# NUJS Journal of Regulatory Studies

## Journal of the Centre for Regulatory Studies, Governance and Public Policy

2456-4605 (O)

Vol. 2, Issues 3-4 & Vol. 3, Issues 1-2 | Jan-Jun. 2018



**Centre for Regulatory Studies, Governance and Public Policy**

P.C. Abhijeet Nandy

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**ISSN: 2456-4605 (O)**

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*Research Fellow and Coordinator*
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NUJS Journal of Regulatory Studies was first brought out in October 2016. The ISSN (O) assigned to it by the ISSN National Centre, India (National Science Library) is 2456-4605. It is being published by the Centre for Regulatory Studies, Governance and Public Policy (CRSGPP) at the West Bengal National University of Juridical Sciences, Kolkata. It is a quarterly, on-line, peer reviewed journal, which focuses on issues that relate to law, governance and public policy. The main motto of the journal is to publish *bonafide* quality articles on socio-legal matters of contemporary relevance. Papers contemplated to be published in the journal are judged not only on the basis of their structural and functional relevance but also on their ability to convince the lay reader that some path-finding work in the field regulatory studies, governance and public policy is in the offing.

Comments and contributions are sought from academicians, lawyers, students and professionals. These should be sent to the Editor at the following address:

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# Message from the Vice-Chancellor

The NUJS Journal of Regulatory Studies has been conceived as a premier journal for publication of research in the field of law and public policy. In an increasingly data driven world, public policy oriented research centred on thorough theoretical concepts with the analysis of empirical data is imperative. This journal aims to provide a platform for innovative researchers whose data driven research creates knowledge that is conducive to the creation of long term strategies and goals for policymakers in India and abroad.

The Centre for Regulatory Studies, Governance and Public Policy (CRSGPP) actively engages stakeholders for the formulation, analysis and oversight of public policy. This journal reflects the ethos of CRSGPP and reflects its commitment to democratic values, academic excellence and legal research of contemporary relevance.

The Journal presently publishes articles on issues of national and international relevance in consonance with the aforementioned objectives. I hope that CRSGPP continues to enlighten the legal fraternity, policymakers as well as members of the public as it continues its journey of excellence and innovation.

**-Prof. Dr. N.K. Chakrabarti**

# Editor's Note

The NUJS Journal of Regulatory Studies started its journey in 2016 to promote legal research focusing on policy formulation. In 2019, the journal gets a new dimension with the priority inclusion of cutting edge empirical research papers from across Asia.

The new board of editors accompanied by a robust peer review team gives the journal the much needed international status. Additionally, the new shape of this open access online journal authorizes the access of the entire edition as a single file.

The journal explores through its research papers the various challenges and highlights various human rights issues. The platform of NUJS Journal of Regulatory Studies provides the young minds to find solutions beyond convention and also gives the right impetus to the centre to explore avenues to recommend such policy formulation to the concerned forum.

I am really thankful to the authors for such vivid contribution. I also take this opportunity to thank the esteemed members of the Advisory Board, Editorial Board, Peer Reviewers and my entire team who has worked relentlessly to finish the work in time.

**-Dr. Shambhu Prasad Chakrabarty**

**Head and Centre Coordinator**

# Articles

## Assessment of Nutritional Status among the Lodha Woman in village of Paschim Medinipur: An empirical statistical analysis

*Sunita Bera & Dr. Santanu Panda*

**Abstract**

*Tribes constitute about 10% of the total Indian population. They are found in most parts of the country and are generally economically deprived. Tribe is a social group speaking a distinctive language or dialect and possessing a distinctive culture, mainly living in hilly areas and forest areas. The Lodhas are treated as one of the denitrified communities by the Central Government and now treated as a Particularly Vulnerable Tribal Groups in West Bengal. In West Bengal, Lodhas are mainly concentrated in the districts of Paschim (West) Medinipur and Jhargram. In the pre-Independence period they were treated as a Criminal Tribe till the revocation of the Criminal Tribes Act in 1952.Nutrition is the science that deals with the digestion, absorption and metabolism of food, i.e. the utilization of food in the body. It may be defined as the science that interprets the relationship of foods to the functioning of living organism. It includes the intake of food, liberation of energy, elimination of wastes and all the processes of synthesis essential for maintenance, growth and reproduction. Anthropometric measurement helps in the assessment of nutritional status and physical growth. Health and nutrition, particularly in the tribal societies, is intimately connected with forest. It has been reported in various studies that the tribals who are living in remote areas have a better health status and more balanced food than those living in less remote and depleted forest areas. The purpose of this study was to evaluate the nutritional status of Lodha women. This study design was a questionnaire-based cross-sectional study. The study revealed that dietary intake of tribal women is poor than those of their adult male counterpart. The study conducted 71 Lodha woman in a remote village of Paschim Medinipur. According to Kuppur's swami Scale the socio-economic status is Upper Lower (IV) class. The prevalence of thinness among the study women was 1.41% severe thinness, 8.45% moderate thinness, 43.66% mild thinness. The study conclude that The Lodhas are more back warded tribal populations than other tribal group and they are also socio-economically back warded compared to other population groups. The*

*average intake of all nutrients was lower than the ICMR standards. So, in connection with anthropometric variable of tribal women also found lower than the ICMR standards.*

***Keywords:*** *Lodhas. ICMR standards, health, nutrition*

## Introduction

In Greek 'Tribe meant their geographical division.' Tribe is a social group speaking a distinctive language or dialectand possessing a distinctive culture, mainly living in hilly areas and forest areas. Inthe remote past, they were hunter and food gatherers. A person is identified as amember of tribal (scheduled tribes) on the basis of the prescribed lists of scheduled tribes as per the scheduled tribes lists (Amendment) order 1976 issued by president ofIndia. A member of a ST can profess any religion.

Several studies conducted on various tribal population living in different parts of

India have reported them to be socially and economically disadvantaged groups andtheir diets to be nutritionally deficient (Singh and Rajyalakshmi, 1993; Mishra et al.,2002; Taneja and Saxena, 1998; Murugesan and Ananthalakshmi, 1991). Tribal livingstyle differs place to place and also differs from the general populaion and furtherthey live in dense forests and near to nature. It is obvious that food problems andhabits of different tribes are bound to be different from those living in urban areas.

The tribes of India comprise about 8% of the total population of the country havingprobably the largest number of tribal communities in the world (Topal and Samal,2001). Bhils constitute the third largest tribal group of India, next to Gonds andSanthals. They are also one of the largest schedule tribes of Rajasthan and constitute44.50% of the total tribal population of Rajasthan (Bhasin et al. 2007). Limited dataare available on anthropometric and body composition characteristics and nutritionalstatus of tribal population of India. [1]

Biologically, an adult is a human being that has attained reproductive age. In humancontext, the term adult has additional meanings associated with social and legalconcepts; a legal concept for a person who has attained the age of maturity and istherefore regarded as independent, self-sufficient and responsible. Majorcharacteristics of adulthood are the "settling–down age", reproductive age, problematic age, period of emotional tension, period of social isolation, time of valuechange, time of adjustment to new life style, creative age and time of commitment.

## LODHAS

The Lodhas are now treated as one of the denitrified communities by the Central Government. In West Bengal, Lodhas are mainly concentrated in the districts of Paschim (West) Medinipur and Purba (East) Medinipur. In the pre-Independence period they were treated as a Criminal Tribe till the revocation of the Criminal Tribes Act in 1952. In the first Census of India after Independence, the Lodhas were recorded as a scheduled caste and their total population was

[1] Bisai, S., Bose, K., Gangula, S., Mumtaz, H., Mukhopadhyay, A. and Bhadra, M. Sexual dimorphism and age variations in anthropometry body composition and nutritional status among Kora Mudi tribals of Bankura district, West Bengal, India. Stud. Tribes and Tribals **2:** 103-109, 2008.

returned to be 8,346 only in West Bengal. According to the Census of 1951 the Lodhas were found to be distributed in the districts of Burdwan, Birbhum, Bankura, Midnapore, Hooghly, Howrah, 24 Parganas, Calcutta, Murshidabad and Jalpaiguri. In 1951, they were not found in the North Bengal districts like Nadia, Maldah, West Dinajpur, Darjeeling and Cooch Behar. In the same Census the total number of Lodhas in erstwhile Midnapore was 7040, that is 84.35 percent of the then total population of Lodhas in West Bengal. The Lodhas of Midnapore are said to be identical with Savaras and Sahars but in Orissa they are different. They marry young but they do not practice widow remarriage or divorce. Their traditional occupation is collection of jungle produce, but in Midnapore they also work as agricultural labourers and firewood collectors and sellers. The Census of 1981 shows that the total population of the Lodhas including the Kharias and the Kherias of West Bengal was 53,718. The Lodhas were concentrated in erstwhile Midnapore District and their total number according to the Census of 1981 was 16,534. Besides West Bengal, they are also found in the Mayurbhanj and Baleswar districts of Orissa, Originally, they inhabited hilly rugged terrains covered with jungle. Their mother tongue is Lodha, which is close to Savara, an Austro-Asiatic language. They are fluent in Bengali. Traditionally, they were forest dwellers but now they have started cultivation either as owners of land or as agricultural labourers and are also engaged in hunting and fishing. More than 80 percent of them follow Hinduism with traditional belief in spirits and nature. At present the Lodhas do not live exclusively in the forest covered areas, but have spread out in other deforested regions where they are found to be working as agricultural and non-agricultural labourers. But their main economy is still based on collection of minor forest products, such as leaves for preparing leaf-plates for sale. According to Bhowmick, the Lodhas were found to collect edible roots and fruits for household consumption and sell the surplus in the local markets. They are also found to be engaged in the collection of tussore cocoons and sell them in the market for cash. Lodhas also catch snakes and lizards and sell their hides and consume the flesh of these animals. They also catch fish and tortoises from the water bodies for domestic consumption as well as for sale.Women among less privileged communities in India.

Dietary energy intake is not adequate to compensate their heavy physical work load.The National Nutrition Policy (1993) advocates a comprehensive intersect oral strategy for alleviating all the multi-faceted problems of malnutrition and its related deficiencies and diseases. While malnutrition is prevalent among all segments of thepopulation, but women are highly affected by malnutrition because their nutrientsintake level is low, beside this they have several duties to be performed such as childbearing, child rearing and other domestic duties etc.

In tribal area especially, tribal women are sufferer in all type of condition. Because they have lack of knowledge, lack of availability, poor economic condition and their geographical condition are responsible for their poor nutritional status.

Thereafter when they go through the period of pregnancy and lactation their nutritional status become more poor because of the increased requirement of nutrients specially iron, calcium, energy, protein and vitamin A etc. during these period. Women with poor health and nutrition are more likely to give birth to low weight infants. They are also likely to be unable to provide adequate food and proper care for their children. [2]Food, which provides our body all the nutrients such as carbohydrates, fat, protein, vitamins, minerals and water, does influence our health status.

Nutrition is the science that deals with the digestion, absorption and metabolism of food, i.e. the utilization of food in the body. It may be defined as the science that interprets the relationship of foods to the functioning of living organism. It includes the intake of food, liberation of energy, elimination of wastes and all the processes of synthesis essential for maintenance, growth and reproduction. The fundamental activities are characteristics of all living organism from the simplest to the most complex plant and animals.

Body requires different nutrients in a varying proportion so as to maintain proper body functions. By the time we reach adulthood, particularly in terms of height and body stature, stops to a certain extent. Is to thus that there is not much of apparent growth but the, the breakdown and repair of body tissues go on continuously even among adults. Therefore, adequate amounts of all the essential nutrients need to be provided to adults through their diets for maintaining both physical and mental health.

The consumption of a wide variety of nutritious food is important for women's health. Adequate amounts of protein, fats, carbohydrate, vitamins and minerals are required for balanced diet. Meat, fish, eggs and milk as well as pulses and nuts, are rich in protein. Green leafy vegetables are rich in a source of iron, folic acid, vitamin C, β-carotene, riboflavin and calcium. Many fruits like amla and guava are good sources of vitamin C. Bananas are rich in carbohydrates, papayas, mangoes, and other yellow fruits contain β-carotene, which is converted to vitamin A. Vitamin A is also present in milk and milk products, as well as egg yolks. [3]

Malnutrition has been defined as a pathological state resulting from a relative or absolute deficiency or excess of one or more essential nutrients, this state being clinically manifested or detected only by biochemical, anthropometric or physiological tests.[4] Malnutrition increases the risk of mortality and morbidity. Nutritional profile of tribal's is low as compared to the national average. Few studies have revealed the pathelic situations with regard to chronic energy and micro nutrient deficiencies among tribal communities.

[2] Chatterjee, M. Indian Women: Their health and economic productivity. World bank discussion papers. 109, Washington, D.C; World Bank, 1990

[3] Gopalan, C., Ramasatri, B.V. and Balasubramanian, S.C. Indian Council of Medical Research, National Institute of Nutrition, Hyderabad, 1996

[4] Jelliffe, B.D. The assessment of the nutritional status of the community. Monograph Series No. 53, world health organization, Geneva: 63-78, 1996.

In a country like India, women face serious health problems due to socio-economic ,environmental conditions, nutrition and gender discrimination. Diet and health are synonymous with the well being of an individual. In absence of proper and adequate nutrition, a person can develop several developmental malformations. Many research studies have documented that malnutrition affects body growth and development. Nutrition is an important complement of physical fitness program.[5] Good nutrition is not only important to help improve performance but also promote healthy dietary practices in the long term.[6]

The physical well being and maintenance of normal health of an individual is closely related to the status of nutrition. Proper nutrition keeps man healthy and fit where as inadequate or improper nutrition reduces fitness and causes susceptibility to disease. Nutritional status refers to the intake of nutrients and their utilization.[7] The need for assessment of the nutritional status is to identify individuals or the community at risk due to malnutrition and to provide nutritional aid. Food is a pre requisitenot only for attaining good health but also for maintaining adequate growth and body equilibrium. The choice of food is deeply related to life style of an individual and the conditions, in which she is living. However the food habits are greatly influenced by thoughts, beliefs, notions, traditions and taboos of the society. Apart from these socio-cultural barriers, the religion, education and economic factorsare the determinates of the food pattern of an individuals in a given society. That iswhy the food patterns are bound to vary from a one society to other, one area to otherand so on. Life cannot be sustained without adequate nourishment. Man needs adequate food for growth, development and healthy life.

Dietary habits of populations in different regions of the world have been determined mainly by the availability of foods locally grown and which are in practice in this particular area. Man has involved his habitual dietary pattern to maintain good health, perhaps after a good deal of trial and error. Satisfaction of hunger is usually the primary criteria for adequate food intake for sustaining healthy and active life. Butdiets should be planned on sound nutritional principles.

Man needs a wide range of nutrients to perform various functions in the body and to lead a healthy life. The nutrients include proteins, fat, carbohydrate, vitamins and minerals. These nutrients are chemical substances which are consumed daily are classified as cereals, legumes, nuts and oil seeds, vegetables, fruits, milk and milk products and flesh foods (fish, meat and poultry). Most of the foods contain almost all the nutrients in various proportions, some foods being rich in certain nutrients. Depending on the relative concentration of these nutrients, foods are classified as protein rich foods, carbohydrates rich foods and fat rich foods etc. some foods provide only a single nutrient as in the case of sugars

[5] Babitha, B. Nutritional status of adolescent girls and impact of short term food supplementation with special reference to vitamin A and hemoglobin. J. Commun. Guidan. Resear. **20**: 121-131, 2003.

[6] Jonnalagadda, S.S., Rosenbloom, C.A. and Skinner, R. Dietary practices, attitudesand physiological status of collegiate freshman football players. J. Strength Cond.Resear. **15**: 507-513, 2001.

[7] Bera, S. Food and nutrition of the Tibetan women in India. Anthropolo. **6:** 175-180, 2004.

which are source of only carbohydrates while oils, ghee etc. provide only fat.

Nutrition is responsible for the nutritional status of an individual person. Good nutrition and malnutrition are directly linked to the nutritional status of a person.

Nutritional status must take into account the state of the body before and after experiments, as well as the chemical composition of the whole diet and of all material excreted and eliminated from the body. Nutritional status can be measured in four ways: Anthropometric measurement, dietary intake, biochemical and chemical examination.

Anthropometry refers to the measurement of the human individual. As an early tool of physical anthropology, it has been used for identification, for the purposes of understanding human physical variation, in pale anthropology and in the various attempts to correlate physical with racial and psychological traits. Anthropometric measurements are frequently used to diagnose malnutrition in clinical settings. The standard values given by national centre for health statistics will be used for to calculate anthropometric measurements. Anthropometric measurement helps in the assessment of nutritional status and physical growth. The anthropometric measurement is influenced by different factors like religion, social, cultural background, customs, and dietary habits, biological and genetic influences. Adult growth associated with poor intake of all nutrients due to improper dietary habits, make as women at high risk for anaemia and nutritional deficiency status.

Anthropometry offers a reliable method to assess the nutritional status of the women. It is the single most universally applicable, inexpensive and non invasive method available to assess the size, proportion and composition of human body. The physical well being and maintenance of normal health of an individual is related closely to his status of nutrition. Life cannot be sustained without adequate nourishment. Man needs adequate food for normal growth and development and maintenance of body tissues.

Nutrition is the science that deals with the digestion, absorption and metabolism of food, i.e. the utilization of food in the body. Proper nutrition keeps man healthy and fit whereas inadequate or improper nutrition reduce fitness and causes susceptibility to diseases. [8] Therefore, nutrition is responsible for the nutritional status of an individual person. Good nutrition and malnutrition are directly linked to the nutritional status of a person. The anthropometric measurements influenced by different factors like religion, social, cultural background, customs, dietary habits, biological and genetics influences.

Anthropometric and nutritional characteristics are related to genetics, environmental, socio-cultural conditions and to lifestyle, health and functional status. This makes it difficult to give standard interpretation of their values. Anthropometry is an essential tool in geriatric nutritional assessment to evaluate underweight and obesity conditions,

[8] Bhardwaj, S. and Kapoor, S. Nutritional anthropometry and health status: A studyamong Dhanka Tribals of Rajasthan. Anthropolo. **9(3)**: 211-214, 2007.

which are both important risk factors for severe diseases.[9]

The BMI shows the relation between a person height and weight and can be used to indicate whether the person has a normal weight or if she is underweight or overweight. BMI can also be called the Quetelet index. It is important to note that BMI is not actually a measurement for the percentage of body fat, and is not applicable to everybody (e.g. persons with a large muscle mass or body builders). The BMI table that is being used for adult is not applicable to children and teenagers.

BMI is simple index of weight for height that is commonly used to classify underweight, overweight and obesity in adults. It is define as the weight in kg divided by square of the height in meters (kg/m2). For example, an adult whose weight is 70 kg and height is 1.75 m will have a BMI of 22.9. BMI values are age independent and the same for both sexes. However, BMI may not correspond to the same degree of fatness in different populations due, in part, to different body proportions. The health risks associated with increasing BMI are continuous and the interpretation of BMI grading in relation to risk may differ for different populations. BMI is an important index in evaluating the state of health of the population. BMI was recommended as the basis for anthropometric indicators of thinness and overweight.[10] The term 'underweight' in adult assessment has been applied to individuals of low body weight relating to height, generally expressed in terms of BMI. BMI was found useful for the assessment of the current or short duration malnutrition among adults.[11] It is used as a measure of underweight and Chronic Energy Deficiency (CED). [12]Vary low BMI reflects low fat and fat free mass, which is typical of CED. The condition of low BMI in adults (also terms as 'thinness'), which results in CED, can be graded on the basisof BMI into mild thinness (BMI< 18.49 > 17.0), moderate thinness (BMI<16.99 > 16.0) and Severe thinness (BMI < 16.0). BMI in the range of 18.5 to 24.99is considered as normal and individuals above a BMI of 25 are categorized as overweight. Although adults nutritional status can be evaluated in many ways the body mass index (BMI) is most widely used because it's use is inexpensive, non-invasive and suitable for surveys.[13]

**Forest, Health and Nutrition:**

Health and nutrition, particularly in the tribal societies, is intimately connected with forest. It has been reported in various studies that the tribals who are living in remote areas have a better health status and more balanced food than those living in

[9] Jensen, G.L. and Rogers, J. Obesity in older persons. J. Am. Dietetic. Assoc. **98**:1308-1311, 1998.

[10] Rolland- Cachera, M.F. Body composition during adolescence: methods, limitations and determinants. Hormone Resear. **39** (suppl.): 25-40, 1993.

[11] Reddy, P.Y.B. and Rao, A.P. Body mass index among the sugalis, a tribal population of Cuddapah district, Andhra Pradesh. J. Hum. Ecol. **11(5)**: 409-410, 2000.

[12] Ferro-Luzzi, A., Sette, S., Franklin, M. and James W.P.T. A simplified approachof assessing adult chronic energy deficiency. Eur. J. Clin. Nutr. **46**: 173-186,1992

[13] Ulijaszek, S.J. and Kerr, D.A. Anthropometric measurement error and the assessment of nutritional status. Br. J. Nutr. **82**: 165-177, 2007.

less remote and depleted forest areas. In the Report of the Roy Burman Committee on Forest and Tribals, it has been noted that, " It has been possible for the tribal community to subsist for generations with a reasonable standard of health because forest provided their food such as fruits, tubers, leafy vegetables, shoots, honey, flowers, juices, grass, game, fish, etc. "Medicinal herbs and plants which they have been using for treatment of diseases and maintaining health are today the source of modem medicine. In two recently completed studies related to tribal health, it has been noted the various roots and tubers available in the forest or small animals they can hunt supply a more balanced nutritional status of the tribals, but due to deforestation as most of the roots and tubers are not available in many areas, the health and nutrition have been affected. Again, in many cases, it has been noted that certain diseases may be common in certain areas but remained controlled due to certain food habits based on vegetation available locally. Forest helps to maintain a balanced ecosystem in nature and supplies sufficient food to the people who depend on it. So any type of degradation in the forest environment is likely to affect the balance and thereby adversely affecting the concerned population.

**Relation between anthropometry and nutritional status**

The relative merits of anthropometric measurements commonly used in nutrition surveys and the interrelationship between the various measurements were assessed using data obtained on 71 adult women surveyed in some tribal areas.

Anthropometry and nutrition are interrelated and include genetic and environmental characteristics, socio-cultural conditions, functional status and health. The evaluation of anthropometry is an essential part of nutritional assessment to determine the level of malnutrition, overweight and obesity. It also denotes the loss of muscle mass, gain of fat mass and redistribution of adipose tissue. These anthropometric indicators have been used to evaluate the prognosis of both acute and chronic disease in adults and assist to guide, medical intervention in the elderly.

It has been demonstrated that anthropometric measurements are highly reliable in determining nutritional status in comparison with other, more sophisticated methods (hydrodensitometry, dilution techniques and electronic bioimpedance), the use of which is restricted by their complexity and cost.

**Why Anthropometry Is Important To Study Of Nutritional Status**

Anthropometry (the use of body measurements to assess nutritional status) is a practical and immediately applicable technique for assessing nutritional status of populations as an expression of the magnitude and distribution of under-nutrition. Anthropometric indicators are less accurate than clinical and biochemical techniques when it comes to assessing individual nutritional status. In many field situations where resources are severely limited, however, anthropometry can be used as a screening device to identify individuals at risk of under-nutrition, followed by a more elaborate investigation using other techniques.

Dietary intake is necessary to compare dietary data with established standard like the allowances recommended by the Indian Council of Medical Research (ICMR)nutrient expert group (2010) and is provides general impression regarding the nutritional adequacy of the diet since the Recommended Dietary Allowances (RDA) includes margin of safety a person not consuming 100 percent of all the nutrients and should not be considered malnourished without the support of biochemical, clinical and anthropometric data.

Dietary intake of women is poor than those of their adult male counterpart. Chronic malnutrition continues to exist extensively, especially among women of different age groups, because they are caught in the sequence of ignorance, poverty, inadequate nutritious food intake and diseases. Finally, a women health affects the household economic well being and a woman with poor health will be less productive in the labour force (Rao, 2010).

**Literature Review**

A national level study has been done by Das & Bose in 2012, at different state of India on Nutritional deprivation among Indian tribal: A cause for concern, ….their study revealed that Since nutritional status is intricately linked with dietary habits as well as the ecology of the population, further research should be undertaken to investigate, in details, these factors. Each tribal population has its unique food habits.[14] Moreover, there are distinct inter-tribal differences in the environment in which they reside, i.e. the ecology of the population. The studies reviewed here did not deal with these factors as they were beyond the scope of study. It is, therefore, imperative that future studies on tribal populations include these parameters when investigating their nutritional status. Similar studies should also be undertaken among other tribal populations in India, since they constitute a sizeable portion of India's population. Moreover, since under-nutrition has several underlying causes, future investigations should aim at identifying the likely cause(s) of high rates of under-nutrition among Indian tribal populations. To overcome this problem, there is an immediate requirement for appropriate steps to be taken to improve the nutritional status of these groups on the basis of severity of the burden they are facing.

The nutrition and health problems faced by Kannikar tribal women of Trivandrum district, Kerala in normal physiological conditions like pregnancy and lactation were studied. pulses, milk and milk products and other animal foods which were the sources of protein were lacking on their diets. Average calorie consumption as found to be below the recommended level for the normal, pregnant as well as lactating women. Consumption of calcium (in the form of tapioca and fish) was noticed to be highest in normal women where as it was poorest in the lactating women. Similar deficits of calcium in the diets of pregnant and lactating tribal women of Western and central India was reported.[15] The intake of

[14] Mandal, H., Mukherjee, s., Dutta. India-*An Illustrated Atlas 0/ World Kolkata*: Anthropological Survey of India (2001).

[15] Das, S., Bose, K. (2010). Body Mass Index and Chronic Energy Deficiency among Adult Santal of Purullia District,

iron and vitamin. A were found to be low. Detailed clinical examination Kannikar tribal women showed that anaemia (90%), vit-A deficiency (30%) and niacin deficiency(10%) were prevalent among them. The morbidity status of the tribal women revealed the prevalence of pyrexia, respiratory complaints, gastrointestinal diseases and rheumatic diseases. Among the adult women gynaecological complaints and deficiency diseases were common.

Abortion and child death rates were also found to be high among the tribal population studied. Poor maternal nutritional could be one of reasons for this high rate. However, it was not possible to identify whether poor maternal nutritional status was contributing to high abortion rate of our simple size was small. Knowledge of tribal women reported as having not consumed iron and folic acid tablets during their previous pregnancy. This was the case with the rest of the county where low consumption of iron and folic acid tablets was reported by multi centric study. Tribal women of this study did not have the warring slipper when they go out .This may increase the chance of getting hookworm infestation thereby causing anaemia. Thus majority of tribal women in Bihar are at risk of delivering low birth weight babies and have pregnancy complications. Some of the reasons for under nutrition among tribal women could be poor diet intake, income , early marriage, and high morbidity due to unhygienic practice and surroundings. Under nutrition of mothers may be may be carried over to their children.

The study revealed that mean BMI and levels of CED of santal females of Purulliya and various tribal population (among females) of West Bengal. From this table it can be inferred that, in general, the mean BMI of santal females of Purullia were low (18.1 kg/m$^2$) and CED rate indicated a critical situation. In the state of West Bengal, among tribal females, mean BMI was in the range 17.7 kg/m2 to 19.7kg/m2. Moreover, the rates of CED varied between 31.7% and 67.9%. These rates were in the category high (20-39%) to very high (>40%). These result clearly indicated that, santal females of Purulliya ware in very critical nutritional stress. The relationship between mean BMI and CED among santal females and other female tribals in various states of India is presented in Figure 1. From this table it can be inferred that, in general, the mean BMI of Purulliya was 63.4%. The tribal females of various states of India were in the range 18.2-23.0kg/m2. Moreover, the rates of CED varied between 4.8% (Sikkim) and 64.2%(W.B). These rates were in the category good (<5%) and very high (40%). These results clearly indicated that, tribal females of West Bengal were under critical nutritional stress**.**

The findings are the study of the tribal women of Singbhum direct reveal that highly undernourished. The present study reported 23.9% tribal women as having height <145 cm and 95.9% having weight <45kg. If <38kg is taken 3 cut-off for weight than 36.0% of these women can be termed as low weight. This is quite high when compared to studies reported from other parts of India In their study in rural Tamil Nadu Samuel

West Bengal, India. International Journal of Human Sciences.

and Rao (1992) had found 14.1% as having g height <145 cm and 37.3% as having weight <40 kg. Similarly Anderson (l989) reported 56.0% of women in Gujarat and 63.05% of women in Maharashtra as having weight <40kg and 31.3% mothers were founds to have height <l45cm. The percentage of malnutrition among tribal women of the present study is high when compared to developed countries. Only 1% US women were found to have weight <40kg.

An earlier study the intake of cereals was higher than the recommended level. Similar observations were also reported by other authors among tribes of Maharashtra and Bihar. This is because most of the tribal diet is a cereal-based diet. Most of the nutrients (calories, protein, Iron etc.) except calcium mean intake were inadequate as compared to RDA. Hanumantha Rao et al. (1993) also reported lower intake of such nutrients in Jenu Kurubas, a primitive tribe of Karnataka. The low value of Carotene and Riboflavin could be due to low intake of green vegetable and negligible amount of milk in their diet. The high calcium value was mainly due to frequent consumption of fetid cassia leaves (Cassia-Tora) by this tribe. From the above discussion, it can be attributed that the poor growth pattern of the Bumia may be due to the poor socio-economic condition. Most of the Bhumia populations of Madhya Pradesh live without modern health care and transport facilities. Hence, the Bhumia the study area face many health and nutritional hazards due to poverty, illiteracy and ignorance. The health and nutrition status of the Bhumia tribes requires an immediate attention in the implementation of short-term supplementary feeding programmes, general medical, and awareness and health care facilities, improvement of food security are needed to overcome the nutrient deficits.

**Aims and Objectives**

Objective is the root of any scientific research. To completion the project work objective formulation is the main part of the study.

i) To evaluate the nutritional status of tribal women.
ii) To assess the nutritional status through anthropometric measurement of tribal women.
iii) To explore the dietary intake of tribal women.
iv) Finally, some recommendation would be made for better livelihood.

**Materials and Method**

**Study area:** The survey was carried out at Kharikashuli Village of Chandra Grampanchayat under the juridiction of Medinipur sadar Block in Paschim Medinipur District among the adult women. This study has been conducted for the period of Feb, 2019 to April, 2019.

**Selection of Subjects:** The data has been collected through intensive field presented here were obtained from a cross-sectional anthropometry measurement and dietary survey carried out in an adult population (females). I have applied simple random sampling in availability of

the population during survey. In brief, a random sample of 71 female's are from different Lodha household.

**Survey Method:** Anthropometric measurements were performed as a survey method. It is very useful method for assessing nutritional status as it provides rapid and quantitative means of nutritional assessment. So for this purpose following parameters were taken: weight, height, MUAC, waist, hip **Apparatus:**

The apparatus used for anthropometric measurements are as follows-

1. Anthropometer- for measuring height.
2. Weighing machine- for measuring weight.
3. Steel tape- for measuring different circumference of body.

**Procedure**

**a) Weight measurement:** For weight measurement I have used human weighing machine. Subject stands the platform of the machine with minimum clothes and exerting equal pressure on both feet. I have taken the weight reading from the scale with an accuracy of 0.5 kg.

**b) Height measurement:** The measurement of body height in nutritional assessment is well recognised as it is a useful indication for long - term nutritional adequacy and fundamentally important in anthropometric measurements. For height measurement I have used anthropometric rod. Subject should stand on a flat floor keeping his feet parallel with the heals. His back of head touched the upright portion to touch the hair and make contact with the top of the head. At last I have take the reading from the scale.

**c) Body Mass Index (BMI):**Body Mass Index (BMI) is a simple index of weight-for-height that is commonly used to classify underweight, overweight and obesity in adults. It is defined as the weight in kilograms divided by the square of the height in meters ($kg/m^2$). For example, an adult who weighs 70kg and whose height is 1.75m will have a BMI of 22.9.BMI = 70 kg / ($1.75\ m^2$) = 70 / 3.06 = 22.9

**BMI=Weight in Kg/Height in meter square.**

**BMI Classification according to WHO (1995)**

| Nutritional Status | BMI($kg/m^2$) |
|---|---|
| Underweight | <18.50 |
| Severe thinness | <16.00 |
| Moderate thinness | 16.00 - 16.99 |
| Mild thinness | 17.00 - 18.49 |
| Normal range | 18.50 - 24.99 |
| Overweight | ≥25.00 |
| Pre-obese | 25.00 - 29.99 |
| Obese | ≥30.00 |

| | |
|---|---|
| **Obese class I** | **30.00 - 34.99** |
| **Obese class II** | **35.00 - 39.99** |
| **Obese class III** | **≥40.00** |

**Measurement of Mid Upper Arm Circumference (MUAC):** MUAC is recognized to indicate the status of muscle development. It is measured on the left hand, the mid-point between the acromion of the scapula and tip of the olecranon of the fore-arm bone, ulna is located with the arm flexed at the elbow and marked with a marker pen. Flexible tape is used and the reading is taken to the nearest millimeter.

**Measurement of Waist circumference:**

The waist circumference is measured in standing position with arm at sides, done with minimal clothing with measuring tape to the nearest 0.1 cm in a perpendicular to the long axis immediately superior to iliac crest.

**Measurement of Hip circumference:**

*Hip circumference* measured in a standing position with minimal clothing by measuring tape to the nearest 0.1 cm at the level of maximum posterior extension of the buttocks.

**Waist–hip ratio:**

**WHR** is the ratio of the circumference of the waist to that of the hips.

This is calculated as waist measurement divided by hip measurement ($W \div H$).

**Dietary Assessment:**

Diet survey constitutes an essential part of any complete study of nutritional status of individual or groups.

Here, I followed the interview method for the purpose of dietary assessment. Some of the interview techniques are diet recall, diet history, food frequency questionnaire etc. Here I followed the diet recall (3-5 day) method.

**Statistical Analysis of data:**

Statistics is the science of the methodology for scientific collection, systematic, presentations, mathematical; analysis of interpretation of the data and for drawing in references about the explored property of phenomenon it the relevant population, in this respect, statistics has the following basic applications. The calculated data was analysed by Microsoft excel.

**Mean:**

Mean is the arithmetic average of asset of scores. The mean of a sample (statistical mean) and that of a population (Parametric mean) are represented by the symbols x and μ, arerespectively where X (or X 1)represents each individual score of a sample, Σ X (or Σ Xi) is the sum of all its scores, an n is the sample size or the total frequency of cases in the sample.

$$X = \frac{\Sigma X}{n}$$

**Standard deviation:**

Standard deviation (SD) is the positive square root of the mean of squared deviations of all the scores from the mean. It is an absolute measure of deviation and is expressed in the same unit as the original scores. Standard deviation of a

$$s = \sqrt{\frac{\sum(x - \bar{x})^2}{n - 1}}$$

sample is denote by

**Standard Error:**

Standard error (SE) of a statistics is a measure of the deviation of that statistics from the corresponding parameter and consequently serves as an index of the sampling error of that statistics. It is the standard deviation of the sampling distribution of the relevant statistics.

**FINDINGS OF THE STUDY**

This study had a total of 71 adult female who participated in the present study.

**Table 1: Statistical value of Anthropometric and dietary intake in relation with ICMR Reference Value**

| PARAMETERS | TRIBAL WOMEN MEAN±SE | ICMR REFERENCE VALUE |
|---|---|---|
| **Weight(kg)** | 42.20±0.78 | 55 |
| **Height(cm)** | 147.52±0.70 | 161 |
| **MUAC(cm)** | 21.69±0.21 | 22 |
| **W/H ratio (cm)** | 0.83±0.004 | 0.85 |
| **Energy (kcal)** | 2099.55±18.46 | 2850 |
| **Protein(gm)** | 47.86±0.71 | 55 |
| **Calcium (mg)** | 333.09±15.69 | 600 |
| **Iron (mg)** | 12.44±0.55 | 21 |
| **Beta-carotene (ug)** | 1438.12±225.65 | 4800 |
| **Thiamine (mg)** | 1.40±0.02 | 1.4 |
| **Riboflavin (mg)** | 0.56±0.02 | 1.7 |
| **Niacin (mg)** | 19.96±0.15 | 16 |
| **Vitamin C (mg)** | 76.36±7.65 | 40 |

**Table 2: Mean nutrient intake of the selected subjects.**

| Sl.No | Nutrients | ICMR standards | Mean | SD | % of nutrient intake | % Excess or deficit |
|---|---|---|---|---|---|---|
| **1** | Energy(Kcal) | 2850 | 2099.55 | 155.51 | 73.67 | -26.33 |
| **2** | Protein(gm) | 55 | 47.86 | 5.98 | 87.02 | 12.98 |
| **3** | Calcium(mg) | 600 | 333.09 | 132.23 | 55.52 | -44.49 |
| **4** | Iron(mg) | 21 | 12.44 | 4.65 | 59.24 | -40.76 |
| **5** | B-Carotene(ug) | 4800 | 1438.12 | 1901.4 | 29.96 | -70.04 |
| **6** | Thiamine(mg) | 1.4 | 1.4 | 0.18 | 100 | 0 |
| **7** | Riboflavin(mg) | 1.7 | 0.56 | 0.18 | 32.94 | -67.06 |
| **8** | Niacin(mg) | 16 | 19.96 | 1.28 | 124.75 | 24.75 |
| **9** | Vitamin C(mg) | 40 | 76.36 | 64.47 | 190.9 | 90.9 |

**Table 3: Mean dietary intake of the selected subjects.**

| Sl. No | Food Stuffs | ICMR standards | Mean | SD | % of the present study | % Excess or Deficit |
|---|---|---|---|---|---|---|
| **1** | Cereals | 480 | 432.04 | 36.4 | 90.01 | -9.99 |
| **2** | Pulses | 90 | 24.72 | 11.98 | 27.47 | -72.53 |
| **3** | Milk&milk | 300 | 45.0 | 50. | 15.02 | -84.98 |

| | | | | | | |
|---|---|---|---|---|---|---|
| | products | | 7 | 11 | | |
| **4** | Roots & tubers | 200 | 205.28 | 46.08 | 102.64 | 2.64 |
| **5** | Green leafy vegetables | 100 | 58.45 | 53.44 | 58.45 | -41.55 |
| **6** | Other vegetables | 200 | 148.59 | 56.83 | 74.3 | -25.71 |
| **7** | Fish/meat/egg | 50 | 19.72 | 24.61 | 39.44 | -60.56 |
| **8** | Frutis | 100 | 19.72 | 40.07 | 19.72 | -80.28 |
| **9** | Sugar | 45 | 19.23 | 1.82 | 42.73 | -57.27 |
| **10** | Fat | 30 | 19.58 | 1.4 | 65.27 | -34.73 |

**Table 4: Socio demographic profile of tribal women.**

| Age group | Number (%) n=71 |
|---|---|
| **18-** | 71 (100) |
| Education | **Number (%) n=71** |
| **Illiterate** | 50 (70.42) |
| **Literates** | 21 (29.58) |
| Occupations | **Number (%) n=71** |
| **Labour** | 48 (67.61) |
| **FPC** | 23 (32.39) |
| Type Of Family | **Number (%) n=71** |
| **Nuclear Family** | 54 (76.06) |
| **Joint Family** | 17 (23.94) |
| Number of children | **Number (%) n=71** |
| **<2 children** | 49 (69.01) |
| **>2 children** | 22 (30.99) |
| Economic Status | **Number (%) n=71** |
| **Above Poverty Line** | 31 (43.66) |
| **Below poverty Line** | 40 (56.34) |

**Table 5: According to Kuppur's swami scale Socio-Economic Status of the studied Lodha Women**

| Score | Socioeconomic Class | Frequency | Percent |
|---|---|---|---|
| 26to29 | Upper(I) | 0 | 0 |
| 16to25 | Upper Middle(II) | 0 | 0 |
| 11to15 | Lower Middle(III) | 3 | 4.23 |
| 5to10 | Upper Lower(IV) | 68 | 95.77 |
| <5 | Lower (V) | 0 | 0 |
| | Total | 71 | 100 |

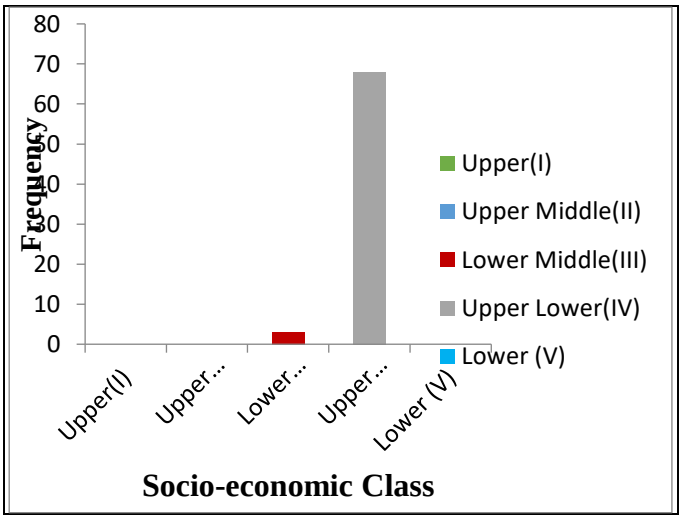


**Table 5: Comparison of body weight (kg) of tribal women (n=71) with ICMR standard**

| | Tribal Women | Reference value |
|---|---|---|
| Mean(kg)±SE | 42.20±0.78 | 55 |

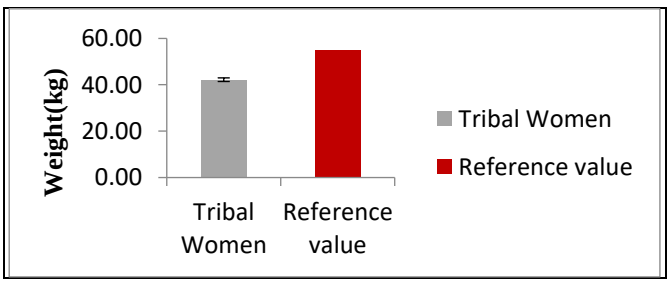


Figure : Body weight of tribal women.

**Table 6: Comparison of body height (cm) of tribal women (n=71) with ICMR standard.**

| | Tribal Women | Reference value |
|---|---|---|
| Mean(cm)±SE | 147.52±0.70 | 161 |

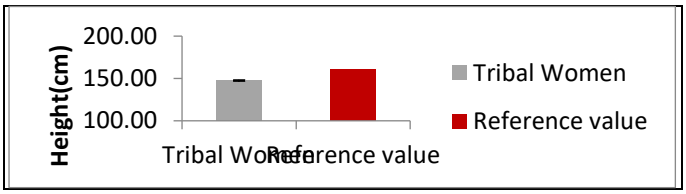


Figure:Body height (cm) of tribalwomen.

**Table 7: Comparison of MUAC (cm) of tribal women (n=71) with ICMR standard.**

| | Tribal Women | Reference value |
|---|---|---|
| Mean(cm) ±SE | 21.69±0.21 | 22 |

**Table 8: Comparison of W/H Ratio of tribal women (n=71) with ICMR standard.**

| Sl .No | Nutrients | ICMR standard | Mean | SD | % of nutrient intake |
|---|---|---|---|---|---|
| 1 | Energy(Kcal) | 2850 | 2099.55 | 155.51 | 73.67 |
| 2 | Protein(gm) | 55 | 47.86 | 5.98 | 87.02 |
| 3 | Calcium(mg) | 600 | 333.09 | 132.23 | 55.52 |
| 4 | Iron(mg) | 21 | 12.44 | 4.65 | 59.24 |
| 5 | B-Carotene(ug) | 4800 | 1438.12 | 1901.4 | 29.96 |
| 6 | Thiamine(mg) | 1.4 | 1.4 | 0.18 | 100 |
| 7 | Riboflavin(mg) | 1.7 | 0.56 | 0.18 | 32.94 |
| 8 | Niacin(mg) | 16 | 19.96 | 1.28 | 124.75 |
| 9 | Vitamin C(mg) | 40 | 76.36 | 64.47 | 190.9 |

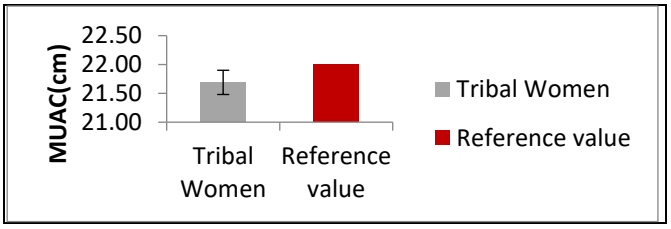


Figure: Mid Upper Arm Circumference (cm)of tribal women.

| | Tribal Women | Reference value |
|---|---|---|
| Mean±SE | 0.83±0.004 | 0.85 |

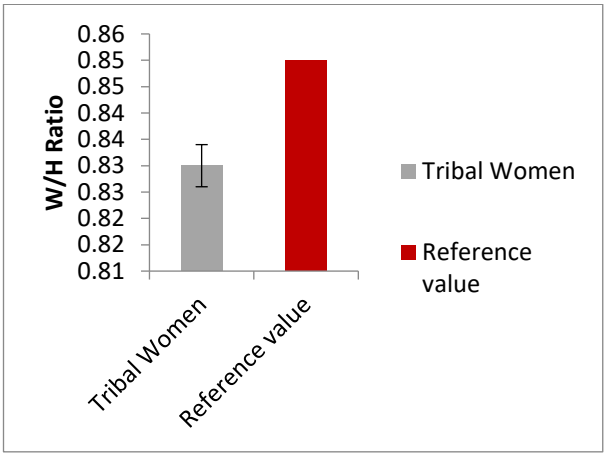


Figure : W/H Ratio of tribal women.

**Table 9: Body mass index of tribal women (N= 71) according to WHO standard in different categories.**

| Grading of BMI | Frequency | Percent |
|---|---|---|
| Severe thinness | 1 | 1.41 |
| Moderate thinness | 6 | 8.45 |
| Mild thinness | 31 | 43.66 |
| Normal | 28 | 39.44 |
| Overweight | 5 | 7.04 |
| Total | 71 | 100.00 |

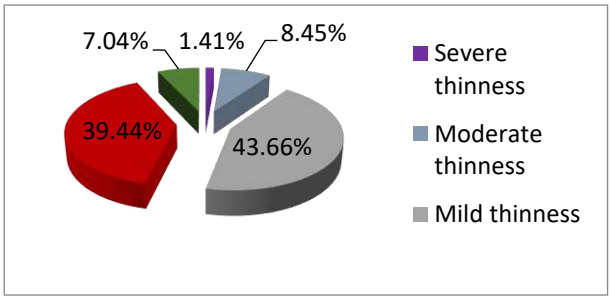


Figure: Body Mass Index of tribal women.

**Table 10: Comparison of nutrient intake of tribal women (n=71) with ICMR standard.**

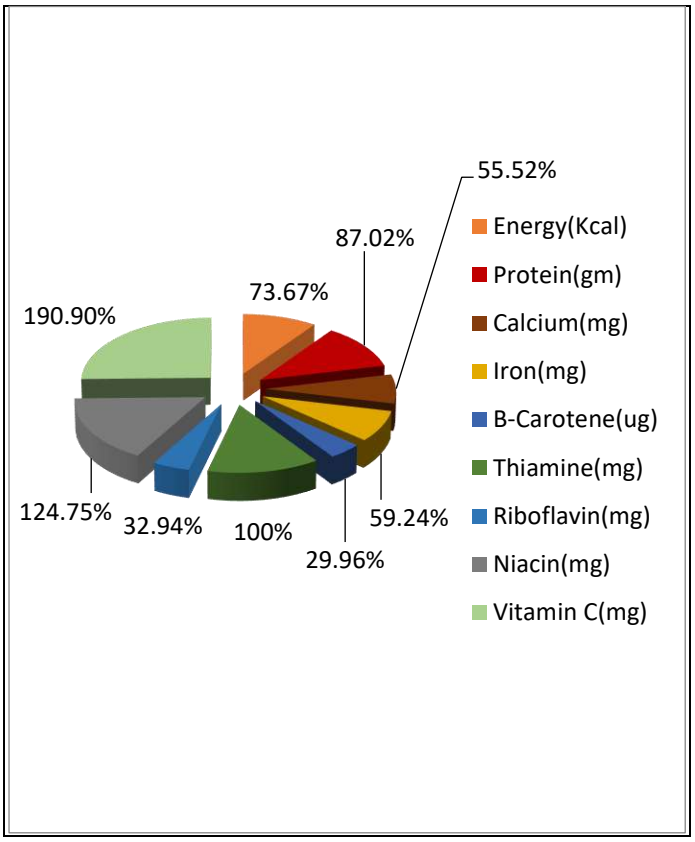


Figure :- Nutrient intake of tribal women.

**Table 11: Comparison of dietary intake of tribal women (n=71) with ICMR standard.**

| Sl .No | Food Stuffs | ICMR standards | Mean(gm or ml) | SD | % dietary intake |
|---|---|---|---|---|---|
| 1 | Cereals | 480 | 432.04 | 36.4 | 90.01 |
| 2 | Pulses | 90 | 24.72 | 11.98 | 27.47 |
| 3 | Milk & milk products | 300 | 45.07 | 50.11 | 15.02 |
| 4 | Roots & tubers | 200 | 205.28 | 46.08 | 102.64 |
| 5 | Green leafy vegetables | 100 | 58.45 | 53.44 | 58.45 |
| 6 | Other vegetables | 200 | 148.59 | 56.83 | 74.3 |
| 7 | Fish/meat/egg | 50 | 19.72 | 24.6 | 39.44 |
| 8 | Fruits | 100 | 19.72 | 40.07 | 19.72 |
| 9 | Sugar | 45 | 19.23 | 1.82 | 42.73 |
| 10 | Fat | 30 | 19.58 | 1.4 | 65.27 |

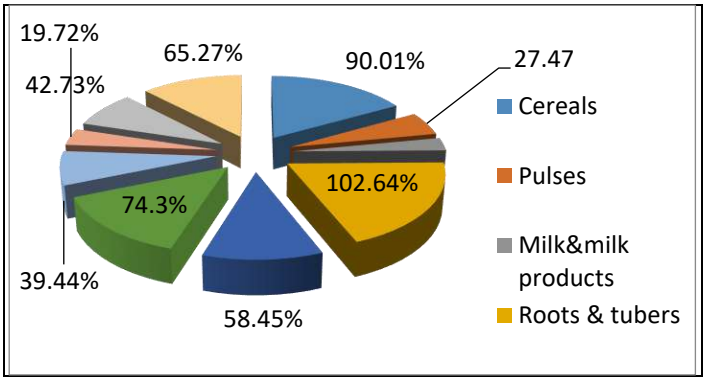


Figure: Dietary intake of tribal women.

## DISCUSSION

The present study examines the nutritional status of women in an effort to estimate the prevalence of malnutrition. It is a cross sectional study conducted in Kharikashuli Village of Chandra Grampanchayat under the jurisdiction of Medinipur sadar Block in Paschim Medinipur District among 71 randomly selected tribal women. Simple random sampling technique was applied to collect data.

The anthropometric measurements of the tribal women in this study revealed that there is deficit in both weight and height as compared to the standards. The Indian Council of Medical Research (ICMR) has set a standard of 161 cm as average height for Indian women and 55 kg as average body weight for Indian reference women. In the study mean weight of tribal women was 42.20±0.78 kg and mean height was 147.52 ± 0.70

cm. prevalence of thinness among the study women was 1.41% severe thinness, 8.45% moderate thinness, 43.66% mild thinness.

Nutrient intake of the selected tribal adult women in the present study was found to be inadequate when compared with RDA of ICMR (2010) except thiamine, niacin and vitamin-C. calorie deficiency was 26.33% where as protein deficiency was about 12.98%. The extent of deficit was highest with respect to calcium (44.498%), iron (40.76%), followed by beta-carotene (70.04%), riboflavin (67.06%).

In this study earnings status of the household was very low. In this study it is shown that about 4.23% respondents belonging to lower middle (III) category and the rest 95.77% were belonging to upper lower (IV) class. Studies have shown that majority of the respondents (70.42%) were illiterate and the remaining were (29.58%) were literate but have attend only up to primary school. Most of them of the subject are day labour (67.61%) and rests are forests produce collection (32.34%) by which it is expressed that they have low economical status.

**CONCLUSION**

The purpose of this study was to evaluate the nutritional status of Lodha women. This study design was a questionnaire-based cross-sectional study. For the assessment of nutritional status different parameters like weight, height, MUAC, waist and hip circumference, Socio-economic status and dietary intake pattern was taken.

The Lodhas are more back warded tribal populations than other tribal group and they are also socio-economically back warded compared to other population groups. [10] This study concluded that the average intake of all nutrients was lower than the ICMR standards. So, in connection with anthropometric variable of tribal women also found lower than the ICMR standards.

In my study it was revealed that the nutritional status of Lodha women was generally poor. During my survey I have found that the most Lodha women belonging in upper lower (IV) socio-economic class.

So the observation of dietary assessment could explain the above under nutrition. Most probably above under nutrition may be due to the dilatory intake in tribal adult women. (WHO, 1984)

**RECOMMENDATION**

Food is the source of nutrients which are required for maintenance, repair, growth and development of body. Low intake of nutrients is a major cause of poor nutritional status. Regular and proper quality intake of nutritious diet is the need of the day in tribal areas. When anthropometric measurements of tribal women were compared with ICMR reference values found to be less than reference values. A comparison of the intake of various nutrients with ICMR recommendations for heavy worker women indicated that their intakes of nutrients were less than RDA.

- Increase literacy rate and awareness about importance of health hygiene and sanitation.
- Knowledge about food and nutrition necessary for women.
- They need to include all food groups in their diet.

- ❖ Intake of seasonal fruits and vegetables when they are not so costly can be Increased.
- ❖ To improve nutritional status of the Lodha women health education, awareness and nutritional counseling are necessary.
- ❖ Most importantly, immediate nutritional intervention programs are needed for better implementation for the Lodhas

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# Trend In Intellectual Property Generation And Disposal Of IP Applications

*Prantik Roy & Dr. Jayanta Ghosh*

**Abstract**

*Intellectual Property (IP) is assuming a greater importance with the rise of the knowledge economy. Technology and innovation are value drivers in the dynamic environment in this day and age. In the emerging knowledge economy worldwide the paradigms are shifting from physical to knowledge resources. Nature of the businesses is undergoing change on this count as increasingly the businesses are turning from being capital-intensive to knowledge-intensive. Thus, there is a pertinent need on the part of the enterprises to consciously manage the activities related to IP. With the emergence of knowledge economy and rapid technological changes, creation of IP is becoming indispensable for the modern day businesses, even for survival. In this backdrop, it is expected for a developing country like India to have in place a strong IP system to boost faster the socio-economic progress of the country through stimulation of innovation, research and creativity. A strong IP system contributes to GDP growth of a country through increased sectoral output. It facilitates knowledge-based industrial growth and creates favourable climate for technology transfer. A strong IP system could also influence the inflows of Foreign Direct Investment (FDI). Most significantly, it enables a country to achieve self-sufficiency especially in strategic sectors and thereby, it provides a competitive edge. Moreover, a strong and balanced IP system is one of the key means to support innovation and development objectives of a country. Hence, the present study made an attempt to explore the trend in IP generation and disposal of IP applications in India. Above all, the present study seeks to analyse the working of IP system in the country.*

***Keywords:*** *Property, Knowledge Economy and Foreign Direct Investment*

## Introduction and Background

The word Intellectual Property *(IP)* may sound alien to someone's ears. But when we pick any product around us from the routines of our life it forms as part of an intellectual property. IP in common parlance is the creative work of the human intellect. World Intellectual Property Organisation (WIPO) defines IP as the creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs, used in commerce[1].

IP is assuming a greater importance with the rise of the knowledge economy. Technology and innovation are value drivers in the dynamic environment now days. In the emerging knowledge economy worldwide the paradigms are

[1] *About IP,* World Intellectual Property Organisation (Feb. 22, 2019, 8:00 PM), https://www.wipo.int/about-ip/en.

shifting from physical to knowledge resources. Nature of the businesses is undergoing change on this count as increasingly the businesses are turning from being capital-intensive to knowledge-intensive.

At enterprise level IP assets such as, Patents, Copyrights and Trade Marks now account for a majority proportion of market capitalisation. According to the available estimates, by late 1990s approximately 75% of market capitalisation of the Fortune 100 companies was accounted for by such IP assets[2]. Thus, there is a pertinent need on the part of the enterprises to consciously manage the activities related to IP. With the emergence of knowledge economy and rapid technological changes, creation of IP is becoming indispensable for the modern day businesses, even for survival.

In this backdrop, it is expected for a developing country like India to have in place a strong IP system to boost faster the socio-economic progress of the country through stimulation of innovation, research and creativity. A strong IP system contributes to GDP growth of a country through increased sectoral output. It facilitates knowledge-based industrial growth and creates favourable climate for technology transfer. A strong IP system could also influence the inflows of FDI. Most significantly, it enables a country to achieve self-sufficiency especially in strategic sectors and thereby, it providesa competitive edge. Moreover, a strong and balanced IP system is one of the key means to support innovation and development objectives of a country. Hence, the present study is undertaken with the following aims and objectives.

**Objectives of the study**

- To present an overview of Genesis of IP and working of IP system.
- To study IP generation activity in India- exploring the trend in IP filing and composition thereof.
- To explore the trend in disposal of IP applications over the study period.
- To analyse in a nutshell the working of IP system in India.

**Research Methodology**

The present work is an analytical construct and data for this have been collected from diversified sources which include existing *secondary* sources such as, books, reports and publications of relevant national agencies and international organisations and other published web based resources accessed through internet.

In order to show the trend in IP filing, composition and disposal thereof, the data for 7 years covering the period 2010-11 to 2016-17 *("study period"*) have been taken into consideration since lot of policy changes took place during the same period. However, data for 2017-18 have been excluded as data for the whole year are not available in the public domain. Further,datain respect of copyright excepting for the year 2015-16 and 2016-17 are available on calendar year basis, and therefore, excluded.

The data gathered from various sources have been reviewed and summarised before processing. Tables have been used in relevant places to depict the statistical data relevant for the study. Statistical tools and calculations like percentage,

[2] Pandey, N.and Dharni, K.,*Intellectual Property Rights* 129 (PHI Learning, 1st ed. 2014).

arithmetic mean, growth rate etc., have been used for analysis of data.

**Genesis Of IP And Working Of IP System** (An Overview)

As noted earlier, WIPO defines IP as creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce. However, IP is divided into two categories namely, Industrial Property and Copyright. The following chart shows in detail what actually constitutes IP.

**IP**

**Industrial Property**

Covers

Patents, Trade Marks, Industrial Designs and Geographical indications

**Copyright**

Covers

Literary works (such as novels, poems and plays), films, music, artistic works (e.g., drawings, paintings, photographs and sculptures), architectural design etc

In addition, for the purpose of Agreement on TRIPS, the term "intellectual property" refers to all categories of intellectual property that fall within the ambit of following [AGREEMENT ON TRIPS, art. 1]:

**IP**

Copyright and Related Rights

Trade Marks

Geographical Indications

Industrial Designs

Patents

Layout-Designs (Topographies) of Integrated Circuits

Protection of Undisclosed Information

IP rights like any other property right allow creators or owners of Patents, Trade Marks or Copyrighted works to benefit from their own work. These rights are outlined in Article 27 of the Universal Declaration of Human Rightswhich provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions.

Recognition to importance of IP was first given by the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). These two Conventions are administered by the WIPO at this moment in time.

In India, the Department of Industrial Policy and Promotion (DIPP) is responsible for administering legislations concerning Patent, Design, Trade Mark, Geographical Indication (GI), Copyright and Semi-Conductor Integrated Circuits Layout Design. However, these are administered through Office of the Controller General of Patents, Designs and Trade Marks (CGPDTM), a subordinate office under DIPP, Ministry of Commerce and Industry, with headquarters at Mumbai. It is noted that the administration of Copyright is shifted to Office of the CGPDTM *w.e.f.,* 17.03.2016.

Thus, Office of the CGPDTM is primarily concerned with the administration of Patent, Design, Trade Mark, Geographical Indication, Copyright and Semi-Conductor Integrated

Circuits Layout Design Registry and functioning of IP offices in the country. The Office of the CGPDTM has been working in streamlining the processes of IP administration in the country in order to provide better services to stakeholders.

The Government has taken multiple steps over the years to strengthen IP system in the country in line with International best practices. National IPR policy was launched recently in the year 2016 which aims at fulfilling several objectives which include, *inter alia*, administration and management of IPRs. Amendments aiming at simplifying the procedures were made in the existing IP laws.

**Exploring trend in IP generation and composition**

Table 6.1shows the IP applications filed in IP offices in India between 2010- 11 and 2016-17. Data clearly indicates a consistent rise in IP filing in India during the study period except in the year 2016-17 in which there was a sharp decline in total number of applications filed by1.5243 % as compared to 2015-16.

**Table 6.1: Trend in IP Filing in India (Between 2010-11 and 2016-17)**

| **Categories** | **Number of Applications Filed** | | | | | | |
|---|---|---|---|---|---|---|---|
| | **2010-11** | **2011-12** | **2012-13** | **2013-14** | **2014-15** | **2015-16** | **2016-17** |
| Patent | 39,400 | 43,197 | 43,674 | 42,951 | 42,763 | **46,904** | **45,444** |
| Design | 7,589 | 8,373 | 8,337 | 8,533 | 9,327 | **11,108** | **10,213** |
| Trade Mark | 1,79,317 | 1,83,588 | 1,94,216 | 2,00,005 | 2,10,501 | **2,83,060** | **2,78,170** |
| GI | 27 | 148 | 24 | 75 | 47 | **17** | **32** |
| Copyright | - | - | - | - | - | **14,812** | **16,617** |
| **Total** | **2,26,333** | **2,35,306** | **2,46,251** | **2,51,564** | **2,62,638** | **3,55,901** | **3,50,476** |

**Source:** Annual Report[3]

Thus, Table 6.1 shows Trade Mark accounts for a major portion of IP filing which consisted of 79.3693 % of total IP filing in 2016-17.Table 6.2, however, shows the composition of IP filing and percentage share of each in total.

**Table 6.2: Composition of IP Filing and Percentage Share of Each in Total**

| **Categories** | **Applications Filed During 2016-17** | **Percentage of Total** |
|---|---|---|

[3] *Annual Report*, Controller General of Patents, Designs, Trade Marks and Geographical Indications [GOI] (23 Jan. 2019, 3:00 PM), http://www.ipindia.nic.in/annual-reports-ipo.htm.

| | | |
|---|---|---|
| Patent | 45,444 | 12.9663 % |
| Design | 10,213 | 2.9140 % |
| Trade Mark | 2,78,170 | 79.3693 % |
| GI | 32 | 0.0091 % |
| Copyright | 16,617 | 4.7413 % |
| **Total** | **3,50,476** | **100** |

Consequently, major categories of IPs in respect of which applications are being filed for registration comprises of Trade Mark followed by Patent, Copyright and Design with a very less percentage that is,12.9663 %, 4.7413 % and 2.9140 % respectively of total applications filed in 2016-17, and a few applications are filed with respect to GI with a very insignificant percentage of 0.0091%. However, Tables 6.3, 6.4, 6.5, and 6.6 respectively show the trend in each of the major categories of IP.

**Table 6.3: Trend in Trade Mark Filing**

| **Trade Mark** | **2010-11** | **2011-12** | **2012-13** | **2013-14** | **2014-15** | **2015-16** | **2016-17** |
|---|---|---|---|---|---|---|---|
| Filed | 1,79,317 | 1,83,588 | 1,94,216 | 2,00,005 | 2,10,501 | **2,83,060** | **2,78,170** |
| Growth Rate (%) | - | 2.3818 | 5.7890 | 2.9807 | 5.2478 | **34.4696** | **(-)1.7275** |
| **AAGR** (Average Annual Growth Rate) | **8.1902 %** | | | | | | |

Table 6.3 exhibitstrend in Trade Mark filingat all five locations of Trade Mark Registry. Trade Mark generation activity in India is rising consistently with average annual growth rate of 8.1902%. However, the year 2016-17 recorded a sharp decline by 1.7275 % as comparedto 2015-16.

**Table 6.4: Trend in Patent Filing**

| **Patent** | **2010-11** | **2011-12** | **2012-13** | **2013-14** | **2014-15** | **2015-16** | **2016-17** |
|---|---|---|---|---|---|---|---|
| Filed | 39,400 | 43,197 | 43,674 | 42,951 | 42,763 | **46,904** | **45,444** |
| Growth Rate (%) | - | 9.6370 | 1.1042 | (-)1.6554 | (-)0.4377 | **9.6836** | **(-)3.1127** |
| **AAGR** | **3.0552 %** | | | | | | |

Table 6.4 shows trend in Patent generation activity in India is not consistent. Although, the year 2011-12, 2012-13, and 2015-16 recorded a positive growth rate in Patent filing, yet the same declined during 2013-14 and 2014-15. In 2016-17, number of filing again has gone down by 3.1127% as compared to 2015-16. However, Patent generation activity in India recorded an average annual growth rate of 3.0552% during the study period.

**Table 6.5: Trend in Design Filing**

| **Design** | **2010-11** | **2011-12** | **2012-13** | **2013-14** | **2014-15** | **2015-16** | **2016-17** |
|---|---|---|---|---|---|---|---|
| Filed | 7,589 | 8,373 | 8,337 | 8,533 | 9,327 | **11,108** | **10,213** |
| Growth Rate (%) | - | 10.3307 | (-)0.4299 | 2.3509 | 9.3050 | **19.0951** | **(-)8.0572** |
| **AAGR** | **5.4324 %** | | | | | | |

Table 6.5, however, indicates that Design generation activity in India recoded an average annual growth rate of 5.4324% during the study period. The year 2015-16 recorded an all time highest growth rate of 19.0951%.

**Table 6.6: Trend in Copyright Filing**

| **Copyright** | **2015-16** | **2016-17** |
|---|---|---|
| Filed | **14,812** | **16,617** |
| Growth Rate (%) | **-** | **12.1860** |

Table 6.6 indicates a total of 16,617 Copyright applications were filed during the financial year 2016-17. Copyright generation activity is gone up by 12.1860% during 2016-17 as compared to 2015-16.

**Exploring trend in disposal of ip applications**

Table 7.1 drawn below exhibits trend in Trade Mark applications filedvis-a-vis examined, registered and disposed. The figures shown in Table 7.1 under disposal category include Trade Marks registered and refused by the office, and also applications withdrawn and abandoned by the applicants.

**Table 7.1: Trend in Trade Mark Filing vis-a-vis Examination, Registration and Disposal**

| **Trade Mark** | **2010-11** | **2011-12** | **2012-13** | **2013-14** | **2014-15** | **2015-16** | **2016-17** |
|---|---|---|---|---|---|---|---|
| Filed | 1,79,317 | 1,83,588 | 1,94,216 | 2,00,005 | 2,10,501 | **2,83,060** | **2,78,170** |
| Examined | 2,05,065 | 1,16,263 | 2,02,385 | 2,03,086 | 1,68,026 | **2,67,861** | **5,32,230** |
| Registered | 1,15,472 | 51,735 | 44,361 | 67,876 | 41,583 | **65,045** | **2,50,070** |
| Disposal | 1,32,507 | 57,867 | 69,736 | 1,04,756 | 83,652 | **1,16,167** | **2,90,444** |

**Source:** Annual Report[4]

Examination of Trade Mark applications recoded an increase by 98.6963% in 2016-17 than 2015-16. The number of Trade Marks registered also increased significantly by 284.4569 % and number of applications disposed increased by 150.0228% in 2016-17 than 2015-16.

[4] *Annual Report*, Controller General of Patents, Designs, TradeMarks and Geographical Indications [GOI](25 Jan. 2019, 5:00 PM), http://www.ipindia.nic.in/annual-reports-ipo.htm.

**Table 7.2: Trend in Patent Filing vis-a-vis Examination, Grant and Disposal**

| **Patent** | **2010-11** | **2011-12** | **2012-13** | **2013-14** | **2014-15** | **2015-16** | **2016-17** |
|---|---|---|---|---|---|---|---|
| Filed | 39,400 | 43,197 | 43,674 | 42,951 | 42,763 | **46,904** | **45,444** |
| Examined | 11,208 | 11,031 | 12,268 | 18,615 | 22,631 | **16,851** | **28,967** |
| Granted | 7,509 | 4,381 | 4,126 | 4,227 | 5,978 | **6,326** | **9,847** |
| Disposal | 12,851 | 8,488 | 9,027 | 11,411 | 14,316 | **21,987** | **30,271** |

Table 7.2 indicates examination of Patent applications gone up by 74.6999% in 2016-17 than 2015-16. The number of Patents granted during 2016-17 also increased by 55.6591% as compared to 2015-16. Total number of applications disposed which includes Patent granted and refused by the Patent office, and also applications withdrawn and abandoned by the applicants increased by 37.6768% in 2016-17 as compared to 2015-16.

**Table 7.3: Trend in Design Filing vis-a-vis Examination, Registration and Disposal**

| **Design** | **2010-11** | **2011-12** | **2012-13** | **2013-14** | **2014-15** | **2015-16** | **2016-17** |
|---|---|---|---|---|---|---|---|
| Filed | 7,589 | 8,373 | 8,337 | 8,533 | 9,327 | **11,108** | **10,213** |
| Examined | 6,277 | 6,511 | 6,776 | 7,281 | 7,459 | **9,426** | **11,940** |
| Registered | 9,206 | 6,590 | 7,252 | 7,178 | 7,147 | **7,904** | **8,276** |
| Disposal | 9,221 | 6,705 | 7,300 | 7,226 | 7,218 | **8,023** | **8,332** |

Table 7.3 depicts during 2016-17, number of Design applications examined increased by 26.6709%, Design registrations, however, increased by 4.7064% and number of applications disposed increased by 3.8514%, as compared to 2015-16.

**Table 7.4:Trend in GI Filing vis-a-vis Examination and Registration**

| **GI** | **2010-11** | **2011-12** | **2012-13** | **2013-14** | **2014-15** | **2015-16** | **2016-17** |
|---|---|---|---|---|---|---|---|
| Filed | 27 | 148 | 24 | 75 | 47 | **17** | **32** |
| Examined | 32 | 37 | 30 | 42 | 60 | **200** | **28** |
| Registered | 29 | 23 | 21 | 22 | 20 | **26** | **34** |

Between 15$^{th}$September 2003 and 31$^{st}$ March 2017, 543 (nos.) GI applications have been filed, of which 32 (nos.) applications filed in 2016-17. However, during 2016-17, 34 (nos.) of GIs were registered as compared to 26 (nos.) in 2015-16,

which recorded an all time highest increase by 30.7692%.

**Table 7.5: Trend in Copyright Filing vis-a-vis Examination, Registration and Disposal**

| Copyright | 2015-16 | 2016-17 |
|---|---|---|
| Filed | 14,812 | 16,617 |
| Examined | 9,325 | 16,584 |
| Registered | 4,505 | 3,596 |
| Disposal | 16,203 | 16,236 |

Table 7.5 indicates although the examination of Copyright applicationsincreased by 77.8445% during 2016-17 as compared to 2015-16, the number of Copyrights registered during the year, however, declined by 20.1775% than 2015-16. A total of 16,236 (nos.) Copyright applications were disposed during 2016-17 which recorded an increase by less than 1% as compared to 2015-16.

Summary of IPs registered/granted vis-a-vis disposed study period shown in Table 7.6 below. The figures in bracket represent number of applications disposed.

**Table 7.6:Trend in IP Registered/Granted and (Disposed) at a Glance**

| **Categories** | **2010-11** | **2011-12** | **2012-13** | **2013-14** | **2014-15** | **2015-16** | **2016-17** |
|---|---|---|---|---|---|---|---|
| Trade Mark | 1,15,472 **(1,32,507)** | 51,735 **(57,867)** | 44,361 **(69,736)** | 67,876 **(1,04,756)** | 41,583 **(83,652)** | 65,045 **(1,16,167)** | 2,50,070 **(2,90,444)** |
| Patent | 7,509 | 4,381 | 4,126 | 4,227 | 5,978 | 6,326 | 9,847 |
| | **(12,851)** | **(8,488)** | **(9,027)** | **(11,411)** | **(14,316)** | **(21,987)** | **(30,271)** |
| Design | 9,206 **(9,221)** | 6,590 **(6,705)** | 7,252 **(7,300)** | 7,178 **(7,226)** | 7,147 **(7,218)** | 7,904 **(8,023)** | 8,276 **(8,332)** |
| GI | 29 | 23 | 21 | 22 | 20 | 26 | 34 |
| Copyrights | - | - | - | - | - | 4505 **(16,203)** | 3,596 **(16,236)** |

**Concluding remarks**

It is therefore, noted that the year 2015-16 recoded an all time highest growth rate in IP generation activity in India in terms of number of applications filed for registration in all categories. During this year only *"Start-up India"*, a flagship initiative, was launched by the Government of India to build a strong eco-system for nurturing innovation and start-ups in the country. This rising trend continued in respect of GI and Copyright even in 2016-17.However, number of applications filed in respect of Patent, Design and Trade Mark fell down in 2016-17 as compared to 2015-16.

Yet on the other, it is to be noted that the year 2016-17 recorded an all time highest increase in disposal of IP applications in respect of all major categories of IPs. This may be attributed to procedural reforms brought about during the year in the working of IP system especially in connection with filing, processing and disposal of IP applications. The year 2016-17 has recorded several achievements at policy level with the aim of establishing a favourable environment for creation as well as protection of IPRs and

streamlining the working of IP system in the country.

Amendments aiming at simplifying the procedures, inclusion of start-up as a new category of applicant with 80% concession in fees, expedited examination of patent applications filed by start-ups etc were made in the Patent Rules, 2003 by the Patent (Amendment) Rules, 2016which *notified in May 2016*.Patent Rules, 2003 were further amended by DIPP *w.e.f.*, 1stDecember 2017 called as the Patent (Amendment) Rules, 2017. The definition of *"start-up"* under rule 2(fb) has been substituted with a new definition. A more liberal definition of start-up has been provided that allows domestic as well as foreign entities to claim benefits such as fast-track mechanism and lower fee for filing Patents.

Trade Mark Rules, 2017*(notified in March 2017)*which repealed earlier Trade Mark Rules, 2002,again have brought about significant changes namely; number of forms brought down from 74 to 8, promotion of e-filing, expedited processing of applications, allowing video conferencing for hearings, reduced adjournments ,e-service of documents, etc.

Moreover, the National IPR Policy 2016 laid down the future roadmap for IPRs in India. The policy of 2016 in totality aimed at to promote stable IP regime in the country and to encourage innovation to achieve the country's developmental goals.

Expedite disposal of IP applications and satisfactory delivery of services to stakeholders are pillars of IP framework. During 2016-17, the Office has made noteworthy achievements in terms of delivery of IP services and IT-enabled functioning. As a result, the number of applications examined and disposed has gone up during the year. Pendency in examination of Trade Mark applications has been brought down from 14 months to less than 1 month. In Designs, pendency in examination of new applications again has gone down from 8 to 1 month. During 2016-17, e-filing has increased to 80% in Trade Marks and 90% in Patents. Further, as reported by the Office of CGPDTM, out of total 45,444 Patent applications filed during 2016-17, the number of applications filed by Indian applicants was 13,219 which represent 29.2% of the total applications filed.

At last, it can be concluded that policy initiatives taken in the recent past are expected to yield desired result in the days to come.

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# Romantic relationships: the case of special courts under POCSO Act of 2012

*Shivam Pandey & Somabha Bandopadhay*

**Abstract**

*The POCSO Act came as a respite for curbing the menace of child rape and childhood molestation by adults. However, the effectiveness is now questioned. The record of the State of West Bengal as an example establishes that the use of the Act is merely as a mode of expression of vengeance or threat for marriage, extortion of money among other ill intentions. At the same time, with change in the cultural pattern of the country early relationships are not uncommon. However, if the provisions of this Act are strictly implemented these innocent relationships will be penalizing. The paper seeks to understand whether there is a need to have an exception to the application of the Act in cases of childhood romantic relationships by trying to grasp whether increased rate of crimes is as a result of this strict application and whether this Act is really merely a tool for revenge by the parents.*

*The paper is neither to justify any illicit or childhood relationships especially involving sexual intercourses nor to propagate the same, but is intended towards portraying the ground reality and the changes in the society that have emerged over the years.The gradual acceptance and subsequent amendment of the laws with its adequate interpretations to suit the "best interests of the child" towards successful attainment of the objectives behind this legislation as enshrined in the Preamble of the Act and upheld in catena of judgements is the pivotal aim of this paper. Finally, the question whether incorporation of an age group for "consent" by children for consensual sexual relationship under a new category as has been proposed lately can bring about an overall success of the Act will form the edifice as well as the conclusion of this paper.*

***Keywords:*** *consent, age categorisation, autonomy, privacy, POCSO Court*

## Introduction

The enthusiasm and sigh of relief that the country was faced with after the enactment of the POCSO Act in 2012 was unmatchable. The law was to ensure deterrence in the society for the acts indulged in with sexual intent against children below 18 years. However, the POCSO cases after 4 years of the Act are mostly false cases that the courts are faced with which challenges the novelty of the Act and the purpose for which it was brought now seems farce. There are several reasons attached to this failure, but the major being the cases of teenage romantic relationships often involving sexual behaviors which creates apprehensions in the families and the societies leading to slapping of false cases under this Act. Surveys conducted by various organizations in various capacities is witness to this fact.[1]

[1]Surveys conducted by NLSIU Bangalore in the States of Karnataka and Assam, WBNUJS in West Bengal, etc.

Recognizing this proposal shall certify 2 concerns: *firstly*; give respect to the right to a dignified life of the adolescents guarantying them their right to autonomy over body and therefore consent for the same and *secondly*; shall reduce the number of false cases the Special Courts are faced with every year (if not every month) which otherwise affects the veracity and effectiveness of the Act, since the ultimate faith of such cases lead to marriage.

Thus, if the law recognizes such relationships as valid in the very first place, the society shall be conditioned accordingly because we need to realize that the world has changed and teenagers, whether we like it or not, are sexually active. They cannot be dragged to court over it[2], in the words of activist Enakshi Ganguly of the HAQ Centre for Child Rights.

**Duality of Indian laws and the road ahead**

India lacks a uniform age recognizing juvenility, different Acts have different age mentioned therein for considering a person as a child. Hindu Marriage Act (18,21), Juvenile Justice Act (18), Child Marriage (Restraint) Act (18,21), POCSO (18), Child Labour (Prohibition and Regulation) Act (14), Indian Majority Act (18), Factories Act (15), IPC [*doli incapax (below 7 years)*, *doli capax (7 years -12 years)*], Marital rape (above 12 years consensual). Thus, when there is no uniform age of juvenility, there is no adherence to UNCRC, the main argument being put forward by critics of the new proposal of having a new age of consent categorisation under POCSO.

The Juvenile Justice (Care and Protection) Act has been amended to make a new categorization of the age group of 16 to 18 years where the juvenile with knowledge consents to committing a grievous offence and conducts it. Here the legislature and the parliamentarians have accepted age of 16 as an age of consent for committing the offences. So, the concept of age of concept has keyed the Indian legal system with this amendment. In POCSO, which is yet another Act for the children below 18 years, this concept must be adopted. A different category recognizing the age of consent is needed i.e. 16-18 years and 12-15 years of age with an age gap of 4-5 years between the partners. In fact, as mentioned above, there are proposals of incorporating 2 different age groups for consenting age, like 12-15 and 16-18 years with certain conditions.

**Formulations of the judges of the Special Courts**

In order to restore faith in this Act and to let remain the strict attitude towards genuine POCSO cases, there is a new proposal which has been initiated by the honorable judges of the Special Courts dealing with such cases at the district level and accepted subsequently by many child rights activists.

***New age categorisation***

National Commission for Protection of Child Right (NCPCR) had stressed on the need for the law to recognise consensual sexual exploration among adolescents by decriminalising it when it is between:

- Children above 12 years when the age-gap was less than two years and

[2] Ananya Sengupta, "Teen romance in line of child abuse law fire"*The Telegraph*, Feb.10, 2016.

- Children above 14 years when the age-gap was less than three years.[3]

In the UK, the age of consent is 16 years. In the US, it varies from 16 to 18 across states. It is 14 years in Germany and Italy, and 15 in France[4]. In Korea it is 13 and Mexico has it as low as 12.[5]

This categorisation shall facilitate the youngsters to live their lives in a dignified manner with freedom of choice being ensured and the courts being faced with less false cases.

### *International obligations*

The best interest of the child which is the utmost outcome the Act seeks as established by UNCRC[6]lies in having a liberal interpretation of the provisions- in a way of application of the golden rule of interpretation where the object and purpose of the Act be upheld. Such an approach shall enable success of the Act by ensuring fruitful development of the child. For this development of the child his or her **right to privacy and confidentiality**[7] must be protected and respected by every person by all means and through all stages of a judicial process involving the child[8]. This right[9] needs to be respected especially in case of adolescents which the courts have partially recognized and must continue to do so even though not expressly mentioned under the constitution[10].

### *Children's autonomy over the body*

In order to ensure this, autonomy over body is needed by ensuring an age of consent as proposed. The right of privacy has evolved to protect the freedom of individuals to choose whether or not to perform certain acts or subject themselves to certain experiences.[11] In USA, this concept has developed into 'liberty' which is protected under the Due Process Clause of the 14th Amendment[12] calling for a similar development in the Indian legal system under Article 21 of the Constitution. Furthermore, it is important to recognize that sexuality is an integral part of the personality of every human being. Its full development depends upon the satisfaction of basic human needs such as the desire for contact, intimacy, emotional expression, pleasure, tenderness and love. Sexuality is constructed through the interaction between the individual and social structures. Full development of sexuality is essential for individual, interpersonal, and societal well being[13] which in turn ensures the same kind of parameters of best interest of the child being fulfilled. Sexual rights are

[3]Swagata Raha, "Love and sex in the time of the POCSO Act, 2012", In Plainspeak A digital magazine on sexuality in the Global South, (June 1, 2014), http://www.tarshi.net/inplainspeak/voices-love-and-sex-in-the-time-of-the-pocso-act-2012/.

[4]Ananya Sengupta, "Teen romance in line of child abuse law fire"*The Telegraph*, Feb.10, 2016.

[5] Averting HIV Aids, Global information and education on HIV and AIDS, "Age of consent for sexual intercourse", http://www.avert.org/sex-stis/age-of-consent.

[6]Article 3 United Nations Convention on the Rights of the Child.

[7]World Health Organization, Human Production Programme onSexual health, human rights and the law (2015).

[8]Preamble, United Nations Convention on the Rights of the Child.(And whereas it is necessary for the proper development o the child that his or her right to privacy and confidentiality be protected and respected be every person by all means and through all stages of a judicial process involving the child.)

[9] International Conference on human rights ICPD Beyond 2014, Human Rights and Sexuality in the Context of Development(2013).

[10] David A.J. Richards, "Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the unwritten Constitution" 30 Hastings L.J. 957 (1978-1979).

[11]Cornell University Law School, "Personal Autonomy", https://www.law.cornell.edu/wex/personal_autonomy.

[12]Roe v. Wade[410 U.S. 113 (1973)].

[13] World Association For Sexual Health, Declaration of Sexual Rights (Adopted in Hong Kong at the 14th World Congress of Sexology)(August 26, 1999).

universal human rights based on the inherent freedom, dignity, and equality of all human beings. Since health is a fundamental human right, so must sexual health be a basic human right.[14]Recognizing this shall enable the success of the object and purpose of the Act as enshrined in the Preamble.

### *Consent as a key element*

The key aspect to be harped upon here is consent. In order to ensure this, a simple test can be put forth. If the accused in section 164 CrPC[15]statement confirms of a romantic relationship and sexual acts which is similarly confirmed by the so called victim in his or her section 164 CrPC statement as well as in the cross examination the same must be given the due respect of consent. This shall ensure right to freedom of expression and right to life. Acknowledging that consent is immaterial for offences under POCSO, the realization needed is that the same must be confined to instances of victimization and sexual abuse and not for consensual sexual relationships which is not victimization unless the contrary is proven through instances of coercion[16] which cannot be justified at any given moment of time in life[17]. The Act otherwise infringes upon the right to dignity and bodily integrity, freedom, of expression, right to life and right of privacy of the adolescents. The honorable courts have accepted the age consent at various instances.

[14]ibid.

[15]Recording of confessions and statements.

[16]United Nations,A/CONF.177/20 on Report of the Fourth World Conference on Women(September, 1995).

[17] Right to sexual freedom: Sexual freedom encompasses the possibility for individuals to express their full sexual potential. However, this excludes all forms of sexual coercion, exploitation and abuse at any time and situations in life, World Association For Sexual Health, Declaration of Sexual Rights (Adopted in Hong Kong at the 14th World Congress of Sexology, August 26, 1999).

### Interpretation of Case laws

In a case in Pune,the special court relied on various judgments by the supreme court and the high courts that no offence of rape can be made out if the girl is above 16 years of age and there is consensual sexual relationship. The court cited medical and other evidence while observing that the girl was above age 16 and was a consenting party.[18] In the case of ***S. Varadarajan v. State of Madras***[19], though the age of consent though as per law was 18 years, when the girl eloped with the accused, she was approximately 17 years and 9 months old. However, the matter was finally heard and the accused was convicted realizing that the girl who takes the decisions.

In ***State v. Suman Dass***[20], a 15-year-old girl left home and married a 22-year-old man. Her mother filed a complaint alleging that the man had kidnapped and sexually assaulted her. In court, the girl admitted to having gone willingly and to having sexual intercourse. Judge Dharmesh Sharma was of the view that a strict interpretation of the POCSO Act 'would mean that the human body of every individual under 18 years of age is the property of State and no individual below 18 years of age can be allowed to have the pleasures associated with once [sic] body.' He reasoned that: 'The words 'penetrative sexual assault' used in section 3 of the POCSO Act goes to suggest that where physical relationship or sexual intercourse had taken place with consent of a girl child which is not derived by coercion or not in the nature of an assault or use of

[18]TNN, "Child's consent immaterial in deciding guilt in sexual assault case: Court", *The Time of India*,July 24, 2015.

[19]*S. Varadarajan v. State of Madras*[1965 SCR (1) 243].

[20]*State v. Suman Dass*[Decided on 17.8.2013 by Dharmesh Sharma, ASJ01, New Delhi District, Patiala House Courts, New Delhi SC No. 66/13].

criminal force, or which is not resulting in exploitation, or where the consent is not obtained for unlawful purpose, no offence within the ambit of section3 of POCSO Act can be said to have been committed.'[21]

The Bombay High Court in ***Sunil Mahadev Patil v The State of Maharashtra***[22] the court granted bail on the similar understanding and acknowledging the consent of the adolescent girl. Moreover, a South African court[23] on the like matter of admitting the age of consent of children for sexual conduct to be 12 years passed a verdict for striking down the law which restricted the same.

It is ironical to note that the Hindu Marriage Act has recognized child marriage implicitly under section 12 and subsequently POCSO disallows sexual intercourse with persons below 18 years at the same time exception to section 375 IPC does not recognize rape beyond 15 years if the girl is the wife. Further, legitimacy of a child born out of a voidable marriage in this that being of a minor couple cannot be questioned, which a way permits sexual intercourse.[24] There are contradictions in these provisions and hence policy ambiguities exist which certainly does not seem justified.

Sexual pleasures in an integral part of humans' lives whose urges can occur at any moment in time[25], restricting that part of healthy living are certainly not the goal of laws. Whether married or not, if one of the partners is sent to jail, it shall have ill effects on the mental well being of the other partner which certainly is not the outcome the law seeks and is definitely against the preamble of the Act[26] enacted towards protecting the best interests of the child.

The other pertinent concern which might bring apprehensions to the minds of many is what if the girl gets pregnant as a result of such relations? In order to address such issues, it is pertinent to note that in such unfortunate cases we need to act as per the ***Chandrakant Jayantilal Suther v State of Gujarat***[27]verdict of the Supreme Court by allowing abortion of the foetus in case the mother is a minor girl keeping in mind her future and career even though it contradicts the provisions of the MTP Act in order facilitate a healthy life for the girl.

**Probable Solutions**

There needs to be check on such cases at the initiation of these at the initial stages of the cases i.e. at the time of investigation after lodging of FIR for framing of the charge-sheet.

There must be little more stringent guidelines for investigation for POCSO cases which shall ensure the filtering of genuine cases only. The reasons for

[21]Swagata Raha, "Love and sex in the time of the POCSO Act, 2012", In Plainspeak A digital magazine on sexuality in the Global South, (June 1, 2014), http://www.tarshi.net/inplainspeak/voices-love-and-sex-in-the-time-of-the-pocso-act-2012/.

[22]*Sunil Mahadev Patil v The State of Maharashtra*[ABC 2016 (I) 34 BOM].

[23]*Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*[2013] ZACC 35].

[24]Hindu Marriage Act,1955 (Act 25 of 1955)(s.16 (2) - Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity).

[25]United Nations, Report of the International Conference on Population and Development (September, 1994).

[26]Protection of Children Against Sexual Offences Act, 2012 (Act 32 of 2012). (And whereas it is imperative that the law operates in a manner that the best interest and well being of the child …. to ensure the healthy physical, emotional, intellectual and social development of the child.)

[27]*Chandrakant Jayantilal Suther v State of Gujarat*[R/SCR.A/4255/2015].

complaint must be of the nature which shall be cogent and the investigation shall exactly be witness to that fact to augment further proceeding with that case.

We need to recognize that Marriage is not the solution, but recognizing this freedom and liberty is what is sought out of this proposal. POCSO Act has sadly conflated child sexual abuse and child sexuality as is now understood after its implementation. Thus, if this proposition based on the true events as unfolded now is accepted it shall reduce the unnecessary cases of POCSO which overburdens the courts and ultimately serve no purpose in ensuring justice to the victims of such offences.If this is not so conceded there would be a tendency to commit graver offences which shall in return affect the society.

**Conclusion**

The paper is neither to justify the illicit/ child hood relationships especially involving sexual intercourses nor to propagate the same, but is intended towards accepting the changes in the society which have cropped up in these years and modifying the laws and its interpretations accordingly for the best interests of the child[28].

The Supreme Court has given a ruling allowing the women living in live-in relationships for long period of time to claim maintenance in case of separation[29]. The apex court has confirmed in another case that there lies a right to inherit property of a child born out of a live-in relationship[30]. These forward looking decisions of the court embodies the tendency in the legal system to allow societal developments to percolate down the existing laws to bring adequate changes. The judicial orthodoxy has been diluted with judgments like Triple Talaq and Right to Privacy this year which serves as the perfect juncture to accept a modification in regard to the rights of the young souls of our country. The proposal for incorporating the age of consent for children under a new category under POCSO Act shall enable the overall success of the Act and the objectives of the legislation will be accomplished.

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[28]Protection of Children Against Sexual Offences Act, 2012 (Act 32 of 2012). (Preamble-And whereas it is imperative that the law operates in a manner that the best interest and well being of the child …. to ensure the healthy physical, emotional, intellectual and social development of the child.)

[29]Pyla Mutyalamma vs. Pyla Suri Demudu, (2011) 12 SCC 189.

[30]Tulsa & Ors. vs. Durghatiya& Ors., Appeal (civil) 648 of 2002.

# Shielding the unregistered marks: a judicial analysis

*Atish Chakraborty*

**Abstract**

*With the advent and growth of economy, trade has been consistently on the rise & such rise has been increasing at a steady pace. To recognize a product as one's own, the traders tend to associate themselves with the name by which their product is commonly known to the masses and it is this name which is regarded as Trade Mark. The Trade Mark Act, 1999 along with the Trade Mark Rules, 2017 gives an array of rights related to Trade Mark. The principal legislation along with the rules aims at providing plenty of rights to the registered trade mark holder. Going by this notion, does this mean that those who do not have a registered Trade Mark are not subjected to any right or they are disentitled from getting any right? Simply put, the answer is no, it isn't so. Those who do not possess a registered trade mark can also stop the other person from using the identical or similar trade mark by invoking the Doctrine of Passing Off. This doctrine is based on the principle that no one has right to represent one's goods as the goods of other. To get the remedy of passing off the plaintiff has to proof that he is the owner of the mark, and the same has gained reputation and goodwill in the market and that the misrepresentation which has been done by the defendant due has caused the plaintiff to have suffered irreparable losses and damages. This article delves into the concept of passing off, the main elements that constitutes passing off, the evolution of law of passing and the role of judiciary to uphold the concept of passing off in the Indian Judicial system. Though, the person who has not registered the trade mark gets the rights but these rights are per se limited. In order to prove that an action of passing off holds ground, one has to show that reputation and goodwill are attached to the trademark that is in question. For an action of Passing off there as such is no criteria or definition that is expressly provided in any of the statutes. So it becomes a cumbersome job for the plaintiff to proof the same and even judiciary takes different approaches in different cases with regard to a passing off action.*

***Keywords:*** *Passing Off, Infringement, Goodwill, Reputation, Misrepresentation*

## Introduction

The common law tort of passing off, is an indispensable remedy which affords protection to the unregistered trademarks which developed in England historically, to protect the goodwill of the traders. The Doctrine of Passing Off is often invoked to prevent the opposite party to use such identical or similar mark that isn't registered. According to Lord Halsbury, it is based on the principle that *"no one has right to represent one's goods as the goods of other"*[1]. To invoke the remedy of passing off, the complainant must proof that he's the owner of the mark, and the mark in question has acquired goodwill in the market. Further, it is also necessary to prove that the

[1] *Reddy* v. *Banham* (1896) A.C. 199 p.204.

falsification has been done by the defendant and as a result of which the complainant has suffered irreparable loss and damages[2].

Thus, one can regard an action of passing-off as the species of unfair trade practice by virtue of which a person, by means of deception makes an attempt to obtain an unfair economic advantage of the name that the opposite party has established for him in an exceedingly explicit trade or business[3].

Passing off is often done by exploitation of the brand, trade to induce the potential purchasers to believe that his merchandise or business were same as those of complainant. The wrong lies within the falsity done by the suspect against the complainant. The falsity aims at deceiving the potential consumers of the products or services[4]. This may be done through confusing or deceitful use of the trade names, marks or alternative indications employed by the complainant in respect of such merchandise or services[5].

Further, the principle enshrined in an action of passing off is that *"trading should not solely be honest however it should not even accidentally be dishonest."*[6]Hence, it is often said that an action of passing off aims to guard business, goodwill and to confirm that the purchasers isn't exploited due to any kind of dishonest commercialism.

An action of passing off is a Statutory Right[7].The Apex Court[8] of our country has time & again laid down that in no uncertain terms a passing off action to enforce the plaintiff's right is independent of a statutory right to trade mark and it is against the conduct of the defendant which leads to or is intended or calculated to lead to 'deception'. In the case of Wander Ltd[9] it was held that passing off could be regarded as a species of unfair trade competition by virtue of which one person through deception makes an attempt to get economic advantage of the name that another has established for him in an exceedingly explicit trade or business through consistent effort. Thus, a passing off action is thought to be an action for deceit.

Passing off, however doesn't shield the interest of the owner of the trademark however it does protect the interest of the buyers.In the case of Seiko Time Canada Ltd[10], the Apex Court has held that the "the simple wrong of selling one's goods deceitfully as those of another is not now the core of the action. It is the protection of the community from the consequential damage of unfair competition and unfair trading."

**Passing off in India**

In India, passing off is crucial – firstly, since the registration of trade marks in India is a time-consuming process. Further, an application to

[2]Kailasam KC, *Venkateswaran on Trade Marks & Passing Off*(Lexis Nexis, Gurgaon) 2015, p.1188-89.

[3]*Cadila Healthcare Ltd* v. *Cadila Pharmaceuticals Ltd* (2001) 5 SCC 73.

[4]Narayanan P, *Law of Trademarks & Passing Off* (Eastern Law House, Kolkata) 2017, p.685-686.

[5]History of Passing Off,http://shodhganga.inflibnet.ac.in/bitstream/10603/132510/10/10_chapter%202.pdf(08November 2018).

[6] Ryder Rodney D,*Brands, Trademark & Advertising* (Lexis NexisButterworths India, New Delhi) 2003,p. 315.

[7] Difference between Infringement & Passing Off of Trademark in India, http://www.ssrana.in/Intellectual%20Property/Infringement/Difference-between-Infringement-and-Passing-Off-in-India.aspx(08 November 2018).

[8]*Cadila Healthcare Ltd* v. *Cadila Pharmaceuticals Ltd* (2001) 5 SCC 73.

[9]*Wander Ltd.* v. *Antox India (P) Ltd.* 1990 (Suppl.) SCC 727.

[10]*Consumer Distributing Co.* v. *Seiko Time Canada Ltd.*(1984) 1 S.C.R. 583 .

register a trade mark can often take several years, due to the Indian Trade Marks Registry's slow pace of functioning. This has often resulted that the Indian courts have been bound to hear a number of passing off cases where trade mark infringement could not be alleged only because the mark in question was pending registration and at times such pendency was for quite a long period of time. In this regard, it is pertinent to note the recent case of *ITC vs. Godfrey Phillips*[11], where it was observed by the Calcutta High Court that the suit filed by the plaintiff 'emanates from two separate trademark applications, one registered and other pending registration', and that the plaintiff was suing for 'passing off' of its unregistered label mark since such mark was pending registration for a considerably long period of time and that the plaintiff was left with no other option than to go for an action of passing off .

**Historic glimpse of the doctrine of passing off in India**

Passing off actions existed in India much before the enactment of the current Trade Marks Act, 1940. To institute a suit of passing off, one was to firstly establish a title on the trade mark. Secondly, one would have to show that the mark obtained a name and goodwill in the market. Thirdly, it was to be shown absolutely that the suspect had used a mark just like the mark belonging to the complainant and has thus passed his merchandise or sought to pass off his merchandise as those of the plaintiff[12].

The modern law pertaining to passing off and its development as part of common law may be understood as follows. It originated as an action in tort, to redress the wrongful conduct of a defendant in passing off his goods as the goods of the plaintiff, by using the trade name or trade mark of the plaintiff, in order to induce potential buyers into believing that his goods or business were those of the plaintiff. The tort was in the misrepresentation by the defendant to the potential buyers of his goods that the goods were of the plaintiff[13].

The Trade Marks Act, 1958 and Trade Marks Act, 1999 provide for passing off actions. *"Section 27 of the Trade Marks Act, 1999states about no action for infringement of an unregistered trade mark. -*

1. *No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark.*

2. *Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person, or the remedies in respect thereof."*

*Clause (2) of Section 27 "preserves the rights and remedies of the prior user. It states as even if the application for the registration of trade mark has been filed by the subsequent user and the same got the registration, even then the prior user can file for passing off action under Section 27(2)."*

[11]*ITC vs. Godfrey Phillips* AIR 2014 Cal. 19.

[12]Narayanan P, *Law of Trademarks & Passing Off* (Eastern Law House, Kolkata) 2017, p.689.

[13]Kailasam KC, *Venkateswaran on Trade Marks & Passing Off*(Lexis Nexis, Gurgaon) 2015, p.1190.

In the noted case of *Rupa & Co. Ltd vs. Dawn Mills Co. Ltd.*[14], the defendant was in the business of manufacturing underwear under the name "Dawn", which was found to be quite similar to the plaintiff's manufactured underwear ,"Don", which in turn created immense confusion in the minds of the people due the layoutand colour combination since they were too similar to the plaintiff's product and hence an order of injunction was granted.

This concept was further elaborated upon in the case of *Honda Motors Co. Ltd vs. Charanjit Singh & Others*[15], wherein the plaintiff had been using the trademark "HONDA" for automobiles and power equipment. The defendants began to use the mark "HONDA" for their pressure cookers. The plaintiff brought an action of passing off against the defendants. It was held by the Court that *"the use of the mark "Honda" by the defendants couldn't be said to be honest, and that its usage by the defendant was likely to cause confusion in the minds of the public and the injunction was granted for the same"*.

In *Koninkhijke Phillips Electronics vs. Kanta Arora*[16], Justice Thakur had laid down the following propositions:*"Section 27(2) makes it abundantly clear that registration of a mark in the trade mark Registry is irrelevant in an action of passing off and the mere presence of the mark in the Register does not prove its user by the person in whose name the same has been registered."*

**Passing off action: Ingredients**

The law of passing off arises once there's falsity, goodwill is injured within the course of trade, that causes injury to the trade or goodwill of the owner by whom the action is brought. The characteristics of passing off are mentioned and explained in a variety of cases.

In the case of *ErvenWarnik B.V. vs. Townend*[17], Diplock, J. laid down five main characteristics for which an action of passing off can be invoked. They are as follows-

*"1. Misrepresentation;*

*2. Created by someone in course of trade;*

*3. To prospective shoppers of his or final shoppers of products or services equipped by him;*

*4. That was calculated to injure business or goodwill of another trade (in the sense that this can be moderately predictable consequence); and*

*5. That caused actual injury to a business or goodwill of the person by whom the action was brought."*

Further, there are three main elements of passing off that are conjointly referred to as the*"classical trinity*[18]". Further, in the case of Harrods vs. Harrodian School[19] the classical trinity test

[14]*Rupa& Co. Ltd*. v. *Dawn Mills Co. Ltd* AIR 1998 Guj. 247.

[15]*Honda Motors Co. Ltd* v.*Charanjit Singh & Others* 2003 (26) PTC 1.

[16]*Koninkhijke Phillips Electronics* v. *KantaArora* 2005 (30) PTC 589.

[17]*Erven Warnik B.V*. v. *Townend* [1979] AC 731.

[18]Lord Oliver continued that "*The tort of passing off may be expressed in terms of the elements that a claimant (then called a "plaintiff") has to prove. There are three such elements known as "the classic trinity": They are-*

a) *The claimant's goods or services must have acquired a goodwill or reputation in the market by reference to a name, logo, get-up or some other distinguishing feature.*
b) *There is a misrepresentation by the defendant (whether or not intentional) in that he adopts a trade name, logo or other inidcia that is the same or similar to the claimant's that leads or is likely to lead the public to believe that goods or services offered by the defendant are goods or services of the claimant.*
c) *The claimant loses sales or suffers other damage such as the erosion of his or her goodwill.*
d) *In practice, damage is presumed to have been caused if the first two probanda can be established."*

[19]*Harrods* v. *Harrodian School* (1996) RPC 698 .

involves the elements namely*"reputation, deception & damage"*.

Once a falsity is established it's affordable to infer that the purchasers of the products bought them on it falsity unless there's proof to the contrary.

In Reckitt & Colman's case[20] which is commonly referred to as the "*Jif Lemon Case*" it was held that wherever it absolutely was declared by the House of Lords that in line with the law relating to passing off that *"No man may pass off his merchandise as those of another. It may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. Firstly, goodwill must be established or the name connected to merchandise or services that he provides within the mind of buying public by association with the characteristic "get up" under which his particular goods or services are offered to the public as distinctive specifically of the plaintiff goods and services. Secondly, he must demonstrate a misrepresentation by the defendant to the public leading or likely to lead the public into believing that goods or services offered by him are goods and services of the plaintiff. Thirdly, he must demonstrate that he suffers or likely to suffer damage by reason of erroneous belief engendered by the defendant's misrepresentation that the source of defendant's goods or services is the same as the source of those offered by the plaintiff. There are two necessary elements, first a misrepresentation expressed or implied but not necessary fraudulent and second a consequent likelihood of damage to the plaintiff's goodwill."*

In Baker Huges Ltd. vs. Hiroo Khushalani[21]the Delhi High Court had held that the plaintiff in an action of passing off must be able to establish the following elements:

*"1. The plaintiff has acquired a reputation or goodwill in his goods, name or mark;*

*2. A misrepresentation, whether intentional or unintentional, which proceeds from the defendant by the use of the name of mark of the plaintiff or by any other method or means and which leads or is likely to lead the purchaser into believing that the goods or services offered by the defendant are the goods and services of the plaintiff; or that the goods and services offered by the defendant are the result of the association of the plaintiff;*

*3. The plaintiff has suffered or likely to suffer damage due to the belief endangered by the defendant's representation."*

These three elements of passing off namely the reputation of goods, possibility of deception and likelihood of damage have been upheld by the Apex Court in the case of Laxmikant V. Patel vs. Chetanbhat Shah.[22]

**Jurisdiction of courts in an action of passing off**

Section 134(2) of the Trade Marks Act, 1999 states that *"for the purpose of clauses (a) and (b) of sub-section (1), a" District Court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than*

[20]*Reckitt & Colman Ltd* v *Borden Inc* [1990] 1 All E.R. 873.

[21]*Baker Huges Ltd*. v. *Hiroo Khushalani*(2000) 102 Comp Cas 203 (Del).

[22]*Laxmikant V. Patel* v. *Chetanbhat Shah*AIR 2002 SC 275.

*one such persons any of them, actually and voluntarily resides or caries on business or personally works for gain."* It means that a suit for passing off can be filed where the proprietor(s) or the owner(s) lives or carries the business.

**International perspective to passing off**

It is a well settled position that an Indian based plaintiff who can establish his wide consumer base in India can easily prove goodwill in the event of passing off cases. However, the question arises about the position of a foreign based organisation, for instance UK based Fortnum & Mason or US based food chain White Castle, which has neither any operation in India nor has applied to register their trade names in India.[23] Will the laws of India prevent a local trader from opening a store named Fortnum & Mason or a local fast food stall being named White Castle?[24]Can those foreign organisations argue that its reputation or good will is being *Slopped over* or damaged?[25] In the Indian setting, the foreign entities are most likely to succeed in such a suit. The subsequent sections will elaborate upon the India's liberal understanding of goodwill.

**The Indian Approach to Goodwill**

Goodwill of a business not only depends on the locality but also other circumstances.[26]The concept of goodwill shouldn't just be lifted bodily and applied to passing off cases.[27]"Goodwill" and "reputation" were widely used interchangeably by the Judges and the main focus was nevertheless the determination of reputation. India's attitude towards this was extremely liberal to that extent that even evidences like advertisements were sufficient for passing off suits.[28]

In *Kamal Trading vs. Gillette*,[29]Gillette sued a local trader for the use of the mark '7 O'clock' on the trader's toothbrushes which Gillette used on razor blades. Albeit the defendant argued that the goodwill of Gillette had no existence in India at all, the court disregarded the argument and held that 'the goodwill or reputation of a product is independent of its availability in a particular country. However, even if certain goods weren't freely available in India, they could still acquire a 'wide reputation' through the use of advertisements in newspapers and magazines, which per se is protectable.[30] Using the same principle, the defendants were restrained from using the mark 'APPLE' despite its negligible presence in India.[31] This view is indeed in contrary to the view adopted by the English Judges however appropriate keeping into

[23] A search of the website of the Indian Trade Marks Registry <http://ipindiaonline.gov.in/tmrpublicsearch/frmmain.aspx> conducted on 7 June 2014 in *"Nice Classes 35 (for Fortnum & Mason) and 43 (for White Castle) confirms this. However, a person with no ostensible links to White Castle applied to register the White Castle logo in October 2013 (Application No 2614755). The mark is currently pending registration. Email queries by the author to White Castle's trade mark counsel, seeking confirmation on whether the applicant is a squatter, have not been answered."*

[24] A list of references to White Castle in popular culture can be found at <http://www.whitecastle.com/cravers/pop-culture>(08 November, 2018).

[25] This expression has been used in, *inter alia*, *Esanda v Esanda* [1984] 2 NZLR 748 (High Court of New Zealand) 752; (1984) FSR 96, 101.

[26] Per Hidayatullah J, *Cambatta v. Commissioner of Excess Profits Tax*, 1961 SCR (2) 805.

[27]*Apple Computer Inc* v.*Apple Leasing Industries* (hereinafter APPLE case),(1992) 1 Arb LR 93 (Delhi High Court) [119].

[28]*Apple Computer Inc* v.*Apple Leasing Industries* (hereinafter APPLE case),(1992) 1 Arb LR 93 (Delhi High Court) [119].

[29]*Kamal Trading v. Gillette*(1988) 8 PTC 1 (Bom HC).

[30]*ITC v Godfrey Phillips* AIR 2014 Cal 19.

[31]Ryder Rodney D,*Brands, Trademark & Advertising* (Lexis NexisButterworths India, New Delhi) 2003,p. 315.

consideration the exchange of information, and the movement ofnewspapers, magazines, videos, motion pictures and movement of people across boundaries.[32]

In the famous case of *William Grant vs. Mc Dowell,*[33]the same principle was re-iterated by the Court while holding that Glenfiddich whisky had caused a spill-over reputation in India due to advertisements in the in-flight magazine of Air India as well as in various foreign magazines available in India. The reputation was extended to the shape of the bottle and the defendant were barred from selling bottles which are shaped in a similar manner. The same principles were subsequently upheld in various cases like *Calvin Klein vs. International Apparel*[34], *NR Dongre vs. Whirlpool (*hereinafter referred to as "Whirlpool case"),[35]*Dunhill vs. Makkar,*[36] Jolen vs. Doctor,[37]*Las Vegas Sands vs. Bhasin,*[38]. Interestingly, the court distinguished between the concepts of "reputation attached to a trade mark in India" from "the use of a trade mark in India", stating that advertisements by 'a foreign trader in respect of a product need not be associated with the actual use of the product in order to establish reputation.[39] The Whirlpool case has been the landmark case in the India in Jurisprudence in regards with the concept of goodwill. In fact, its ratio was further extended to include spill-over reputation through the internet[40]and even through other social media sources.[41]

Notwithstanding, even though the courts have progressively interpreted the provisions regarding goodwill, they accept spill-over reputation claims onlyif there are adequate evidence for the same. There have been situations where the cases have been dismissed on the grounds that the magazines were not read by Indian public[42] or that there were no evidences that there has been spill-over reputation prior to the filing of the suit.[43] Post the joining of India in Madrid System for International Registration of Marks in April, 2013, there has been greater digitisation in the aspect of trade mark applications.[44] This has reduced the time taken to obtain trademark in India to a great extent.

**Observation of Change on a Case to Case Basis**

It is pertinent to note that the Indian Courts have restrained spill-over reputation in cases of dissimilar goods and services too. This level of progressive stance taken by Indian courts could be understood by the following reasons:

(a) to promote fair play and honesty in commerce and to protect the creators of brands;

[32]Ryder Rodney D,*Brands, Trademark & Advertising* (Lexis NexisButterworths India, New Delhi) 2003,p. 315.

[33]*William Grant v. Mc Dowell*[199(4] FSR 690 (Delhi High Court).

[34]*Calvin Klein v. International Apparel*(1996) 16 PTC 293 (Calcutta High Court).

[35]*NR Dongre v. Whirlpool* AIR 1995 Del 300 (Delhi High Court).

[36]*Dunhill v. Makkar*,(1999) 19 PTC 294 (Delhi High Court).

[37]*Jolen v. Doctor*(2002) 25 PTC 29 (Delhi High Court).

[38]*Las Vegas Sands v. Bhasin*(2012) 51 PTC 260 (Delhi High Court).

[39]*Las Vegas Sands vs. Bhasin*(2012) 51 PTC 260 (Delhi High Court).

[40]*EasyJet v.EasyJet,(*2013) 55 PTC 485 (Delhi High Court).

[41]*Cadbury UK Limited &Anr. v. Lotte India Corporation Ltd*, (2014) 57 PTC 422 Del.

[42]*Roca v. Gupta, (*2010) Indlaw DEL 898 (Delhi High Court) (hereinafter referred to as "Roca case").

[43]*Chorion v..Ishan (*2010) 43 PTC 616 (Delhi High Court) (hereinafter referred to as '*Noddy case*').

[44]Leung Peter, '*India's Trade Mark Office Goes Digital*' (Managing Intellectual Property, 27 March 2014)http://www.managingip.com/Article/3324659/Indias-trade-mark-office-goes-digital.html (18 November 2018).

(b) to prevent the consumers from being deceived;

(c) rejection of the strict English approach by other countries in the international arena.[45]

The Courts have emphasised upon the importance of honesty and the impacts of dishonest cum fraudulent acts in the Gillette and the Apple cases. It was held in Apple case that:

*"It would not be right for courts to permit the persons who have spent considerable time, effort, money and energy in building up a name sufficient to have an impact to lose control over such an impact by improper use of the very same or colourably similar name by another in an unauthorized manner or even dishonestly".*[46]

Yet again the principles of commercial honesty were upheld in the famous Benz case[47] wherein it was held that law could not 'protect a person who deliberately sets out to take the benefit of somebody else's reputation .Especially so when the reputation extends worldwide. The interest of the consumer has always been the concern for the Courts in India which was expressly enunciated by the Delhi High Court in *Mathys vs. Sunthes.*[48] In fact, the court reasoned out that the rejection of English approach was necessary to protect the interest of the consumers.

In the Apple case, the Court referred to cases of several other countries *C&A Modesv vs. C&A (Waterford)*(Irish Case),[49]*Fletcher vs. Fletcher (*Australian case),[50]*Esanda vs. Esanda (*New Zealand case),[51]&*Orkinvs Pestco(*Canadian case)[52] and held that India needs to match up with the said countries in order to prevent the public from getting deceived.

The realistic groups however criticize and fear the influence of a Judge's personal socio-economic background in deciding in the passing over cases as there are no statutory provisions regarding the issue. One of the best ways to overcome this fear could be to borrow certain provisions from Section 11 of the Trade Marks Act 1999, which lays down the rules that guide the determination if a trade mark is regarded as a well-known trade mark' for registration[53]and the conditions that

[45]Ryder Rodney D,*Brands, Trademark & Advertising* (Lexis NexisButterworths India, New Delhi) 2003,p. 318.

[46]Ryder Rodney D,*Brands, Trademark & Advertising* (Lexis NexisButterworths India, New Delhi) 2003,p. 315.

[47]*Daimler-Benz v. Hybo Hindustan* AIR 1994 Del. 239.

[48]*Mathys v. Sunthes*(1997) 17 PTC (Delhi High Court).

[49]*C&A Modesv v. C&A (Waterford)*[1978] FSR 126 (Supreme Court of Ireland).

[50]*Fletcher v. Fletcher* [1982] FSR 1 (Supreme Court of New South Wales).

[51]*Esanda v. Esanda* [1984] FSR 96 (High Court of New Zealand).

[52]*Orkinvs Pestco*(1985) 50 OR (2d) 726 (Ontario Court of Appeal).

[53]"Trade Marks Act 1999 (India), ss 11(6). "*The criterias are:*

*1. The knowledge or recognition of that trade mark in the relevant section of the public including knowledge in India obtained as a result of promotion of the trade mark.*

*2. The duration, extent and geographical area of any use of that trade mark.*

*3. The duration, extent and geographical area of any promotion of the trade mark, including advertising or publicity and presentation, at fairs or exhibition of the goods or services to which the trade mark applies.*

*4. The duration and geographical area of any registration of or any application for registration of that trade mark under this Act to the extent they reflect the use or recognition of the trade mark.*

*5. The record of successful enforcement of, the rights in that trade mark, in particular, the extent to which the trade mark has been recognised as a well-known trade mark by any court or Registrar under that record."*

*Section 11 (7) states that "while determining as to whether a trade mark is known or recognised in a relevant section of the public' under s 11(6), the following shall be taken into account:*

*(i) the number of actual or potential consumers of the goods or services.*

should not be considered for making such a determination.[54] Surprisingly, these provisions are similar to the recommendations made on Paris Convention.[55]

There are chances of an undeserving plaintiff easily convincing a judge to hold in favour of him in a spill over reputation case. However, the plaintiff ought to further prove the likelihood of misrepresentation i.e. 'a real risk that a substantial number of persons among the relevant section of the public would in fact believe that there was a business connection between' the plaintiff and the defendant.[56] The Supreme Court[57] finally decided the factors that should be taken into account before giving a judgement in a spill-over reputation case, which are as follows:

"(a) The nature of the marks;

(b) The degree of resemblance between the marks;

(c) The nature of the goods in respect of which they are used;

(d) The similarity in the nature, character and performance of the goods;

(e) The class of purchasers who are likely to buy the goods, their education and intelligence;

(f) The mode of purchasing the goods; and

(g) Any other surrounding circumstances which may be relevant."

The Apex Court further held that the weight-age that needs to be given to each factor and that such factors may vary on a case to case basis.[58]

It can be inferred from the above sections that Indian courts can be easily played with and the foreign traders could 'legally harass'. To sum up, it can be said that there should be a requirement to produce a strong evidence of spill-over reputation along with the rigorous need of requiring the plaintiff to prove deception and the likelihood to cause damage.

**Conclusion**

To conclude it can be said that the Indian courts have consistently been recognising spill-over reputation issues, even in the absence of any goodwill, as a sufficient ground to fulfil the first requirement of the classical trinity test as to the requirements in case of a passing off action. The Courts have been mindful as to the judicial trends which has been prevailing in other Commonwealth countries and of all modern advancements through which the reputation of a mark can go beyond the territorial borders. Thus, the tort of passing off in India continues to remain highly relevant even in the 21st century and can be regarded as one of the most sought after remedy which has stood the test of time and has proved to

*(ii) the number of persons involved in the channels of distribution of thegoods or services.*
*(iii) the business circles dealing with the goods or services to which that trade."*

[54]Trade Marks Act 1999 (India), ss 11(9). These conditions are:

*"(i) that the trade mark has been used in India.*
*(ii) that the trade mark has been registered.*
*(iii) that the application for registration of the trade mark has been filed in India.*
*(iv) that the trade mark—*
*(a) is well-known in, or*
*(b) has been registered in, or*
*(c) in respect of which an application for registration has been filed in any jurisdiction other than India.*
*(v) that the trade mark is well-known to the public at large in India."*

[55]Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks, Article 2, adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the World Intellectual Property Organisation, 20 to 29 September, 1999.

[56]*Lego v.Lemelstrich* (1983) FSR 155 (Ch) 187–8.

[57]*Cadila Health Care Ltd. v. Cadila Pharmaceuticals Limited* (2001) 5 SCC 73.

[58]*Khoday Distilleries Ltd. v. Scotch Whisky Association*, AIR 2008 SC 2737.

be an indispensable remedy consistently over the ages.

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# Judicial Activism to Judicial Outburst: Contemporary Analysis of Indian Judicial System

*Ashwini Siwal, Vikas Bhati & Jatin Kalon*

**Introduction**

Two distinct words- "*niti"* and "*nyaya"*- both stand for Justice in Sanskrit. While the former, means organizational propriety and behavioral correctedness. The latter meant justice in reality and undoubtedly a wrong niti will give a wrong result i.e. nyaya. The Indian judicature is an instrumentality with grand stature and sober splendor. It has antique value and implicit heritage in its culture. It enjoys vast authority; it has disciplined dignity and decorum having meticulously chosen personnel having a luminous social philosophy.

There is a well-known adage in MEASURE FOR MEASURE that *"…it is excellent to have a giant's strength, but tyrannous to use it like a giant*". Unfortunately, the last decade witnessed the degree of "**Judicial Outburst**" which smacked off intemperate, sweeping and undignified comments by judges. There are several cases where some remarks were made, one of the cases is the VIP's Bungalow case. Another is Ghaziabad Judges Scam Case where a senior counsel was accused of behaving like a ***street urchin- three times***. Another case concerning cops who refuse to register F.I.R.'s, the court suggested huntering to make them work {*When you need to use the rod, authority is already lost}*. That's not all; the judges usually advise media "*to maintain fairness and accuracy*". Bowdlerizing press reports of court proceedings violates these values. Judges who feel besieged become intolerant of criticism. The generalization made by the judges that "*We are always under attack" & "judge-bashing and using derogatory and contemptuous language against judges has become a favorite pastime of some people.*" Was unwarranted. In the Godhra Bail case, the remark of the then Chief Justice shows that critics are shown scant fairness.

On the other side, the numbers of delinquents are on the rise. The passive assurances of integrity that judges are answerable to their conscience and the law are losing. [1] The standards of "**ROBED BRETHREN"** are suffering. Huge backlogs are eroding public faith; there are the instances of mob justice. The emergence of **banyan tree justice systems** like for eg. Lok Adalats, ADR'S etc. are claimed by some as reflections of failing faith in the judiciary at least in the lower courts.[2]. Allegations of corruption and wrong-doing surfacing in the case of judges in West Bengal, Uttar Pradesh Punjab & Haryana and Delhi and when the functioning of the institution is itself suspected and seen as unfair, it is a problem and what makes this crisis more upsetting is the fact that judiciary owns and claims so much power over its own affairs on the grounds that all other institutions in the country are corrupt. The

[1] Garry, Sturges., & Philip, Chub., (1988). Judging the World: Law and politics in the world's leading courts. (W. Heinemann).

[2] Marc Galanter, Kirpal B.N. Desai. H, *Fifty Years On, Supreme But Not Infallible*, Oxford, 2004.

exercise of this power is in itself a matter of great mystery. The virility of these allegations might not be in question, the point is that they do cast a shadow over the legitimacy. This opaqueness has been compounded by a sense of double standards.

It is one thing if a few judges are found involved in corruption but when the functioning of the whole institution is seen as skeptical, it is a serious matter altogether. "True or not, there is an unfortunate impression that even the judiciary, their oaths notwithstanding, and generally commanding esteem, have a social philosophy which is alien to the people's democracy. It is not uncommon that we find judges who do not write judgments- at all or dawdle or delay unpardonably in hearing cases and pronouncing judgments- arbitrarily on and off the bench, dubious on perquisites and forgetful of transparency, accountability and social justice." [3] This remark of KRISHNAIYER J. is a reflection of the sorry state the Judiciary has reached and also the high expectation of the people from the Judiciary who view it as a, "last post of hope" by the people. In today's outlook of transparency and accountability in government the Judiciary cannot escape scrutiny of its performance and conduct and the conceptual argument that Judiciary should be independent is untenable [4]. In fact, the two notions should be perceived as complimentary rather than antithetical.[5]

The journey of the courts in India has been from "Judicial Self-restraint" to "Judicial Activism" to "Judicial Outburst" which as feared by some might well end up in judicial imperialism. The notions of SEPERATION OF POWERS are crumbling with claims that the judiciary is indeed usurping the functions of other branches, whereas it reacts sharply to any criticism of that. Instead, what the paper attempts to claim is that the notion of separation of power is a myth and what is intended is that the three organs must work in their respective domains to uphold the cardinal constitutional principles only.

This paper identifies and discusses two problem areas:

*The Power of Contempt*: Whether the power of contempt has been stretched too far?

The stature of judiciary is high enough that any action to denigrate the dignity and the integrity of the court is bound to fall. But whether the court in India is very touchy and forgotten that they hold the power in the public trust which is the sovereign under the Constitution of India? Had they also forgotten that they are also the creation of the law that is the Constitution of India which expressly provide for their removal? And what happens if judges themselves commit crimes or the Judiciary as an Institution commits any act which is extravagant, excessive, unfair, authoritarian or corrupt? Or that is permissible under their oath or by the independence they claim?

With these questions in mind the paper will examine the proper extent of the power of contempt?

[3] Justice V.R. KrishnaIyer. (2008) Judge's Potpourri. Universal Law Publishing.
[4] Venkatesan, V. (2004, August 27). For Judicial Transparency, *The Frontline*, 32.
[5] R.D. Nicholson. (1993). Judicial Independence and Accountability: Can They Co-exist?. 67 ALJ 404

*The Judicial Outburst:* Whether the Judiciary in the name of Judicial Activism is running counter to the Constitutional framework?

All the three important pillars in democracy are undoubtedly the creation of the Constitution of India and it's the Constitution from which they derive their powers. The constitution envisages the Doctrine of Separation of Powers in the form of checks and balances. The process of judicial activism often is running counter to that leading to charges of usurpation of power by the judiciary. This problem is undoubtedly exacerbated by the strong language in which judge sometimes express themselves. This paper will examine the concepts of review, activism, kinds of the same, the Indian experience and the way forward. The paper will attempt to establish that the judicial self-restraint is the best way out in the light of the fact that they have moved away from what they were originally supposed to do and their claim that they are acting as buffer as the other organs are not doing their functions properly falls on the face in the light of the arrears and huge backlogs, the justice is actually not reaching the lowest strata which is causing dissatisfaction and delusion of the same degree which is used to justify the activism and where does the separation of power goes which the court had themselves held to be a part of the basic structure.

## The Separation of Powers

### *Meaning, Reason, Limits and the Proper Course*

The main criticism of the Judicial Activism is on the ground that it runs counter to the cherished principles of the Separation of Powers. *Black's law Dictionary* defines the doctrine as, "*The division of governmental authority into three branches of government each with specified duties on which neither of the other branches can encroach*." [6] Putting simply, it means that in an ideal state the Legislature makes, the Executive executes and the Judiciary construes the law. It depicts the general meaning of the expression and also indicates that it is not as simple as it looks.

Though, the French philosopher, *Montesquieu*[7], is credited for the development of this concept but according to *C. K. Allen* it was '*Locke*' who propounded this theory for the first time. The importance of these philosophers lies in the fact that their influential writings sowed the seeds of the doctrine of "*Separation of Powers*" and helped it to attain fruition in the American Constitution. And, it was not without a good reason based on experience, that Americans, almost at the moment of independence was declared, began to set up written Constitution and put the Separation of Powers at their foundation. The 19th century, Philosophical jurists deduced the Separation of Powers from the idea of Liberty[8], and took it to be a necessary dogma for a state ruled by law. This statement of *Montesquieu* captures the idea, "*There is no liberty if the power of Judiciary be not separated from the Legislative and Executive. Were it joined with the Legislature, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the Executive power, the Judge might behave with violence and*

[6] Black's Law Dictionary 6th Ed.-19.
[7] Montesquieu. (1748) The Spirit of Laws.
[8] Roscoe Pound. (1951). Justice. Yale University Press, (Chapter 3)

*oppression.*"[9] The theory aimed at the removal of arbitrariness and promotion of liberty as it is quite common sensual that where all the powers are vested in one body there can be no liberty and things will lead into arbitrariness, tyranny and autocracy, as *Blackstone* and *Ivory Jenning* also agrees to that [10]. It would be apt to give the quote of *Lord Acton* here that, "*Power corrupts, and absolute power corrupts absolutely*."

The traditional approach of this theory was in the form of division of the power of the state in three separate organs, viz, the Legislature, Executive and the Judiciary. The question is whether the Judicial Activism results into the betrayal from this solemn theory of Separation of Power. If we take into account only one aspect, then yes, but that will be a hasty conclusion. And if we fail to take into account the practical realities then the truth might be converted into wrong hood. In practice, it is impossible to separate the three organs completely in watertight compartments as that situation will also lead to tyranny by making the Constitution unworkable. Our framers also recognized this and introduced a system of checks and balances, a system of overlapping and intermingled powers. However, that does not imply that one is free to do anything- the caution must be taken so, "***THAT THE OVERLAPPING DOES NOT BECOME ENCROACHMENTS***".

This leads us to another important question, as to what are the limits? Does that mean that the respective organs know their powers? However, that will be a misconception, as there may be certain exceptional cases where a common man after giving unsuccessful knocks at the doors of the Legislature and the Executive comes to Judiciary, demanding justice. Now if the Judiciary will say that, "*Oh look, I can't help you*!" under the pretext of this doctrine and shut the door on him is that the separation of power…certainly not and whether it should be stretch to that limits, the answer is very clear. That is the notion of this doctrine and as long as the Judiciary responds to his knocks, without prevarication or procrastination- it is acting as a buffer between various wings. That's the reason why the Montesquian genome has to give way to the bigger cause of justice as justice is the *supreme virtue.*

However, the respective powers had their limits and if stretched beyond that it would lead to collapse of the system as *Spencer's Law* says that action and reaction are in an equal and opposite direction, it might give rise to a snowball effect that will soon lead to an avalanche. The proper course may aptly be put into the words of *Abraham Lincoln*, "*Have we not lived enough to know that two men may honestly differ about a question, but both be right? In this paradox lies the secret of judicial process. There are areas where judges must be activist and there are areas where they must be passivists. In which area they must be activist and in which area they must be passivists can be gathered from the knowledge we*

[9] Baron de Montesquieu, The Spirit of Laws, 152 (T.N.T., Hafner Pub. Co. 1949) (1750).

[10] Justice Louis Brandies in Roscoe Pound's, *The Development of Constitutional Guarantees of Liberty"*, that, "*The doctrine of separation of power was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incidental to the distribution of the governmental powers among these departments, to save the country from autocracy*."

*get by experience*." Thus, the judges must be guided by the experience in setting out their limits.

INDIAN JUDICIAL PRACTICE:

The notion of the Separation of Power is not so deeply rooted in the Indian Constitution as in the United States Constitution. Our Constitution has system of check and balances which require all the three wings to work harmoniously. In re Delhi Laws [11], Supreme Court pointed the absence of explicit provisions in the Constitution specifically vesting legislative powers in the legislature and judicial power in the judiciary. The question than arises; did the Constitution, thus, envisage the doctrine of separation of powers at all? The majority opinion, however, imported the "essence" of the doctrine of Separation of Powers and the doctrine of constitutional limitation and trust implicit in the constitutional scheme. A necessary corollary of this principle, as later predicted in Chandra Mohan v. State of Uttar Pradesh [12] was the separation and independence of the judicial branch of the state[13]. In the famous case of Indira Gandhi v Raj Narain[14] the doctrine of Separation of Powers was equated as basic feature. Though, that in itself appears contrary to the doctrine of Separation of Power. This decision seemed to be most adverse to the theory of judicial review. It seemed to wrestle supremacy to a non-elected court and against the elected parliament. The LORD SCARMAN'S advice must be observed here, that the separation of powers must be adhered if the judicial independence is not to be put to risk.[15]

**Justification and Desirability of Judicial Activism**

"*…the purpose of the law, and the purpose of the judiciary, is not merely to sit in wig and gown for a number of hours a day and look very learned. They supply a social purpose that is, to bring about justice, to deliver justice to the people*"

The social purpose of delivering justice to the people could not have been fulfilled without the brooding omnipresence of Judicial Review in the form of Judicial Activism. The rhetoric expressions like, "jardem das seine" and "fiat justitia et pereat mundus" would be no more than a wasted eloquence, sans the willingness of a judge to regard letter of law as nobody and to venerate the sense and reason of law as the sole. They are expected to give the constitution, "a continuity of life and experience"[16] and must be "vocal and audible" [17] for the ideals that may otherwise remain silent to put it in the words of the revered Justice Benjamin Cardozo. They argue that the original intention of the constitution makers does not bind a constitutional court and if they failed to give the interpretation according to contemporary notions there is danger that the constitution will be stultified and devoid of strength necessary to provide the normative order for the changing times.[18] As the constitution is an organic law and this requires that

[11] A.I.R. 1951 S.C. 747
[12] A.I.R. 1966 S.C.1987, at p.1993
[13] Justice S.B. Sinha. (2006). Judicial Independence, Financial Autonomy and Accountability Justice. NYAYADEEP, Vol. VII, Issue 1.
[14] A.I.R. 1975 S.C. 2299
[15] LORD SCARMAN in DUPORT STEEL LTD. V SIRS [1980] 1 AllER 529 AT 551.
[16] Benjamin N. Cardozo. (1927). The Nature of Judicial Process, 92-94.
[17] Ibid 16
[18] S.P. Sathe. (2001). Judicial Activism: The Indian Experience, Washington University Journal of Law & Policy, 6, 29.

the courts interpreting should be creative rather than mechanistic in their interpretations. According to Justice Cardozo, a written constitution "states or ought to state not rules for the passing hour but principles for an expanding future." [19] It was the doctrine of ultra vires that enabled the judiciary to, and not the elected parliament to have the last say on the validity of the laws. The critics call it undemocratic and violation of the principles of majoritarianism, however, this judicial function has heightened the tension between the judiciary and other branches of government opening the judiciary to charges of over-reaching itself.

**Reasons:**

***Philosophical basis:***

There are two cardinal principles inherent in the things; these are the spirit of change and the spirit of conservation. Nothing can be real without the presence of both. Mere conservation without change can't conserve and mere change without conservation is a passage from nothing to nothing. Now the change is not necessarily to be bought about by the statute. Judiciary has also a role to play. In fact, no court can interpret a statute, much less a Constitution, in a mechanistic manner[20]. A court has to sustain its relevance to the contemporary needs and situations which arise in the ever changing social, economic and political scenarios and to quote BENJAMIN CARDOZO, give to its words, "a continuity of life and expression." [21] DEAN ROSCOE POUND has also observed that it is not about the maintenance of status quo. And for that little friction is bound to happen but friction is necessary in law as in motion.

**Jurisprudential aspects:**

There are many diverse conceptions regarding the growth of law. However, two of them are peculiar. They are:

- One that the essence of the law is that it is imposed upon society by a sovereign will. The first is the essential attribute of the Austinian Jurisprudence it is argued that it fails to capture the true nature of judicial function.
- In the other one the essence of law is that it develops within the society of its own vitality though it does not discard the notion of sanction or enforcement by a supreme authority established by law and that itself is a creation of law. It explains the jurisprudence of the judicial activism.

The superiority of the other theory becomes clear from the celebrated decisions in the Marbury v. Madison, [22] Brown v Board of Education [23] , Donoghue v Stevenson, Rylands v Fletcher, Keshavanand Bharati[24] and M.C.Mehta[25] cases.

Further, the process can be regarded as either-

- DEDUCTIVE i.e. a priori. The first theory assumes that the legal rule applicable to any case is fixed and certain from the beginning,

[19] Supra note 16, at 83.
[20] J. Marshall in the Maryland case of 1819 remarked that," the *constitution was intended to endure for ages to come and consequently to be adopted to the various crisis of human affairs*".
[21] Supra note 16.
[22] 5 U.S.(I (Cranch) 137 (1803))
[23] 360 U.S. 201 (1964).
[24] AIR 1973 SC 1461.
[25] AIR 1988 SC 1037.

and all that is required of the judge is to apply this rule. In this way this follows the legal positivism and seems to be intimately attached to the BLACK LETTER LAW TRADITION which has been defined by Rajeev Dhavan as one which seek to interpret law as a distinct, relatively autonomous reality. Within this tradition law is separated from morality. It is understood and interpreted by esoteric rules known only to the initiated and critiqued on the basis of self-constituted legal principles and concepts. The literal or mechanistic view, this is the Austinian or Positivist approach, according to which the Judges do not make laws, as said by Blackstone that, "the duty of the court is not to pronounce a new law, but to maintain and expand the old one."[26]

- INDUCTIVE or a posteriori: The latter conceives that the judge is always reasoning inductively. Its basic application is from particular to general and in adherence to the precedents, but it leaves scope for the courts to interpret the law not strictly according to its letter but in the light of its spirit taking into account the changing situations. Thus, it is the inductive approach which provides the better understanding of judicial review in the form of proper judicial activism. The other view is the liberal, purposive interpretation which involves the creative function of the Judiciary with insight into social values and with suppleness of adoption to changing needs. It adheres to the Realist School.

The idea underlying Judicial Review can be traced to the Natural Law Doctrines which says that a man-made law was susceptible to correction and invalidation by reference to a higher law.[27]

**Indian pecularity:**

In India, Judicial Review is a constitutional command. There need is proper Judicial Activism can be justified, in fact fortified, when we take into account the growing hiatus between the expectations and the reality, the promises and the performances, the enactments and their implementation. The net difference is so vast that it had resulted into despair, disenchantment and disillusion and consequently developed a feeling of helplessness, deception, alienation and anger. It is now clear to prudence that it was meant to fill the yawning gap and it should not be doubted that it is required as a measure to keep the instrumentalities on the course or to provide justice through law-in-action. It explains the reasons and the basis of the constitutional commands and the need of Judicial Activism.

**Judicial Review, Judicial Activism**

***Meaning and Relation***

JUDICIAL REVIEW: The Black's Law Dictionary, defines Judicial Review as, "A court's power to review the actions of other branches or levels of government; especially the court's power to

[26] Blackstone. (1808) Commentaries, 69

[27] M.J. Harmon. (1964). Political Thought: From Plato to the Present. New York: McGraw Hill, Also refer to DR. BONHAM'S CASE, 8 Coke's Report, 114 at 48.

invalidate legislative and executive actions as being unconstitutional."[28]

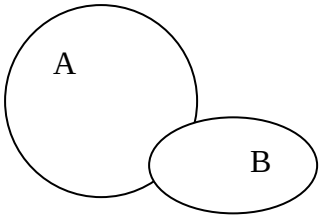
The power of judicial review is a constitutional mandate in India. The scope of Judicial Review in India is somewhat circumscribed to that in the U.S.A., while in India, the Fundamental Rights are not exhaustively defined as in the U.S. and limitation thereon has been stated in the Constitution itself. The Constitution Framers also felt that the Judiciary should not be raised to the level of "super-legislature." Professor Ramaswami suggested that precise framing of the declaration of rights would avoid large scale invalidation of laws by the courts.[29] That seems to me the reason why the Directive Principles of State Policy were not made justifiable.[30] The reason de attire for Judicial Review can be seen in the following argument that Constitution is not a self-executing document and in order to prevent a horrible situation where the Constitution is a plaything of the politicians it becomes an imperative. Little doubt Dr. Ambedkar called Article 32 the heart and the soul of the Constitution. Federalism and Fundamental Rights add new dimensions to the significance of judicial role. And lastly, the judiciary is politically neutral hence eligible for unbiased analysis.

**Judicial Activism**: Judge Frank Easterbook once said that, "Everyone scorns Judicial Activism, that Notoriously Slippery term." [31] The Black's Law Dictionary defines, "Judicial Activism" as, "a judicial philosophy which motivates judges to depart from the strict adherence to judicial precedent in favor of progressive and new social policies which are not always consistent with the existing accepted by the appellate courts."[32]

Judicial activism has became a subject of controversy in India for pro-activists it is merely a legitimate function of the courts [33], while for its critics it amounts to usurpation of powers allotted to others organs of the government and a miserable sophistry. The justification that is provided in the Indian Perspective is that it is the Constitutional mandate to the judiciary to keep in mind the social and economic objectives which the Constitution seeks to protect, promote and provide as embodied in the law. When the practical organs fails to discharge their obligations effectively or show an attitude of indifference to them. Then, the judiciary comes in for rendering the social, economic and political justice to the people at large. In such case the behavior of Judiciary can be rightly and legitimately be summarized as Judicial Activism. Dr. B. R. Ambedkar, defended the Article 32 as being necessary in fact he defined the writ jurisdiction as the very heart and the soul of the constitution.[34]

RELATION: Judicial Review and Judicial Activism are related to each other in a way that the latter is inherent in the former and the former is sometimes bound to mature in the latter.

[28] Black's law dictionary, 6th ed. at p.849.
[29] Ramaswami, M. (1946). Fundamental Rights. Oxford University Press.
[30] Article 37, The Constitution of India.
[31] Frank H. Easterbook. (2002). Do Liberals and Conservatives Differ in Judicial Activism? 73 U. COL. L.REV. 1401.
[32] Supra note16 at p.847
[33] As remarked by Justice A. H. Ahmadi that it is a necessary adjunct of the judicial function because the protection of the public interest, as opposed to private interest is the main concern. In A.H. Ahmadi, Judicial Process: Social Legitimacy and Institutional Validity, 4 SCCJ, VOL.1, 1-10 (1996).
[34] C.A.D. Vol. 7. 700 & 953.




I) A = Judicial Review.

II) B = Judicial Activism.

III) A  B = Where courts acquires the role of activist while performing Judicial Review.

IV) B – (A  B) = Where courts does not review but is still acts as an activist.

It is all right until B is the sub-set of A, when the last situation grows out of proportion which has happened in today's context.

**Other forms of so-called judicial activism**

***An overview of the judicial practice in India***

Though, the use of the expression Judicial Activism can be traced back to the time of ABRAHAM LINCOLN, it was the Article of the ARTHUR SCHLESINGER Jr. published in Fortune Magazine in 1947 which explored its dimensions in various ways.

**Broadly speaking:**

The inductive method of judicial review gave rise to the NEGATIVE MODEL OF ACTIVISM, which prescribed the path for certainty.[35]

The deductive method gave rise to the POSITIVE MODEL OF ACTIVISM, wherein the court was engaged in changing the power relations to be more equitable.[36]

The expression has been qualified as reactionary, progressive, eclectic, opportunistic and at other times it has been identified with expressions such as judicial excessiveness, passivism, authoritarianism, overreach, adventurism, romanticism and populism.

- REACTIONARY JUDICIAL ACTIVISM: much of the Nehruvian era activism on issue of land reform, and the activism typified in SHIVAKANT SHUKLA.
- PROGRESSIVE JUDICIAL ACTIVISM: commenced with the cases of GOLAKNATH[37] and KESVANAND BHARATI CASE [38] and culminated into a wholly different genre guided by the PIL's.[39]
- OPPORTUNISTIC JUDICIAL ACTIVISM: Indira Gandhi used to describe certain Judges as GANGADAS and YAMUNADAS though it was not always unreasonable.
- ECLECTIC ACTIVISM: it may be progressive or reactionary; it refers to situations where Judges pick and choose contexts of social action litigation to perform adjudicatory wonders. Eg. it was the AGRA HOME CASE that marked the inception of broadening standing but the radical enunciation of public interest standing took much later in THE JUDGE'S CASE.

[35] Gopalan Case, Habeas Corpus Case.
[36] Supra note 23
[37] AIR 1967 SC 1643.
[38] Supra note 24.
[39] Starting with the Judge, s case

'*Judicial Passivism'* and '*Judicial Excessivism'* represented the ends of the two extreme poles and both are equally preposterous as too little would signify un-enforcement of constitutional notions and too much will result in over-enforcement of these ideals, imperiling the legitimacy and efficacy of the judicial power.

- JUDICIAL PASSIVISM: the times when the Judiciary shrugged of its responsibilities when the people expected it to shoulder their troubles for some the NARMADA DAM CASE and BALCO CASE are an example of such passivism. This leads us to the question that how to draw a clear boundary between the two concepts. To many KESVANAND BHARATI discourses on the Basic Structure Doctrine and the emancipation of constitutional Secularism in S.R. BOMMAI v UNION OF INDIA CASE[40], smack of excessivism.
- JUDICIAL POPULISM: This has infectious qualities and the court is required to be cautioned against it as it stands for self-indulgent judicial behavior. It is often disguised in spurious appeals to the people as a justification for the decision. Upendra Baxi regarded PIL as a form of such populism. And the AIIMS episode was such incident in my humble opinion.
- JUDICIAL AUTHORITARIANISM/ OVERREACH/ ADVENTURISM- These expressions are more or less regarded as synonyms and they are not recommended as they might turn the guided missile of legitimate activism into an unguided one and the court must show restrain and try to remain within the bounds. For me the case of SAMYUKT NAGRIK SAMITI decision by the Patna High Court, the VEERASWAMI JUDGEMENT, JAGDAMBIKA PAL CASE, JHARKAND ASSEMBLY CASE were examples of such activism.
- JUDICIAL ROMANTICISM: It is a habit that results from the habit of the mind that courts are a solution of the problem in fact the previously discussed overreach is a result of this only and it may be rooted in part in the flattery of public faith and in the frequent resort to the judiciary. It has resulted into mushrooming of litigants especially in the form of PIL's, and is a cause of discomfort among the politicians, analysts and even the Supreme Court itself, as it has burdened the courts to do something which they are not well fitted to do and thus they are embarrassed by the public expectations. This in part explains the growth of the "BANYAN TREE JUSTICE SYSTEM".
- JUDICIAL SELF-RESTRAINT: The Black's law dictionary defines judicial self-restraint as, "self-imposed discipline by judges in deciding cases without permitting themselves to indulge their own personal views or ideas which may be inconsistent with existing decisional or statutory laws."[41] The present trend.

**Judicial Review and Judicial Activism**

***The Practice of Indian Supreme Court***

***Pre-independence:***

[40] AIR 1994 SC 1918.

[41] Supra note 2.

In fact, Judicial Review is an integral feature of the Rule of Law, which is a Basic Feature of the Constitution of India.[42] Every state action must be verified and tested on the anvil of the Rule of Law. Unlike the U.S. Constitution which emphasizes on the point that it is the supreme law of the land, the Indian Constitution explicitly provided for the doctrine of judicial Review. It has its roots in the principles that a system originated from a written constitution can hardly be efficacious in practice without an authoritative and independent arbiter and also that it is necessary to restrain government organs from exercising powers which may not be sanctioned by the Constitution. The constitution of India explicitly establishes the doctrine of Judicial Review under Article 13, 32, 131-136, 143, 226 and 246. Thus, doctrine of Judicial Review is firmly routed in the Indian Constitution and was the explicit mandate of the Constitution. The judicial review originated in England. The courts in India began exercising it with the very first act of the British Parliament in 1858.[43] The Privy Council established that although the Indian Legislatures powers were circumscribed by the restrictions of the constituent act, within its limited sphere it was a sovereign as the imperial parliament.[44] In King Emperor v. Benorari Lal Sharma[45], "The question raised was whether the ordinance is intra vires or ultra vires does not depend on considerations of jurisprudence or policy. It depends simply on examining the language of the Government of India Act." The courts struck down very few statutes during the colonial period. Professor Alen Gledhill remark will be well placed that, "even the Indian lawyer generally regarded the legislature as sovereign and it was not until the Government of India Act of 1935 came into force that avoidance of law by judicial pronouncements was commonly contemplated." [46] However, the courts continue to both construe the legislative acts strictly and to apply the English Common Law method for safeguarding individual liberties.

***Post-independence:***

The Supreme Court Continued its policy of observing maximum judicial restraint which was prevailing in the countries ruled by Britain. The Supreme Court of India stated as a technocratic court in the 1950's. in fact, for the first two decades the court rarely took up the cudgels against the Legislature. The best example of this was the A.K. GOPALAN CASE, the literal approach was followed in Chiranjit lal Sahu's case[47] , Mukherjee J. remarked that, "in interpreting the provisions of our constitution, we should go by the plain words used in the constitution."

Literal approach was followed in, Anand Bihari v. Ram Sahay, [48] Pradyut Kumar v. Chief Justice, Calcutta High Court[49], Bijoy Ranjan v. B.C. Das Gupta[50], Jwala Ram v. Pepsu[51] and many others. however in that case a whimper of activism was

[42] Indira Nehru Gandhi v. Raj Narain AIR 1975 SC 2299 at para 320.
[43] Empress v. Burah and Book Book Singh I.L.R. 3 (Cal.)63, 87-88.
[44] Queen V burah, [1878] 3 A.C. 889.
[45] (1945) 72 IA 57.
[46] Alen Gledhill, Unconstitutional Legislation, in 9 Indian Yearbook of International Affairs 40 (Madras ed., 1952).
[47] AIR 1951 S.C.at 58.
[48] AIR 1952 MB 31.
[49] AIR 1956 S.C. 285 L.
[50] AIR 1953 Cal. 289
[51] AIR 1962 S.C. 1246.

heard in the words of J. SUBBARAO. There was certain epoch of activism in the words of SUBBARAO J. in K.K.KOCHURI CASE, and in the words of J. P. SHASTRI in the cases of RAMESH THAPPAR and CHAMPAKAM DORAIRAJAN.

By the end of 60's there were certain visible signs as clear from the decisions in K.T.MOOPIL NAIR V STATE OF KERELA and in the KHARAK SINGH CASE. The court was however bold in upholding the freedom of press and speech as clear from the decisions in the cases of BRIJBHUSHAN'S CASE, EXPRESSNEWSPAPER CASE, SAKAL NEWSPAPER CASE, RAM MANOHAR LOHAI CASE In Puthamma v. State of Kerela [52] the Supreme Court emphasized that judicial approach should be dynamic.The activism reached its pinnacle in the case of Golaknath to undo the melancholy of Sajjan Singh and Shankari Prasad. Subsequently came the Bank Nationalization Case and the Madhav rao Scindia Case.. However, the revolutionary change came with the decision in the Keshvananda Bharati Case. in 1973 in which the Supreme court envisaged the Basic Structure Doctrine Which was severely criticized by various scholars including Prof. B.k. Tripathi, and Seervai. Cases like golaknath, bank nationalization, or keshvanand bharati have raised passionate controversies in India. However, judiciary set certain wrong examples by adhering to the strict interpretation in the Gopalan case, Keshav Madhav Menon case, Saka Venkata Rao case, Habeas Corpus case

**Criticism:**

This was conceptually unsound as if Parliament in its constituent capacity does not have a plenary power to amend, the Constitution get reduced to the status of the removal of the difficulty clause. Mr. Raju Ram Chandran observed that this doctrine stifles a Democracy. Prof. Upendra Baxi observed that the Constituent Power was shared between the Parliament and the Supreme Court.

However, from here came the trough of the Habeas Corpus Case, then came the Indira Gandhi V. Raj Narain IN 1975 thereafter came various landmarks judgments like Meneka Gandhi, Ajay Hasia, M.C.Mehta anda plethora of cases under the leadership of the J. KrishnaIyer and J. Bhagwati Judicial Activism earned a Human face. In 90's we witnessed a phenomenal exercise of judicial power. The Supreme Court has been deeply conscious of the morass created by the politicians, corruptions, administrative and legislative nepotism etc. there were examples of clear overreach like when the Supreme Court incorporated the Directive Principles of State Policy within the Fundamental right to life and personal liberty and made them enforceable indirectly.

**Judicial Activism in United States**

***The Experience and the Lesson from AIIMS Controversy***

The Constitution of United States did not expressly mention that the U.S. Supreme Court had the power to invalidate acts of Congress that are contrary to the Constitution, Chief *Justice Marshall* held in

[52] AIR1978 S.C. 771, ALSO SEE India Cement Ltd. V. State of Tamil Nadu, AIR 1990 S.C. 85, LIC OF India V. Munnabhai D. Shah AIR 1993 S.C., S.R. Chaudhari v. State of Punjab AIR 2001 S.C. 2707.

*Marbury v Madison*[53] that such power was implied. This assertion of power was severely criticized as a usurpation of power by an unelected court. However, both *Thomas Jefferson* and *Alexander Hamilton* on the basis that fundamental law should regulate court decisions[54] assumed that the court would have such power. This assertion of power became controversial but eventually was accepted as desirable and legitimate. One writer acknowledged judicial review of legislative acts as a "*product of American law*"[55]

However, the power of the court to decide issues of policy always evoked a vehement debate. Be it the reaction of Liberals who called the court, "*reactionary*" to the objection of courts to *President Roosevelt's* regulation of the economy in 1930's or the Conservatives who called the court, "*adventurist*" when the Warren Court expanded the Rights of African-Americans[56]. After the decision in *Brown V Board of Education*[57] the conservatives threaten to impeach the judges. Various American scholars have, however, raised objections to the decision of the Warren court on the ground that it tended to legislate.[58] Just to mention that how divided the United States was in response to the activism shown by the Judiciary, the Conservatives approved the, "*former*", while, the liberals approved the, "*latter"*. Thus, there were disapprovals by different sort of activism by different group of peoples.

LESSON: This shows the probable danger of politicization of the Judiciary by the political forces. If we go through the speech of *Justice Learned Hand*, it becomes clear that what he was at pains to emphasize that Judges must not play with power, political forces establish a stable society based on a balance of power under which an independent judiciary works and flourishes their rulings might affect power. They must not avoid judging legal issues because they would have political consequences, but they must not settle political controversies in the garb of legal issues. They are immune to political control but- *the price of that immunity* is their abstinence from politics.[59] the attitude of the Judiciary that, "*Come to us, we will save you*." becomes particularly disturbing in the light of the fact that we had a very fractured nature of polity and if these new forces who are least bothered about Constitutional norms conclude that the Judiciary decided to become a partisan voice, the very legitimacy and the responsibility of the constitutional arrangements would come into challenge and the example of *Pakistan* is well before us.[60]

**Indian Judiciary: Powerful Stature**

The Supreme Court of India has become the most powerful court in the world today. It fortified the independence of Judiciary by upholding that it will have the last word in the appointment of Judges of

[53] 5 U.S. (1 (Cranch) 137(1803).
[54] Alexander Hamilton. (1837). The Federalist, No. 78, 102.
[55]Westel Woodbury Willoughby. (2d ed. 1929). The Constitutional Law of the United States. New York: Cambridge University Press.
[56] Prof. Bickel attacked the Warren Court as, over interventionist in purpose, sloppy in reasoning and mistaken in result.
[57] 360 U.S. 201 (1964).
[58] Alexander M. Bickel, (1986). The Least Dangerous Branch. (2nd ed.) United Kingdom: Yale University Press.
[59] A.G. Noorani. (2008, July 18). Army with a Nation. *Frontline*.
[60] Supra note 57.

the Supreme Court and the High Court. The enunciation of Basic Structure Doctrine and its unsettled boundaries with the Judiciary being the lone arbiter and the judgment in the I.R. COHELO'S CASE has only added to its omni potency.[61]

However, the higher the esteem and power of the Judiciary the more is its obligations. As people expect the Judge's to be Ceaser's Wife, because they may tolerate very wrong decision but they will not tolerate the dishonest intentions.

Thus, it appears that there have been numerous troughs and crests in the path of the Judiciary and it had adopted a variety of approaches from SAJJAN KUMAR to GOLAKNATH and finally to KESHVANAND BHARATI, from GOPALAN to MENEKA GANDHI has ended in various mazes like for example the human right activists and environmentalist's are always searching something. The journey of Judiciary has despite all bravados the lopsidedness in judicial approach has rendered Judicial Activism fading a bit partly due to the inaction of the other organs and partly due to its own faults.

**Judges and Law Making**

There are few who will agree with Montesquieu that, "The judges are mere mouthpiece of the law."[62] The issue here is not only of keeping the judicial power in the Judiciary but also of keeping the law-making power in the Legislature.

Somebody may ask what lawmakers does is the they take an idea or a policy and turns it into law than why can't judges who are well versed in Administration of Justice can not make law. The reasons are:

- It amounts to usurpation of powers.[63]
- The answer lies in the difference between the activist and dynamic law making. In the former, the idea is taken from consensus and demands at most sympathy from the lawmaker. In the latter, the idea is created before it can be formulated; it needs to be propagated, which needs enthusiasm. Enthusiasm can't be a judicial virtue as it means taking sides which will run counter to the impartiality of the judiciary. And it will be a calamity to risk the asset in the form of impartiality in the name of judicial creativity which is an embryo with a doubtful future.
- The judges are the keepers of the boundaries between the rulers and those who are ruled thus essential to maintain a free and a stable society, and for that they need not to be creative lawmaker, better leave that to a social reformer.
- Activism in controversial areas will smack of impartiality. Undoubtedly this is an argument for judicial self-restraint.
- Judges came from a narrow profession and represent only one profession.[64]

[61] M.C. Seetalvad, "The Indian Constitution", 1950-65, wherein he observed that it is difficult to conceive of a higher Judiciary in a federated state more entrenched more independent and with larger powers than we have under our constitution.

[62] Montesquieu, Esprit de Lois, XI 6.

[63] Louis B. Boudin, Government by Judiciary. Journal of American History, Volume 19, Issue 4, March 1933, Page 630.

[64] Prof. Michael Freeman, "Standard of Adjudication, Judicial Law making and Prospective Overruling", 36 Current Legal Problems, 1973, p.166.

- It is undemocratic as unelected judges do not have the legitimate authority as they are not democratically answerable to the electorate.[65] Undemocratic as the judges who declare statutes unconstitutional are neither elected by people nor responsible to the people.[66]
- The attempt to set up new premises for legal reasoning on a large scale by judicial law-making impairs the stability of the legal and the economic order. Judicial development of the law proceeds by analogical reasoning that is in effect by choice between competing analogies in the authoritative body of legal percepts. New premises suggesting new analogies may more or less unsettle the legal system. It is pertinent to mention here the decision of the Supreme court in Jaisinghani v. Union of India[67], where it pointed to the Dicey that the rule of law means that decisions should be made by the application of the known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. New starts, therefore, are better made by Legislation which can be fitted into the system judicially by experience without unsettling the past. As, MARIAM GILLES, in her article suggest waiting for reform of the criminal law as it creates as many problems as the other and is additionally objectionable[68], so its better be left on the Legislature to make a headway.

The bypassing of the judiciary of the traffic-laden ways of a democratic system would be a journey on the road that will never return to highway but would definitely lead to a totalitarian state. If the judicial role is widened too much they will not be believed to be the keepers of the Constitution.

## Whether The Contempt Power Enforced Too Strong?

### *Setting the limits*

*JUSTICE V.R. KRISHNAIYER* in one of his articles, observed that the contempt power is a case of survival after death; a vague, vagarious and jejune branch of jurisprudence, which is of ancient British vintage [69] . To begin with, *LORD ATKIN* once remarked that, "*JUSTICE IS NOT A CLOISTERED VIRTUE*", and must suffer the scrutiny and the outspoken comments of the general public. The constitution of India starts, with the words, "WE, THE PEOPLE OF INDIA"[70] this stood testimony to the fact that it's the people who are sovereign masters and not the institutions (including the Judiciary); rather they serve the people in our democratic set up which the constitution has envisaged. And a master has a right to criticize its servant if the latter did not perform its function properly or commit misbehavior.[71] It's the citizenry

[65] Patrick Atiyah, "Judges and Policy", Israel Law Review, 1980, pp.346,360-70.
[66] Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law", 7 Harv. L.R. 129 (1889).
[67] 1967 (2) SCR 703 at718.
[68] Judicial law-making in the Criminal Courts: The Case of Marital Rape, (1992) Crim L.R.
[69] V.R. KrishnaIyer, Contempt Power and Some Questions, The Hindu.
[70] The Preamble, The Constitution of India, Bare Act, S. Sarkar, J,J, Munir, 2008 Alia Law Agency.
[71] Markandey Katju J., Contempt of Court: The Need for a Fresh Look, 2007 AIR Jour./3 III.

at whose service only the system of justice must work.[72]

Judiciary discharges an important function of maintaining peace in society by acting as a forum where disputes between people can be resolved. Thus, the need for the power of contempt so as to enable the courts to function and it was not meant to prevent the people from criticizing it if it failed to perform its obligations. The power to punish for contempt is much of a British legacy, but it must be remembered that India was not free at that time, and it was the rulers who were supreme. Now we are a democratic setup where the judge gets authority from the Constitution (i.e. the people) and not the King. The power of contempt was included to secure the Independence of the Judiciary, and that need was felt because during the British rule executive and judicial function were combined in the Collector-Magistrate in a district, making him a local dictator, it was to avoid this- that means it was basically meant to prevent tyranny to the people and the unbridled exercise of the contempt power would as a corollary lead the Judiciary to the same situation. In fact, public and media criticism of judges is a common feature throughout the common law world today. *SIR ANTHONY MASON* says, "*Like all other public institutions, the judiciary must be subject to fair criticism and, if the occasion demands it, trenchant criticism. What I am concerned with is response to criticism, particularly criticism that is illegitimate and irresponsible.*" [73] However, the response differs in different countries there is common agreement that such criticism subverts judicial independence, precisely because if decisions would be made under fear of criticism then it would undermine the independence of Judiciary. [74] However, the contempt offence of scandalizing the Judiciary had fallen in desuetude in Britain and it has been increasingly recognized there that, the object of contempt as not to protect the dignity of the courts, but to protect the administration of justice.[75]

The courts at home doesn't seem ready yet to fully adopt U.S. Attorney General *JANET RENO'S* advice that judges, "*must have thick skins*"[76], but they do recognize the right of the public to criticize judgments as an important feature of free speech and for the judiciary to be accountable as an public institution. [77] Our constitution provides the, "*freedom of speech and expression*" under Article 19(1)(a)[78] whereas Article 129[79] and 215[80] gives the "*power of contempt*" to courts. Now, the question which arises is how to reconcile these two provisions?

[72] Mauro Cappilletti (1983). Judicial Responsibility. 31 AJCL 1.
[73] Anthony Mason. (1997). The Judiciary, The Community and The Media, 12 CJJ 4.
[74] Justice P.N. Bhagwati. (April-July, 1997). Independence of the Judiciary in a Democracy, Human Rights Solidarity- AHRC Newsletter- Vol.7, No.2, p.34
[75] See the observation of Lord Solomon in AG v. BBB (1981) AC303.
[76] As Quoted in Hon. Justice Michael Kirby, "*Attack on Judges- A Universal Phenomenon*", 72 ALJ 599 at 601 (1998) n.24 at p.607.
[77] Refer to paras 34 and 43 in D. C. SAXENA v. HON'BLE THE CHIEF JUSTICE OF INDIA, AIR 1996 SC 2481.
[78] ARTICLE 19(1)(a): PROTECTION OF CERTAIN RIGHTS REGARDING FREEDOM OF SPEECH, ETC.: (1) All citizens shall have the right – (a) to freedom of speech and expression." Supra note 1 at p.23.
[79] ARTICLE 129: SUPREME COURT TO BE A COURT OF RECORD: The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt for itself." Supra note 1 at p.66.
[80] ARTICLE 215: HIGH COURT TO BE COURT OF RECORD; Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself." Supra note 1 at p.97.

There is yet another problem that there are no rules, no constraints- no precise circumstance when the administration of justice is brought into contempt. It suffers from uncertainty and is unpredictable- capable of being exercised in different ways by different judges in a same case[81]. That can be seen in the judgments in the *MOHD. YOUNIS CASE*[82], *MOHD. ZAHIR KHAN CASE*[83] and when we compare the decisions in the *DUDA'S CASE*[84] and the *NAMBOODRIPAD CASE.*[85] It is pertinent here to took up the MID-DAY CASE, in which Delhi High Court imposed a severe sentence of 4 months imprisonment of media for scandalizing the court without considering the defense of truth where it writ large in the mottos of the "YATHO DHARMASTHATHO JAYAH"[86] and "SATYAMEVE JAYATE"[87] and it is written outside the Supreme Court "SATYAMEVODHARAMYAHAM"[88]. The cases of ARUNDHATI ROY and NAMBOODODRIPAD[89] are also examples of errors. In the light of the decisions of the court which regard Constitution as supreme and sovereign in the cases of SPECIAL REFERENCE NO.1 OF 1964 CASE(KESHAV SINGH CASE)[90] and more recently in PEOPLE'S UNION FOR CIVIL LIBERTIES CASE.[91] Notably, as far as Judges are concerned I would like to mention that in antiquity as well the judges were bound by the command, "Ne Vile Fano" i.e. do not defile the temple of justice. And if we look at the work of KAUTILYA In ARTHASHATRA it emerges that any variation of the sanctity of the Administration of Justice, either by those who administer it or for whose benefit it is administered, was visited with a penalty, the penalty being the highest where the offence is by those who administer the law[92].

In a democratic setup the people are free but there freedom should not be stretched to a point that renders functioning of the Judiciary impossible or extremely difficult and this should be the touchstone to decide whether an act amounts to contempt or not. In fact, outspoken exposure to the fair criticism only strengthens the judiciary far from weakening it. As it is not the criticism which weakens it but its own conduct, and that alone will upheld the majesty and dignity of the court not the threat of contempt[93]. The court authority principally flow from the respect its performance would gain which will instill public confidence, and that in turn will be an outcome of their integrity, conduct, impartiality, learning and simplicity. The point can be aptly captured from the statement of *LORD DENNING*, "… *We must rely on our conduct itself to be its own vindication*"[94] The answer lie in a balance between the two competing

[81] In fact A.G.Noorani attributed bias to the contempt power in his, "*Constitutional Questions and Citizen's Rights*" Second Impression 2006, Oxford University Press.
[82] VIDE CONSCIENTIOUS GROUP v. MOHD. YOUNIS & ORS. AIR 1987 SC 1451.
[83] MOHD. ZAHIR KHAN v VIJAI SINGH & ORS. 1992 Supp. (2) SCC 72.
[84] P.N. DUDA v. P. SHIV SHANKAR AIR 1988 SC 1208.
[85] AIR 1970 SC 2015.
[86] Meaning thereby, "*truth is where the dharma, or the right order, is*".
[87] Meaning thereby, "*truth is always victorious*".
[88] Meaning thereby, "truth alone I uphold".
[89] AIR 1970 SC 2015.
[90] 1965 (1) SCR 413.
[91] P.U.C.L. v U.O.I. A.I.R. 2003 S.C. 2363 at Para 53.
[92] Shama Shastri's, Translation of Kautilya's Arthashastra,. 5th Ed. p.252.
[93] French writer Alexis de Toqueville describes the power wielded by the judges as, "*the power of public opinion*" as quoted in M.V.Pylee (Ed.), "*Our Constitution, Government and Politics*", 2nd Ed., Universal Publishing Co. Pvt. Ltd., at p.199.
[94] In R v POLICE COMMISSIONER (1968) 2QB 150.

interests with a strong slant in the favor of free expression and accountability coupled with the rider that the contempt power should only be invoked against the very wrong headed keeping in mind that the contempt jurisdiction is a discretionary jurisdiction that is a Judge is not bound to take action for contempt. A fresh approach is necessary to do away with the old anachronistic view and the judiciary should not be very touchy to every criticism it must remember to put it in the words of the learned *J. MARKANDEY KATJU* that the court must realize that the contempt power is a *BRAHMASTRA* to be used only on a *PATRA.*[95] The BRAHMASTRA should be used cautiously, wisely and with circumspection[96] against a PATRA who is- *the very wrong headed*.

**Why the courts should move towards self-restraint**

The judges exercise choices, not the license.[97] The quality of the justice, when access to the court is largely granted by the integrity, impartiality and independence of the judges but there are many cracks in the image of the ideal. The whole court has in fact lost touch with its goal. The question is that aren't we committing a grave error in the sense that we are missing the basic question of the justice being felt by the lowest strata of the society. The backlog and huge arrears stand in contradiction to the PIL justice. Which give only a sense of justice but not in reality. This is the basic notion of law that justice must be done and it in this case only appears to be done. This is the basic notion the delayed justice amounts to the denial of justice, recognizable since the time of Magna Carta. Whether access to Justice has been secured to everyone? The statement that, "judicial activism gets its highest bonus when it wipes some tears from some eyes."[98] Whether that is true?

There are areas on which the judges should be circumspect in the use of his powers to declare the law, not because the principles adopted by Parliament are more satisfactory or more enlightened than those which would commend to his mind, but because it is unacceptable constitutionally that there should be two independent sources of law-making at work at the same time.[99]

Judicial law is always a reinterpretation of principles in the light of new combination of facts. In so far, as the judicial role can be purely declaratory has a clear advantage for the law as the very definition of law demands an element of certainty and predictability.

to my mind we should choose LORD DEVLIN over the two extremes of LORD SIMONDS and LORD DENNING the former give preference to the view that the judge's role is passive [100] while at the opposite end of the spectrum, was LORD DENNING, for him certainty in the law was an overstated virtue and the true function of the judge was to be active in reforming the law. Between them was LORD DEVLIN who was against a Judiciary which was dynamically active, but on the other hand he also saw a useful purpose in shaping the common

[95] Supra note 2.
[96] See the opinion of Gajendragadkar J. in 1965 SC 745.
[97] Joseph M. Steiner. (1976). Judicial discretion and The Concept of Law, 35 Cambridge Law Journal, , p.135 at 139.
[98] Punjab Rickshaw Puller's Case.
[99] Lord Redcliffe. (1968). Not in Feather Beds pp.212-16, 314.
[100] LORD SIMONDS in MIDLAND SILICONS LTD V SCRUTTONS LIMITED [1962] A.C. 446, 467-9

law. The reality today is closer to Lord Devlin's remark, "the judiciary like the navy tends to be admired to excess"[101]

Whether the unelected judges should have the power to undermine the considered judgments of policy approved by a significant majority in the legislature? Generally, people do want the Judiciary to respond to violations of fundamental rights. But on the issue reflecting deep controversy within society like matters of social and economic policy, it is not at all clear that the courts have a relative advantage over the legislature or that they enjoy the legitimacy required to make authoritative decisions for the society at large.

**Conclusion**

"a revolt of the judiciary is more dangerous than any other, even a military revolt, not because it uses the military to suppress disorder, but it defends itself everyday by means of the courts"- Alexis de Tocqueville.

Undoubtedly there are times when judicial aberrations had happened, but this cannot be avoided because infallibility has not been divinely granted to them. Benjamin N. Cardozzo, said, "Judges have, of course the power, though not the mandate, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set by precedent and customs. None the less, by the abuse of power they violate the law." There are traits that can help judges maintain public confidence:

1. the judges ought to recognize that the power is limited to recognize the proper judicial role.
2. a judge must recognize his mistakes.
3. Judges must display modesty and an absence of arrogance in his writing and thinking; and
4. The judges should be honest and if they create new law they should say so.[102]

Surely that can't be a reason for clipping down the Judiciary. We often assume that every problem has a legal or institutional remedy {in fact the courts own powers were founded on this illusion}. We have reached a stage where there is need to define limits of the judicial conduct by the judiciary itself as remarked by **LORD MACMILLAN** that *"courtesy and patience …are essential if the courts are to enjoy public confidence*". The judiciary should itself draft a code for itself that blends integrity, ability, impartiality and generous compassion ensuring tolerance of criticism. The best course can be found in the words of Justice Stone of the U.S. Supreme Court, that which is considered the home of Judicial Review, "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decisions…one is that courts are concerned only with the power to enact statutes, not with their wisdoms, the other is that while unconstitutional exercise of power by the Executive and Legislative branches of the government is subject to judicial restraint, the only check upon our exercise of power

[101] Patrick Devlin. (1981). The Judge, 25 Oxford University Press.

[102] Justice K.G. Balakrishnan. (2007). Judicial Accountability, Journal of Indian Legal Thought, Vol.5, at p.11.

is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts, but to the ballot and to the processes of democratic Government." [103] That is the road to judicial self-regulation.

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25. Louis B. Boudin, Government by Judiciary. Journal of American History.


[103] U.S. v Butler, 297 U.S. 1 (1935).

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# The Constructions of Familial Ideology, Patriarchy and Capitalism in Women's Labour Market

*Sanghamitra Baladhikari*

**Abstract**

*Women's participation in the employment sector is determined by various factors. The gender gap in the employment sector is one of the major concerns rising from the private nature of women's care labour. This paper explores the various constructions of familial ideologies, interactions between capitalism and patriarchy which influences women's secondary position in the wage labour market. The paper also identifies how the definition work is inherently masculine and it controls the feminine space within the wage labour market. The author constructs a theoretical understanding of the productive labour and non-productive "care" labour of women within the domestic sphere. The final aim of the paper is to highlight the factors of women's poverty issues and suggest ways by which these issues can be addressed to.*

*Keywords: Women's Labour, Care Labour, Capitalism, Employment, Poverty, Feminism, Marxism*

## A. Defining 'Work'

The Sustainable Development Goals adopted by the United Nations General Assembly aims at ending the struggle of poverty, inequality, and underdevelopment across the world to ensure the restoration of the world in terms of economic and social scenario. The Sustainable Development Goals recognizes the need for building economic growth and growth of social needs including equal employment opportunities for all, growth in the economic sector and rise in the environmental sustainability. Growth, employment, and poverty are three factors which depends upon the well-being of the individuals in a society and the empowerment of all sections of society including women is important for promoting gender equality in the economic sector. In the United Kingdom, by the year 2008, the gender difference or the 'gender gap' in the employment sector reduced and the economic inactivity also fell due to the changing patterns in men and women's participation in the employment sector. These reflections upon women's position in the employment sector across the world and the rising question of gender equality pertaining to labour (work) can be understood in the light of the division of the masculine labour (public) and feminine labour (private) in the family, the interactions between the forces of patriarchy and capitalism and the Marxist philosophy of biological reproduction. It reflects the historical and contemporary theories behind women's secondary position in the employment sector. In order to deliberate that understanding,

firstly, the idea of what is work and how work is gendered, must be theorised.[1]

In *Defining Women: Social Institutions and Gender Divisions* 'work' is elaborated as –

> *"Work is regarded as an area that is clearly demarcated from domestics or social lives, as something people are paid to do, usually for set hours each week. Work is often experienced as the opposite of home; it constitutes the 'public' side of our everyday life, as distinct from the 'private' or intimate side shared with family and friends."*[2]

The above idea represents a public concept of the nature of work as perceived by the capitalist society. Work is symbolic of production where the time and labour given, manufactures something for consumption. The value of consumption of the production represents the value of the work in question and the monetary reward is the benefit of the labour power. Beyond this, feminists have interpreted work as a public or the masculine domain. It is perceived as dominantly masculine in the context of power. On the other hand, the feminine side of the work is perceived to be more private in nature, relegated only to the domestic household. However, this does not frame the idea that women are not present in the public work space. Rather, it highlights the fact that the public workspace is primarily related to the masculine identity. This could be further seen from the light of the Marxian ideology and the sexual division of labour in the family.

### B. Historicizing Women's Care Labour

Feminist critics and historians have theorised many studies regarding the invisibility of the nature of work that women deliver in the labour market. The study of lack of access to labour opportunities and women's historical positioning in the economic sector is owing to factors of domestic labour, which is often associated with the concept of care labour. The debate regarding domestic labour theorises the association between 'house' work and the rise of capitalism. In the feminist Marxian understanding, 'house' work is broadly understood as care work including household chores, reproductive labour, service to the family, child care and addressing to familial nurture, within the "private space" without any direct form of "wage".[3] In the capitalist market the understanding of growth and the employment capacities of women, historically did not hold an importance because the 'care labour' was considered to be important for the "productive" nature of work that the fathers and the husbands contributed or the "wage labour" in the capitalist market. Therefore, the traditional Marxist philosophy addresses to the question of the value of domestic labour; whether it is productive, unproductive, non-productive or of surplus value. The Marxist theory of Capitalism acknowledged the centrality of productive labour or the surplus value of labour in the workings of capitalism rather than the unproductive or non-productive labour.

[1] Millett, K. (2000). *Sexual Politics*. Urbana: University of Illinois Press

[2] McDowell, L., & Pringle, R. (1992). *Defining women: Social institutions and gender divisions*. Polity Press.

[3] Marx, K., & Engels, F. (1919*). Wage-labor and capital*. Vancouver: Whitehead Estate.

Consequently, this debate was challenged by the feminist critics as they stated that Marxist theory needed a rightful acknowledgement of the significance of gender relations and understand the potential and political force of a woman's labour. The concept of domestic labour being marginal to capitalism is also understood as one of the significant reasons pertaining to the oppression of women, lack of opportunities in the economic sector and the overall growth of the economy. Apart from the recognition of "care labour" as "care work" within the private space, there is a need to explore and enhance women's role in employment that was hindered due to their historical positioning.

### C. The Familial Ideology and the Division of Labour

Kate Millett in her representational work in feminist studies titled Sexual Politics had first indicated the contribution of family as a whole in the workings of patriarchy and stated that family is the smallest unit of patriarchy.[4] In this context, family is considered to be hegemonic that has powerful ideological force that portrays the features of a contemporary family in a profound idealised way. The role of the family in the oppression of women and their labour has been a contested site, as stated by the socialist feminist scholarship. There is a set of values within the household structures that determines women's child rearing and domestic labour. This is rooted mostly in the material relations of capitalism which contributes to the sexual division of labour. Men becomes the wage earners and women in turn becomes victims of what is called their biological destiny or the 'reproductive labour'. This has been further reinforced by the public and the private distinction within the family. The private or the domestic space where women are relegated to, as the socialist feminists reveals that is a result of the two different manifestations of familial ideology. Firstly, moral regulation restricts women's identities as mothers, wives, daughters and familial ideology that shapes these identities of women informs the legal interventions in the family. Secondly, the economic regulation which aims at controlling women's contribution to only human reproduction.[5] The sexual division of labour in the family is distinctly visible. Marxists, inspired by the Marx's theory has been very vocal about this. The labour division between men and women is rationaled in the context of women's "childbearing function".[6] According to the Marxian ideology, the reproductive labour is significant for the development of the society as it contributes to the enhancement of the human labour in the generations to come. The entire existence of the society is based on the development of the power of the labour force.[7]

Women's work has always been associated with the informal cash economy. Their shift towards the formal economy in terms of their contribution to

[4] Millett, K. (2000). *Sexual Politics*. Urbana: University of Illinois Press

[5] Hadd, W. (1991). A womb with a view: Women as mothers and the discourse of the body. *Berkeley Journal of Sociology*, *36*, 165-175. https://www.jstor.org/stable/41035447

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[7] De Beauvoir, S. (1989). *The Second Sex*. New York: Vintage Books.

work and being recognised as the part of official employees (statistical registration) generated slowly through various "movements of productive activities undertaken within the home or the community". These productive activities were however not always supported by financial benefits. The feminists during 1970s and 1980s widened the perspective of work and included household work, child rearing, in the definition of work and further criticised the concepts of work that narrowly focuses on employment and productivity. In *Unequal Work*, Veronica Beechey argues that –

> *"It is housework, rather than waged work, which preoccupied feminist writers in the early days of the new feminist movement. A central tenet of such thinking in the 1970s was the belief that the family lay at the heart of women's oppression and a major theoretical breakthrough involved the recognition that housework, the 'labour of love' performed by the women in the home, was a form of work. This insight made feminist analysis of the 1970s and 1980s substantially different from that of previous periods, which mainly disregarded women's work within the family."*[8]

### D. Capitalism and Patriarchy in Women's Labour

The home, which is a part of the patriarchal ideology, initially was thought to be separate from capitalism. The arguments about the interactions between the paid work and the unpaid labour generated further questions between "gender and class" and "capitalism and patriarchy". Christine Delphy in *Close to Home: a materialist analysis of women's oppression* developed an insight on patriarchy and the mode of production. [9]The interactions between patriarchy and capitalism has developed in a way where the interests of both capitalism and patriarchy has framed women's position in the secondary in the wage labour market. In *Defining Women: Social Institutions and Gender Divisions*, Heidi Hartmann's argument is explored which was earlier developed in an article titled *The unhappy marriage of Marxism and feminism: towards a more progressive union* about patriarchy and capitalism. It was argued that the operation of patriarchal gender relations in a capitalist environment around production becomes contributing forces behind women's position in the labour market.[10]

### E. Interactions Between Women and Poverty

Home is still considered to be the locus of women's existence and over the years that became the reason why they were marginalised. The ideologies of the family, capitalism and patriarchy, as elaborated above, highlights a theoretical and historical understanding of women's position in the labour market. In order to substantiate the theoretical understanding where women has only gained a secondary position in the labour market, it is important to look at poverty issues among women,

[8] Beechey, V. (1987). *Unequal Work*. Verso Books.

[9] Delphy, C. (1984). *Close to Home: a materialist analysis of women's oppression.* Verso Books.

[10] Sargent, L., & Hartmann, H. I. (1986). *The Unhappy marriage of Marxism and feminism: A debate of class and patriarchy*. London: Pluto Press.

which is, as a result of those ideologies. This puts forward a significant question about women's poverty issues. "*World Employment and Social Outlook: Trends",* a report published by International Labour Organization (ILO) in the year 2017 stated that women participate more within the private space and do unpaid work than men and consequently underemployment among women is a significant issue. It also detected significant gaps persisting in women's representation in leadership programmes and positions of decision making. Determining factors such as social and cultural factors frame limitations for women in the potential engagement in labour force in the labour market.[11] The limited democratic participation in employment due to gender roles among women is due to factors such as:

a) Differential access to health care and issues in family planning
b) Religious and cultural factors
c) Weaker literacy rates
d) Lack of opportunities in skill development
e) Lack of gender-sensitive curriculum
f) Gender division of labour in home
g) Lack of women's influence governance and decision making
h) Social ideologies hindering girl's education
i) Early marriage and pregnancies
j) Various forms of discrimination in employment and occupation
k) Lack of training for women in non-traditional occupations.

It is often argued that men's abilities and capacities in the wage labour market are interlinked to their understanding of machines. There is a connection built between machines and masculine aspects. Huge machinery and its handling is seemed to be conventionally appropriate for men. Therefore, there is a huge death of the feminine space in industries and factories that constitutes of the 'masculine machineries'. There is a lack of women's participation not only due to this ideology but also because of the lack of training among women regarding these machines. This further contributes to women's interactions with poverty. According to a report published by the International Labour Office, Geneva for the International Labour Conference (98th Session) in the year 2009 titled "Gender equality at the heart of decent work" (Report VI) stated that –

> *"In absolute numbers, Asia has the largest population living below the poverty line:*
> *out of a total population of 3.7 billion, about 913 million people live in poverty. Yet the*
> *overall rate – about 25 per cent – is far lower than in Africa, even if it is five times the*
> *poverty rate of the Americas. And female poverty is far greater than in the Americas or*

[11] International Labour Office. (2017). World Employment and Social Outlook: Trends. International Labour Office

*Africa, as the female share of poverty represents 63 per cent of all persons in Asia living below the poverty line."* [12]

**F. Region-wise and Sex-wise Unemployment Rate (International Labour Office)**

Table A5
Youth unemployment rate, by sex and region, 1998, 2008 and 2009

| | Total (%) | | | Male (%) | | | Female (%) | | |
|---|---|---|---|---|---|---|---|---|---|
| | 1998 | 2008 | 2009 | 1998 | 2008 | 2009 | 1998 | 2008 | 2009 |
| WORLD | 12.4 | 12.1 | 13.0 | 12.3 | 11.9 | 12.9 | 12.6 | 12.3 | 13.2 |
| Developed Economies & European Union | 14.0 | 13.1 | 17.7 | 14.1 | 13.8 | 19.5 | 13.9 | 12.2 | 15.6 |
| Central & South-Eastern Europe (non-EU) & CIS | 23.0 | 17.3 | 20.8 | 22.5 | 16.8 | 20.6 | 23.7 | 17.9 | 21.1 |
| East Asia | 9.1 | 8.6 | 8.9 | 10.6 | 10.0 | 10.3 | 7.6 | 7.2 | 7.4 |
| South-East Asia & the Pacific | 12.2 | 14.5 | 14.7 | 12.1 | 13.9 | 14.0 | 12.4 | 15.2 | 15.7 |
| South Asia | 8.9 | 10.0 | 10.3 | 8.9 | 9.7 | 10.1 | 8.9 | 10.6 | 10.9 |
| Latin America & the Caribbean | 15.6 | 14.3 | 16.1 | 12.9 | 11.7 | 13.2 | 20.1 | 18.2 | 20.4 |
| Middle East | 22.8 | 23.3 | 23.4 | 20.6 | 20.3 | 20.4 | 29.1 | 30.8 | 30.9 |
| North Africa | 26.5 | 23.3 | 23.7 | 23.7 | 20.2 | 20.3 | 32.6 | 30.3 | 31.7 |
| Sub-Saharan Africa | 13.5 | 11.9 | 11.9 | 12.7 | 11.5 | 11.6 | 14.5 | 12.3 | 12.4 |

**Source: *Global Employment Trends for Youth* (Geneva, 2010), table A5, p. 63.**[13]

Analysis: The above table represents the youth unemployment rate, by sex and region in the years 1998, 2008 and 2009. We can see that there is constant increase in the unemployment rate among the female percentage across the world in between 1998 – 2009. For example, in the South Asian regions, if we compare the unemployment rate among the male population and the unemployment rate among the female percentage, we witness that by 2009, the unemployment rate among the female percentage is much higher (10.9) than the unemployment rate among the male percentage (10.1). The table is an empirical evidence of women's lack of space in the work space or the employment sector. The theoretical understanding discussed in the first part of the article is substantiated by this report, published by the ILO.

**Conclusion and Recommendations**

Therefore, increase in the number of females receiving higher education has raised the number of graduates. Consequentially women's presence in the professional space enhanced by occupying positions of responsibility and power. These enhancements were facilitated by institutional demands of second wave feminists in the discourse equal pay legislation, employments opportunities and gender equity. Various public bodies have encouraged gender equality along with other dimensions of social identity including the growth of race, economic background, and disability. The various suggestions as per the ILO policies and programmes include steps to widen women's participation in the labour market (the employment sector) so that poverty and discrimination is slowly reduced and mitigated. This will not only curb gender inequality prevailing in the labour market but also widen the scope of women's in the public spere and change the masculine definition of work, as discussed in the beginning of the chapter. Some of these strategies to involve women in the 'productive' labour market includes:

a. To develop income generation actions, especially for women who are mothers is necessary because it has more impact in enrolling girls in school.
b. To realise the various kinds of barriers to women's participation in education and develop incentives to enrol girls in school.

[12] International Labour Conference. (2009). Gender equality at the heart of decent work (VI). International Labour Office.

[13] International Labour Office. (2010). Global Employment Trends for Youth. International Labour Office.

c. To incorporate corrections regarding any sort of gender stereotypes in schools by developing new roles for boys and girls. Any form of learning which portrays women's role as care labourers only, as unproductive.
d. To develop qualitative formal and non-formal modes of education. This would include vocational training, enhancing the women's opportunities for decent work in future and empowerment.
e. To develop equal preference for female as well as male recruits in formal economy employments.

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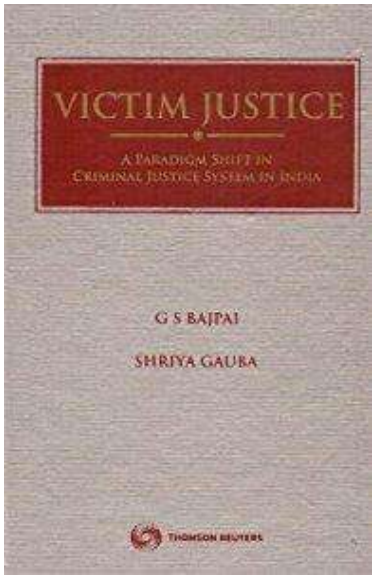
# Book Review

**VICTIM JUSTICE- A PARADIGM SHIFT IN THE CRIMINAL JUSTICE SYSTEM IN INDIA.**




**Authors: G S Bajpai & Shriya Gauba, 2016, Thomson Reuters, ISBN 978-93-84746-68-**

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Thomson Reuters published this book titled 'Victim justice - A paradigm shift in the criminal justice system in India' written by G S Bajpai and ShriyaGauba in 2016 with ISBN:978-93-84746-68-1. It is spread over eight chapters on the topics namely the position of a victim and his position in the historical times, victim-oriented policies in specific system of the criminal justice system, voices of the survivors of crime, victim impact statements, expanding role of victim in the Indian criminal procedural justice system, Expanding role of victim in the Indian criminal substantial justice system and victim jurisprudence.

InChapter IIon 'Victim in the adversarial system: Historical perspective'- The authors have discussed the concept of dharma and nyaya in the times of pre-British era about the criminal justice system. Subsequently, the authors have referred tothe growth of adversary criminal justice in England instances of giving the victim a place during the gathering of evidence along with citizens in the court of law. The authors have also shown how gradually the victim lost the position from the criminal trial which changed from 'lawyer-free trial' to 'lawyer-dominated trial.' The victim who was once at the forefront of the initiative for prosecuting a crime stood marginalized referring a great detriment to the voice and role of the victim. The old code of Criminal Procedure of 1860 which did not mention the word victim rather concentrated on the procedure of investigation and trial, is also showcased.

In Chapter III on 'Victim-oriented policies in select systems of Criminal Justice' the authors have discussed about the emergence of victim justice from the UN Deceleration of Basic Principles of Justice for victims of crime and Abuse of Power, 1985 which ensures that a victims of crimes to be treated with compassion and respect, access to courts for prompt redressal making the process expeditious, fair and accessible, information to the victim of crime such as awareness to the victim about his rights, role of a victim in the judicial process, notice to the victim about the progress of the trial; allowing the victim to express/present his/her views/ and concerns at various stages of the trial; victim assistance for privacy and safety; prompt disposition of the case, participatory rights to victim in a trial; victim's entitlement to fair

restitution after a crime; compensation; supply of material, medical, psychological and social assistance to the victim. These indicators are later used to access whether these rights are there for the victim in various models of criminal justice administration. In the same chapter, the authors also refer to the International criminal court, which is the first-ever international tribunal to accord victims their rights and their due recognition through the Rome Statute of ICC, 2002, which gave the victim participatory rights in the proceedings of the court. The authors have discussed the rights in detail regarding the statute. Further, the authors have given reference to the 'handbook on justice for victims' which is a guide for the policymakers to create substantial and procedural rights o give victims there due position in a criminal trial. Rights such as re-victimization of the victimization which happens due to the reaction of the stakeholders of the criminal justice system,are one of the important areas to re-look. Victim blaming, misuse of the right of cross-examination is another area that needs attention. Subsequently the authors have taken up the model of Japan and has discussed elaborately on the statutes and policies which Japan follows relating to Benefits to Victims of Crime (Crime Victim Assistance Act) 1980, Guidelines for Protection of Victims in 1996, Victim Protection Act 2000, Protection of Victims of Crime Act 2004, Japanese Code of Criminal Procedure. In themodel of the United States of America,a discussion has started with Crime Victim's Bill of Rights in 2004, case laws that have recognized the 'victim' as an essential part of the trial procedure. Other rights such as the right to be informed, the right to be present in the trial, the right to be heard, the right to timely restitution, right to protection from the accused have also been discussed. In the Dutch model 'Vaillant guidelines,'Terwee Act 1992, Dutch criminal procedure code, Victim rights Act 2000 has been referred to the showcase of how a victim of crime is being treated.

In Chapter IV on 'Voices of the survivors of crime' the authors have given detailed account of real victims of crimes such as acid attack, sexual assault, rape have narrated there vivid experience in dealing with the stakeholders of the criminal justice system stakeholders which includes police, court, doctor and other administrative persons in-charge of administering rights of the victim. The experiences which are penned down by the author also covers the concerns of safety and security of the victim who is threatened if they are witnesses against the accused. Further in-depth analysis also shows that a victim not only needs damage control to the body but also to the mind and soul.

In Chapter V on 'victim impact & victim impact statements,' the authors have emphasized the need and importance of victim impact statements, which can be used in three different stages of a trial, which are impact stage which is the first stage followed by the steps of recoil and reorganization. The steps explain the reaction of the victim who maybe in a complete state of denial or anger which is very important to be understood by the court to conclude. In the last stage, which is about acceptance, reconciliation, and the aftermath needs of the victim to live a better life are associated with miseries of acute stress disorder and post-traumatic stress disorder,

which also needs to be taken into consideration by the court before reaching a decision. The theory of victim impact statements has referred to the UN, seventh congress on Prevention of Crime and the Treatment of the Offender, which allows the victims to express there views and concerns for presentation and consideration at appropriate stages of the process. Further, the rationale behind victim impact statements, models of VIS used in the jurisdictions of the USA, Australia, along with advantages of VIS and necessity of VIS in motor accidents.

Chapter VI on 'Expanding role of victim in the Indian criminal procedure -I (procedural justice)', the authors have discussed a range of cases decided by the Indian judiciary to substantiate victim rights in the procedural system of justice with reference to reporting and investigation, medical examination of victims of sexual assault, position of victim during a trial, importance of engaging a private counsel during trial by the victim, victims right to dignity, comfort, confidentiality and protection, participation during plea bargaining, compounding of offences and also during appeal.

In Chapter VIIon 'Expanding role of victim in the Indian criminal procedure – II (substantive justice)', the authors have given various recommendations given by law commission referring to the power of public prosecutor for praying for compensation for the victim and enhancing the position of victims which was referred to the reports of the law commission in 1994 and 1996. The authors have also related to the old code of 1969 and 1898 while discussing the provisions. The remaining part of the chapter is devoted to understanding the concept of victim rehabilitation and the need for compensation through very first cases of nilabatibehra to D.K. Basu and that of Ankush Shivaji Gaikwad. The authors have also made detailed discussion about he present victim compensation scheme and have also conducted an empirical study on victim of negotiable instruments, Section 304-A IPC, 323, 356, 379, 341, 354, 451, 452, 377 and 498A, the study has showcased how the compensation quantum is decided and relief isgiven to the victims depicted through quantitative and qualitative data.

In Chapter VIII on 'Victim jurisprudence,' which is the last chapter of the book, the authors have tried to build a road map and discussed the changes in both the procedural and substantive law. The right to appeal where a victim has to seek leave from the High Court in Section 372 Cr.P.C., which not grants a victim a right but a discretion. Reference has also been given that there is no right in case of lesser quantum of punishment. Other discussions are made upon right to be informed of investigation, unguided power of awarding compensation, right to be informed, protection of victims, participatory rights, being rehabilitated, access to free medical aid and treatment, victim-offender mediation, notice to victim on withdrawal of prosecution are some of the glaring areas which the legislature needs to consider to give the victims their due rights.

To conclude the book also has annexures of the research tools which are used in the studies conducted which not only encourages young researchers but also gives a direction. The book

showcases the victim not only from the position in ancient times but also in the present time and how better a victim of crime may be treated by referring to original data and laws of other jurisdictions. I strongly recommend this book!!

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# News and Announcements

**Single use plastic fatality**

*Sanghamitra Baladhikari*

The usage of plastic has been identified as one of the most menacing factors affecting the environmental quality in the present times and thereby anticipating a future which is fatal for the biodiversity or habitat. Plastic wastes have been considered an emerging contaminant and it continues to pollute soil, sea and also harms aquatic animals to severe extent. Single use plastic wastes accounts for the most of the pollution levels around the world. Every year, about 300 million tons of single use plastic wastes are disposed. Single use plastics are also called disposable plastics. These are the plastic items which can be used only once. They include items such as straws, plastic cans, plastic bags, soda bottles, etc. Single use plastics are extremely toxic for the environment because most of it cannot be recycled. As a result, plastic gets buried in land or water and it releases toxic chemicals and adulterates the quality of the water and soil and results in loss of biodiversity and imbalance in food chain. According to the report 'Single Use Plastic: A Roadmap for Sustainability' published in 2018 by the **International Environmental Technology Centre**,[1] it states that if the waste management techniques and consumption patterns of plastic do not undergo a dynamic improvement, then by 2050 there will be 12 billion tons of plastic litter in landfills and the natural environment.

Plastic wastes affect the environment at different levels. Firstly, the pollution that plastic usage causes to marine life in immense. Most of the plastic wastes are found floating in the top of the ocean and sea water. It intrudes into the water quality and unsettles the lives of the marine animals. An estimated 5 trillion pieces of plastic are floating in the world's oceans from the Arctic to Antarctic. Large plastic items, such as discarded fishing rope and nets, can cause entanglement of invertebrates, birds, mammals, and turtles, salt-marsh grasses, and corals. Entanglement of aquatic species by plastic debris can cause starvation, suffocation, laceration, infection, reduced reproductive success and mortality. For example, recent reports claim that plastic has been found in one out of three sea turtles and about 100,000 deaths in marine life is caused as a result of single use plastic items. According to the report "Plastics, Marine Litter and Circular Economy –Product Briefings" published in 2017 by ***Institute for European Environmental Policy*** [2]it has been reported that '*globally, 4.8 to 12.7mt of plastic enter the ocean annually just from mismanaged waste at coastlines*'.

[1] Single Use Plastic: A Roadmap for Sustainability. (2018). [online] United Nations Environment Programme. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/25496/singleUsePlastic_sustainability.pdf?isAllowed=y&sequence=1 [Accessed 26 Sep. 2019].

[2] Kibria, G. (2017). *Plastic Waste, Plastic Pollution - A Threat to all Nations.*

Secondly, single use plastic usage affects human life as much as the marine life. Researchers have proved that it takes a long time for plastic to decompose and the expanded polystyrene *(Styrofoam)* used to make plastic food containers release toxic chemicals and enters into animal issues and the food chain. This often results in severe damage in human bodies such as harm to nervous system, respiratory system and reproduction system.

Thirdly, plastic wastes also contribute in the degeneration of the aesthetic quality of beaches, sea-shores and land in general. It hampers the natural surroundings or the beauty of the place. This further hampers the tourism levels at a particular place. Various places have faced a sharp decline in the tourism economy due to stranded shorelines and foul odour in the surrounding areas. Thus, it is essential to return to the primitive methods of using cloth bags and strive for 'No Plastic Zones' with the motive of achieving 'Go Green Earth'.

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