present are just there because there is a provision for reservation in our constitution. This representation should go beyond mere representation to fulfill the basic need of tribes.
EXPLOITATION OF RESOURCES-

With the loss of land and the natural surroundings, there has been a breakdown in traditional form of living and practices of tribals. The idea behind the exploitation of the tribal land is quite simple, these are the lands untouched and unexplored by anyone and hence are very rich in its mineral content. The whole 100% of the country’s tin is found in Dantewada of Chhattisgarh which is a tribal area. Their lands have been taken away for various developmental purposes due to which they have lost all their habitat and all means of livelihood. Their lands mined, forests curtailed, rivers poisoned, skies polluted. This is very unfortunate that the rights which our constitution vows to protect are manipulated for economic gains.

GHAR WAAPSI-

Ghar Waapsi which means ‘home coming’, seeks to describe the coerced mass conversions to Hinduism\(^{37}\). At first, they were forcefully converted to Christianity made to forget their “Bonga devta” for the love of Jesus by the English during British regime and then orthodox Hindus reconverted many of these poor tribals back to Hinduism. This is followed even today in India. An important example worth mentioning here would be the Ghar waapsi campaign led by Dilip Singh Judeo, which began more than two decades ago in undivided Madhya Pradesh, present day Jashpur, Chhattisgarh. It had often sparked controversies with organizers claiming to bring Christians ‘back to’ Hinduism which they said had been their original religion. It seems that they don’t even possess freedom of religion.

REPERCUSSIONS OF TREASON-

Naxalism:

Term Naxalism is derived from the village Naxalbari in West Bengal. They are considered to be the far-left radical communists. It was a revolt against the landlords who bashed a peasant over a land dispute in West Bengal and slowly spread across other eastern states such as

Chhattisgarh, Jharkhand, Andhra Pradesh and Odisha. From Tirupati to Pashupati. They are far radical and violent, and pose a threat to the nation. Redundant act of violence, land theft and other atrocities against tribals push them towards Naxalism and hence then they start to take up weapons and opt for violent measures. This terribly hampers the peace and harmony of the country in drastic ways. An important example worth mentioning here would be of ‘Salwa Judum’ (2005), meaning ‘Purification Hunt’. It was led by Mahendra Karma, the Tiger of Bastar, in the districts of Dantewada and Bastar. It was an armed militia that was a part anti-insurgency operation to counter naxalite violence in the region. Local tribals were raised against their own brethren resulting in a civil war. Supreme Court outlawed and banned it, but it still exists in the form of Armed Auxiliary Forces, District Reserve Group and other vigilante groups working covertly.

Acculturation:

With modernization and globalization in full swing, tribal culture comes in contact with other cultures of India due to which there is revolutionary change in tribal culture. Nowadays we see tribals in shirt-pants not with dhotis or peacock feather over their head or so on which used to be their traditional attire. The severe impact of this acculturation is that tribal people are abandoning their own long run culture and traditions which is the heart and soul of a tribe. What is more disheartening is that nowadays their traditions and customs are not seen in their day-to-day life but merely during the festivals or national days through their traditional dance, cuisine and costumes. Culture for them is not merely a symbolic representation but a ‘way of life’.

CONCLUSION:

Even after numbering so many issues of tribal people, we can still expect some good things for them in near future as there are laws being implemented and even amended to protect their rights and interests. There is not really a need of different set of rights and laws as in Tribal Rights for them, Human Rights are enough. But the real question is if we consider them human or not.

INTRODUCTION

In the past few decades, sports apart from being a source of leisure has transformed into a multi-billion industry. Sports has become a multi-party involvement platform where there is constant interaction between sportspersons, organising committees, international organisation, broadcasters, sponsors, etc., from being a simple form of entertainment it has become a solid career for many individuals starting from the very sportsperson to the organisers, team owners, sponsors, etc. So, with involvement of several parties and huge money, there ought to arise disputes which mostly involve legalities. The types of dispute arising can be of contractual, labour related, corruption, sexual harassment, drug use, broadcasting rights, sponsorship disputes, intellectual property issues, etc. In India there are total 56 recognised sports bodies including hockey, football, boxing, shooting, etc.\(^{39}\) Respective bodies deals and decides any kind of issue arising in relation to that sport. But the decisions given by the organisation can be challenged in the national courts. But national courts are reluctant in deciding issues related to sports and another factor for parties not approaching courts against the decision of sporting organisations is the time-consuming procedure of courts. One of such instances could be the issue of the cricketer Azharuddin against whom allegations of match fixing was levied in 1996. He was banned by the sport organisation in 2000 and the matter decided by court in 2012. Though in the end he was declared innocent, but he has lost his remaining sports career. Therefore, in the recent times the alternative means developed to deal with sports cases i.e. arbitration. Even the Supreme Court of India emphasised that instead of national courts parties should sought to arbitration to resolve the issues.\(^{40}\)

NEED OF ARBITRATION IN SPORTS

Due to its peculiar characteristics, arbitration is the most suitable way of dispute resolution in sports related issues. The characteristics are-

1. **SPEED**: The major reason why arbitration is most suitable for sports related issues is its speed in disposing off the matters. As it is very evident that the career of sportsperson gets over


\[^{40}\] M.P. Triathlon Association, Secretary and Anr. v. Indian Triathlon Federation & Ors., (1996) 11 SCC 593.
with the age. They have a very limited span of career due to fitness issues and some issues may come up just before the tournament or even during the tournament. At that time speedy disposal of issues is required so that it will do the minimum harm to career of the sportsperson as well as the tournament. And in arbitration cases can be resolved within 24 hours as well.\(^{41}\) Time is money in sports. And arbitration by saving time is saving money for the parties.

2. **SPECIAL EXPERTISE**- Sports law is not a separate branch of law altogether. It is a mixture of contractual laws, competition law, tort law, narcotic substances law corruption laws, etc. The person dealing with sports issues must have a good knowledge over all these branches of law and a combined application of the same. It may be difficult for Courts to aware of all the aspects therefore, the specialized person i.e. Arbirtator will be able to resolve the issues efficiently and will be in better position to deliver justice.

3. **TRANSPARENCY**- It is often alleged that the decisions taken by the sporting organizations are not transparent is often backed by prejudice, grudge or corruption. In that situation the athlete has no way but to approach national courts but as we have already seen courts are reluctant to take sports disputes and don’t want to interfere in the autonomy of sports organizations.\(^ {42}\) Therefore, the most efficient way to resolve the issue is by way of arbitration where the arbitrators are independent and don’t hold any bias against any party and pass the order basing on the merits of the case.

### STEPS TAKEN IN SPORTS TOWARDS ARBITRATION

The major step taken towards adopting arbitration as a means of dispute resolution is by setting up of Court of Arbitration for Sports (CAS) in Lausanne, Switzerland in the year. The motive behind setting up of CAS was to provide a specialized forum to hear, decide issues related to sports and take out the disputes of international sports from national courts. Soon CAS was recognised as the Supreme Court of Sports Cases. In the last two decades thousands of cases have inflexed in the court and the court has successfully disposed the cases by means of arbitration. The different types of cases are original jurisdiction cases where international commercial contract expressly mention CAS to be the body to resolve the dispute and involve issues such as sponsorship, broadcasting rights, licensing and media rights, or contracts of club

\(^{41}\) According to the Ad Hoc Rules for the Olympic and Commonwealth Games, arbitral awards should be issued within 24 hours of the lodging of the application for arbitration, and the equivalent time limit for football’s European Championships and World Cup is 48 hours.\(^\text{41}\)/ At the recent London Olympics where 11 cases were dealt with, there was even a case where a matter was concluded within four hours of its filing.

owners with players, second type is of appellate nature where the parties appeal against the
decisions of the sporting organisation or after exhausting the legal remedies available to them.
Third kind is of Ad Hoc nature where CAS establishes many temporary Ad Hoc committees to
decide cases on urgent basis as and when dispute comes up before or during the games such as
Olympics games, FIFA, etc. This really helps make the game run smoothly and within
schedule by resolving the issues. Except for World Anti-Doping Agency cases in which CAS
has the compulsory jurisdiction, for other cases parties need to mention the arbitration clause
to approach CAS in their contract. CAS has by far been has been successful to resolve sports
issues, bring consistency in decisions and has enabled to create a sports law jurisprudence.

**INDIA’S SCENARIO IN SPORTS DISPUTE RESOLUTION**

In India the disputes in relation to sports are often decided by the respective sports organisation.
The Committee within the organisation resolves the dispute. The disputes that arise are mainly
disciplinary, drug use, discrimination, harassments, etc. these issues are first dealt by the
sporting organisations and if any of the parties is unsatisfied with the result, they can approach
the national courts. And if the parties have included the clause to approach the CAS they can
appeal against the decision. But it is very evident that only few cases have gone to national
court and similarly only few have gone to CAS over the past many decades. The reason for
not approaching national courts is the long- time taken to resolve the issues and the major
reason for Indian athletes not approaching CAS is the lack of resources. Arbitration is a process
where all the cost incurred are paid by the parties. The fees of arbitrators, procedural fees and
in CAS a court fee of 1000 Swiss Fr. must be paid. All the athletes against whom the decision
is given by the sporting organisations doesn’t always have the necessary means to approach
the CAS. Therefore, India should set up its own Court of Arbitration of Sports to be a body to
resolve the disputes of sports by means of arbitration and sports should be taken out of the
jurisdiction of national courts. India should follow the steps of New Zealand, UK and Germany
who have own national arbitration courts for sport’s disputes. Establishment of such court in

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43 *Id.* at 64.
44 The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal & Anr., AIR 1995 SC 1236; STAR India Private Ltd. v. Akuate Internet Services and Ors., 2013 SCC Online Del 3344, etc.
45 Indian Hockey Federation v. International Hockey Federation & Hockey India., CAS 2014/A/3828; Dutee Chand v. Athletics Federation of India & The International Association of Athletics Federations, CAS 2014/A/3759, etc.
India will make it easy for athletes and for other parties to get their issues resolved efficiently with better convenience and the entire procedure would be cheap in comparison to CAS.

**CONCLUSION**

Sports in India is very profitable and has the potential to become even more profitable and flourishing. India needs a better dispute resolution system which will lead to lesser chances of derogation of the sports industry. For this India needs to implement Arbitration as the mode of dispute resolution and needs to take immediate steps towards the implementation of the same.
SUBSTANCE ABUSE: DRUG ABUSE

BY Ms. JIGYASA JOSHI, VIPS

INTRODUCTION-

Drug abuse is viewed as a form of victimless crime as in case of a drug abuser, the individual is a victim and an offender at the same time. The drug abuser faces primary victimization in matters of addiction to a drug, deterioration of health and physical harm to oneself then faces secondary victimization of being stigmatized from the legal institutions, medical institutions, family, community and the society. The notion of drug abuse always represents use of few drugs like cocaine, heroin etc. in the mind of majority however apart from such drugs, daily usable items such as paint thinner, ink whitener are used as an alternative drug especially by those who can’t afford to purchase the mainstream drugs.

These cause equal amount of dependency like any other kind of synthesized substance leading to addiction among the youth. Health problems caused by dependency on drugs are numerous; one major health concern is the spread of HIV through intravenous abuse of drugs. Since one of the ways of transmission of the virus is use of contaminated syringes and injection equipment, a drug when injected intravenously with the same syringe which is normally shared among the abusers in a group gives rise to the threat of spread of HIV which may lead to AIDS (UNDCP, 1995).

Even though cannabis and other drugs may have been mentioned in religious and ancient texts it does not derive sanctity from them. Before 1985 there was no proper statute to regulate and control prevalence of drugs in society, it was only after India became party to Convention on Psychotropic Substances of 1971 that NDPS Act, 1985 was formulated with a view to curb the illicit production, manufacturing, storage, supply and consumption of substances that are banned under the law. All types of narcotic drugs and psychotropic substances which are used other than for medical purposes are prohibited under this law.

NATIONAL SURVEY ON PREVELANCE OF SUBSTANCE USE IN INDIA-

The Ministry of Social Justice and Empowerment, Government of India conducted a National Survey on Extent and Pattern of Substance Use in India through the National Drug
Dependence Treatment Centre (NDDTC), All India Institute of Medical Sciences (AIIMS), New Delhi during 2018.

The primary objective of the National Survey was to assess the extent and pattern of substance use in each state and UT. A combination of two data collection approaches was employed. A Household Sample Survey (HHS) was conducted among a representative sample of the 10-75 years old population of all the states and UTs of the country. During HHS, 200,111 households were visited in 186 districts of the country and a total of 473,569 individuals were interviewed. In addition, a Respondent Driven Sampling (RDS) survey was conducted covering 135 districts and 72,642 people suffering from dependence on illicit drugs.

**KEY FINDINGS:**

After Alcohol, Cannabis and Opioids are the next commonly used substances in India about 2.8% of the population (3.1 crore individuals) reports having used any cannabis product within the previous year. The use of cannabis was further differentiated between the legal form of cannabis (bhang) and other illegal cannabis products (ganja and charas). Use of these cannabis products was observed to be about 2% (approximately 2.2 crore persons) for bhang and about 1.2% (approximately 1.3 crore persons) for illegal cannabis products, ganja and charas. States with the highest prevalence of cannabis use are Uttar Pradesh, Punjab, Sikkim, Chhattisgarh and Delhi.

About 2.1% of the country’s population (2.26 crore individuals) use opioids which includes Opium (or its variants like poppy husk known as doda/phukki), Heroin (or its impure form – smack or brown sugar) and a variety of pharmaceutical opioids. Nationally, the most common opioid used is Heroin (1.14%) followed by pharmaceutical opioids (0.96%) and Opium (0.52%). Sikkim, Arunachal Pradesh, Nagaland, Manipur and Mizoram have the highest prevalence of opioid use in the general population (more than 10%).

The survey indicates that a sizeable number of individuals use Sedatives and Inhalants. About 1.08% of 10-75-year-old Indians (approximately 1.18 crore people) are current users of sedatives (non-medical, nonprescription use). States with the highest prevalence of current Sedative use are Sikkim, Nagaland, Manipur and Mizoram. However, Uttar Pradesh, Maharashtra, Punjab, Andhra Pradesh and Gujarat are the top five states which house the largest populations of people using sedatives.
Inhalants (overall prevalence 0.7%) are the only category of substances for which the prevalence of current use among children and adolescents is higher (1.17%) than adults (0.58%).

Other categories of drugs such as, Cocaine (0.10%) Amphetamine Type Stimulants (0.18%) and Hallucinogens (0.12%) are used by a small proportion of country’s population.

From the report it is plenteous that substance abuse is a problem in our society which is directly or indirectly a factor in other problems as well.

**ANALYSIS OF THE PROCEDURAL ASPECT OF THE ACT -**

The focus will be on initial step of procedure which has most important role in whole cycle, viz. section 41, 42 and 50.

Section 41: a Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf issue a warrant for arrest of any person whom he has reason to believe he has committed an offence, or for search. Also, Any officer of Gazette rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the central government including the paramilitary forces or the armed forces as is empowered on this behalf by general or special order by the central government and such officer may authorize any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such a person or search. Such officers under section 42 may between sunrise and sunset,—

(a) enter into and search any such building, conveyance or place; (b) in case of resistance, break open any door and remove any obstacle to such entry; (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe he is liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence; and (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe. In respect of holder of a license such power shall be exercised by an officer not below the rank of sub-inspector and if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.
Section 50: When any officer is about to search any person, if such person so requires, take such person without unnecessary delay to nearest Gazette Officer or Magistrate after requisition is made, the officer may detain the person until he can bring him before them. If no reasonable ground for search is seen, the person must be discharged, otherwise that search be made.

When an officer has reason to believe that it is not possible to take the person to be searched to the nearest authorized person without the possibility of the person to be parting with possession of any narcotic drug, or article or document, instead of taking such person to the nearest authorized person, may proceed to search the person as provided under section 100 of CrPC.

**CONCLUSION**

Section 50 binds the hands of the officer by seeking constant approval of magistrate unless exception comes into picture. Even though there are powers given to other officers under section 41 the case would eventually go to the magistrate for trial. The courts in India are overburdened, so unless there are special courts for narcotics cases only the problem will continue to prevail. The implementation of any law is dependent on the law enforcement.

When an individual is booked under NDPS case and brought to the police station, later produced in court, the individual is made to plead guilty and then pay an amount of Rs500 as bail charges and released on bail. The individual returns back to the community and in almost all cases, returns to abusing drugs again. This also brings an increase in the recidivism rates in cases of NDPS. This cycle causes a stress on the family of the drug abuser, on the community, on the police in matters of case load.

The NDPS Act sec 64A gives immunity from prosecution to the offender if the individual voluntarily agrees to undergo medical treatment for addiction from a hospital or institution recognized by the government. However, this is rarely practiced or known. Therefore, there is need to amend the Act by excluding ‘consumption’ and view substance abusers as victims not criminals.
UPLIFTMENT OF BAN ON CRYPTOCURRENCY:

A THEMATIC REVIEW

BY ARUSH MITTAL & MEHAK JAIN, HNLU

In the widely awaited apex court’s landmark judgment on the use and regulation of cryptocurrencies, a three-judge bench has struck down the prohibition by the Reserve Bank of India. The blanket ban which was imposed by the Reserve Bank of India in 2018 stifling crypto trading was revoked as it violated the principle of proportionality. This day is historic not just for the crypto community, but for the entire country as this decision would help in the development of technologies based on blockchain and distributed ledger system.

CRYPTOCURRENCY AND ITS HISTORY

As the name suggests, cryptocurrency is a digital or virtual currency secured by cryptography. It is based on blockchain technology and is not issued by any central authority, making it immune to government interference and manipulation.

Contrary to popular belief that cryptocurrencies first came into existence with the emergence of Bitcoin, systems like Flooz and DigiCash had tried their hand at making successful digital currencies in the 90s itself. However, due to different reasons such as financial problems and fraud, they failed to succeed.

Early 2009 saw the emergence of Bitcoin, described by its founder Satoshi Nakamoto as a “peer-to-peer electronic cash system”. Bitcoin was a decentralized network; meaning it was under no central controlling authority. This solved the problem of double-spending, the fraudulent technique of spending the same amount twice.

Owing to the success of Bitcoin, many other cryptocurrencies such as Ethereum, Ripple, Monero, NEO, etc. emerged on the scene to form a market which is now worth 237.1 billion U.S. dollars.

BACKGROUND FACTS OF THE CASE
On 5 April, 2018, RBI released a circular titled “Prohibition on Dealing in Virtual Currencies (VCs)” barring banks and other financial institutions from dealing in cryptocurrency. This led the crypto-based start-ups to close shop and relocate to more cryptocurrency friendly nations. According to Mr. Sidharth Sogani, the CEO of a crypto and blockchain-cantered analytical firm, India would have lost around $12.9 billion worth of market due to the proposed ban.

A group of petitioners, including trade body Internet and Mobile Association of India, had challenged central bank’s circular, in part, arguing that classification was unreasonable and the circular thrusted disproportionate restrictions.

The bench, headed by Justice Rohinton F. Nariman, delivered the judgement overruling the central bank’s circular on grounds of disproportionality and gave the Indian crypto-community a much-needed sigh of relief.

**CONTENT OF RBI CIRCULAR**

RBI had released a circular on 06.04.2018, which specifically dealt with virtual currencies and the prohibition on dealing with the same. This circular was statutory in nature, issued in exercise of the powers conferred by –

- Section 45JA and Section 45L of The Reserve Bank of India Act, 1934
- Section 35A read with Section 36(1)(a) and Section 56 of The Banking Regulation Act, 1949
- Section 10(2) read with Section 18 of The Payment Settlement Systems Act, 2007

The Circular is labelled as ‘Prohibition on Dealing in Virtual Currencies (VCs)’. It mainly talks about the following aspects:

- Due to the risk associated while dealing with virtual currency, entities regulated by the RBI shall neither deal in virtual currency nor provide services for facilitating any person or entity in dealing with or setting VCs.
- Entities that already provide such services shall exit their relationship within three months of the release of this circular.

**CONTENTION RAISED BY PETITIONER**
Contentions brought forward by Shri Ashim Sood and Shri Nakul Dewan on why trading of virtual should not be banned were as follows:

- Since RBI has accepted the fact that VCs are not legal tender and do not qualify as money (as they do not fulfil the four characteristics of money), it does not fall within the regulatory framework of the RBI Act, 1934 or the Banking Regulation Act, 1949.
- Organizations such as the Department of Economic Affairs of the Government of India, Securities, and Exchange Board of India and Central Board of Direct Taxes have recognized the beneficial aspects of crypto trading and Distributed Ledger Technology and have just recommended a regulatory regime whereas RBI holds a contra position without any rational basis.
- A lot of developed and developing economies of the world, multinational and international bodies and the courts of various countries have found nothing pernicious about cryptocurrencies.
- A total prohibition of crypto trading is violative of Article 19(1)(g) of the Indian Constitution as this activity was not declared unlawful by any law.
- The report of the European Parliament classified VCs into anonymous and pseudo-anonymous. One of the reasons for the RBI to ban crypto trading was the anonymity of transactions. Since every transaction is not anonymous, only anonymous VCs should have been banned.
- A decision to prohibit an article as ‘res extra commercium’ is a matter of legislative policy. This prohibition must arise out of an Act of the legislature and not by a notification issued by an executive authority.
- The RBI Circular which dealt with the prohibition of VCs is based on unreasonable classification and imposes disproportionate restrictions.

CONTENTION RAISED BY RESPONDENT

Shri Shyam Diwan, learned Senior Counsel, put forth RBI’s contentions. They can be summarized as follows-

- VCs do not fit into the definition of a currency, i.e. they fail to fulfil criteria such as store of value and medium of payment and therefore cannot be branded as such
• The circular issued by the RBI was well within the ambit of powers conferred on the RBI under the Banking Regulation Act, 1949, the Reserve Bank of India Act, 1934 and the Payment and Settlement Systems Act, 2007

• RBI gave three months’ time to the affected parties to sever their bond with the banks, and also issued repeated cautions issued to stakeholders through press releases from 2013. By the means of press conference, they addressed the potential financial, legal, security related risks regulators would be exposing themselves to. Therefore, the impugned decision was in no way disproportionate or excessive

• No complete ban imposed on VCs or use of distributed ledger technology

• Took the decision in view of public interest which it is empowered to do, to protect the interest of consumers and payment and settlement systems of the country, and protect regulated entities against the uncertainty and risk associated with VCs

• Owing to their anonymity, VCs can be misused for carrying out illegal activities

• They have potential to mess with the monetary stability and credit system of the country

AFTERMATH OF DECISION

The 180-page-long judgement has brought a clear understanding of crypto-currencies, their legal standing and has set a precedent across many countries in the world. The three-Judge bench comprising of Rohinton Fali Nariman, Aniruddha Bose and V. Ramasubramanian brought the much-needed respite for crypto trading in India.

According to Sumit Gupta, co-founder and CEO of CoinDCX, “The uplifting of the ban by the Supreme Court is going to open new opportunities for India in terms of investments, economic growth, financial inclusion, and market maturation.”

Shivam Thakral, founder and CEO of BuyUCoin called the judgement a proud moment for Indian crypto industry and wrote, “The biggest plus point with the judgement is the backing of the Supreme Court of India, their faith in cryptocurrency as technology.”

Tanvi Ratna, founder and CEO of Policy4.0 gave a pre-verdict analysis stating that a win would mean, “a resurgence of liquidity and resumption of activity with exchanges and other start-ups for the ecosystem.” This would catalyse the potential for the use of blockchain technology in various fields.
CONCLUSION

With this landmark judgement, India can finally look forward to hop on the crypto bandwagon. The central bank’s focus should now be regulating the trade of cryptocurrencies and setting up a new, calibrated framework to deal with the same. India should study legislations of other countries, such as that of Japan and the USA, and incorporate their best practices to develop a customised structure to manage cryptocurrencies aligned with our needs.
DEATH PENALTY IN INDIA.

BY- SIDDHANT TIWARI, DSNLU

“The death penalty is not about whether people deserve to die for the crimes they commit. The real question of capital punishment in this country is, do we deserve to kill?”

A matter of much questioning and Debate, India is amongst one of the 55 retentionist countries who have retained Death Penalty by hanging as its mode of execution which is duly specified under the Code of Criminal Procedure from section 51 to 54. Although these countries prescribe death sentences, there is no international consensus regarding its legality. Indian legal system and jurisprudence has also struggled with the constitutionality of death penalty and outlining the circumstances in which it can be granted. As it was noted in the legendary case of Mithu v. State of Punjab which struck down mandatory death sentence under the Indian Penal code but mandatory death sentences provided under specific criminal legislations the Arms Act.

Death penalty is a legal penalty in India. As per Indian laws, the execution of death sentence is done in two ways i.e. hanging by neck for executing a death sentence for civilians and also by shooting in cases relating to armed forces. While talking about its timeline it has been carried out in five instances since 1995, while a total of thirty executions have taken place in India since 1991, the most recent of which was on 20th March 2020. In Independent India, the first case was that of Nathuram Godse and Narayan Apte in the Mahatma Gandhi assassination case on 15 November 1949, other being the case of Dhananjay Chatterjee in 2004 regarding the rape and murder case of a fourteen year schoolgirl, Ajmal Kasab convicted under the 26/11 attacks, Afzal Guru convicted under the 2002 Parliament bombing case and the most recent case of Yakub Memom convicted of the 1993 Bombay bombings. Four Nirbhaya Gang rape convicted of raping a girl on the night of 16th Dec, 2012, which resulted in nationwide protest.

Both Qasab and Guru were executed in secrecy without informing their family members or the public of the President's decision. The world got to know only after the hangings had been carried out. And the most recent case to be noted here four men found guilty of the gang rape and murder of a woman on a bus in Delhi in 2012 were executed.
As per Project 39A which is inspired by the Article 39-A which specifies the provision of values of equal justice and equal opportunity, a report which is being presented by the National law University in Delhi it is being noted between 2000 and 2014 trial courts sentenced 1,810 people to death and regarding its history it is being noted 720 prisoners have been executed in India since 1947. Through there has been a practice revolving around the trial courts to give death sentences Supreme Court on the other hand, has been in the process of commuting death punishments to life imprisonments.

**426 prisoners were on Death row as on 31st December 2018**

**378 prisoners were on Death row as on 31st December 2019**

It has also been noted that the cases for death row victims is maximum in the states of Maharashtra, Uttar Pradesh and Madhya Pradesh. There have been a sparkling debate over the topic of death penalty and many jurists and judges are of the opinion of abolishing or banning it while many are supporting the concept of death penalty and consider it as a strong deterrence as opposed to life imprisonment but speaking in today’s scenario Death penalty proponents often imposes their arguments in the manner which sheds light on their perspective of most effective manner of execution and those arguments are noted as:

- It is the strictest form of punishment and thus the most effective in deterring crime.
- It makes more sense economically to give death penalty than to incur the cost of a prisoner which creates extra burden on the exchequer.
- Capital punishment has certainty. In most cases where life imprisonment is awarded, the prisoner manages to procure a pardon after a while.

These arguments have also been supported by the Thirty-fifth Report of the Law Commission which argued in favor of the retention of death penalty, and held the view that ‘Experience of other countries could not be conclusive for India. Need for deterrent control provided by capital punishment is greater in various classes of society. There is greater danger in India of increase in violent crimes if capital punishment is abandoned, particularly in respect of professional criminals’.

Their major argument contests that:
When we make examples of people convicted of a crime, a message goes out to the rest, whether as a moral wrong or for fear of retribution, it does affect the society and carries the message across. It creates a conscious inhibition towards the action penalized. The harshness and strictness of the penalty has been proven to act as deterrence, and we do not even need statistics to prove this the criminal justice systems in all countries of the world work on the principle of deterrence.

While these points denote the atrocity of the proponents towards the culprits these arguments are quite flawed in the sense as it shades a sort of eye to eye philosophy or a revengeful attitude which is not good for distributive justice as it then focuses on retributive justice which does not concerns the moral and human rights of a particular individual and thus violating the basic provisions of UNHRC and talking about these facts death penalty is being abolished and banned in many UN countries and their reasons for this considers the answers of some questions too which is being considered important while dealing it with respect to INDIA:

Is death penalty considered a strong deterrent?
Will it stop Rape or will encourage the rapist to stop doing such crimes?
Is Death penalty really a solution?

Let’s talk about the answer to all these questions which could be specified in points:

- There is no statistical report which proves its deterrence effect as even after imposing death penalty to many victims, even after the amendment in the POCSO bill child which imposes death penalty child rape still remains to be in process. Reports by the National law University, Delhi i.e. the Project 39A report states that death penalty has not proven to be a strong deterrent or an effective measure as the mode of execution even when seen with to the TADA acts, terrorists especially the jihadis have been engulfed with the ideology to not even fear from death for their sins as their Allah only calls for it and by doing after death they could rest peacefully in the heaven.

- Death penalty imposes or is based upon retributive justice and is far away from the Utilitarian theory which states that punishment is a necessary evil and reasons that
punishment is inflicted to curb crime should be fair, just and reasonable and thus justice prevailed should be distributive in nature considering or emphasizing the basic moral values of human rights and also as it is specifically noted by Ban Ki Moon on the world day i.e. 10th October in the UN General Assembly that ‘Death penalty has no place in the 21st century, Let our actions be guided by the moral compass of human rights’. There seems to be a general consensus among the developed nations to either abolish capital punishment or severely limit it.

- Also being stated by the report the major culprits for the death penalty i.e. 2/3rd of the culprits comes from a lower or a poor background which is an essential point to be noted while discussing it under the sphere of human rights as seen in the case of Dhananjay Chatterjee and Afzal Guru who were executed in secrecy without informing their family members or the public of the President’s decision. The world got to know only after the hangings had been carried out and whose crimes are now being contested or debated in the recent scenario that they were not being able to prove their innocence as coming from poor background and thus not able to arrange good advocates for themselves and thus were being thrashed tortured by the state who though were innocent.

- Also being noted is the point that it is arbitrary subjective and unreasonable as seen in the context of India it is based on the arbitrary test of rarest of rare doctrine which was established in the case of Bachan Singh v. State of Punjab and is now being rested on the subjective opinion of the judges which they deemed fit to be justified under the rarest of rare doctrine and being seen in the context of development or the image of one country in the international scenario this thing sheds a dark image of one country as it discusses its most important fact of execution on the basis of its subjectivity by the judges dealing the death penalty of a particular victim.

- Also, in the present scene as being noted that in many states specially in Madhya Pradesh during the Shivraj Singh Chauhan government there were points for public prosecutors for bringing the victims to death penalty and thus encouraged corruption and thus was not justified.
• And also, a very essential point being noted is that the Nirbhaya funds which are being allocated to the state are not utilized properly by the states as seen in case of Hyderabad incident where the govt itself had not fully utilized the Nirbhaya fund.

• Thus according to my studies in the respective topic there is a strong view to find reasons for such crimes that give rise to such death penalties being imposed which would then effectively be in consonance with the human rights as well as be a effective deterrence for eliminating crime in the society.