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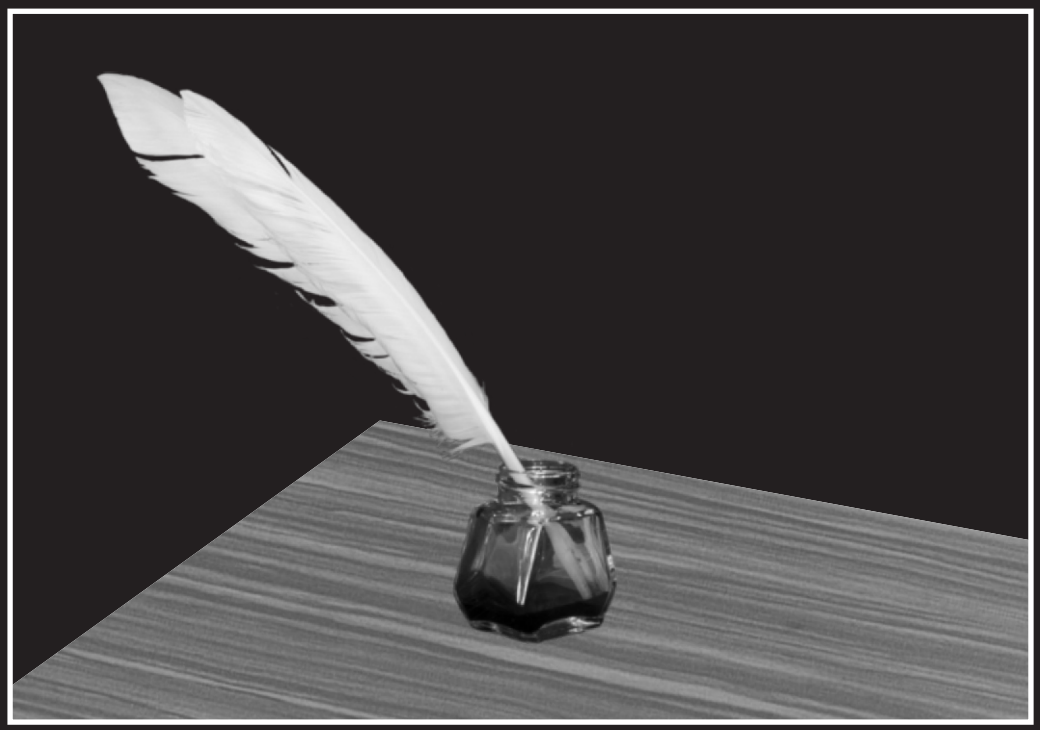

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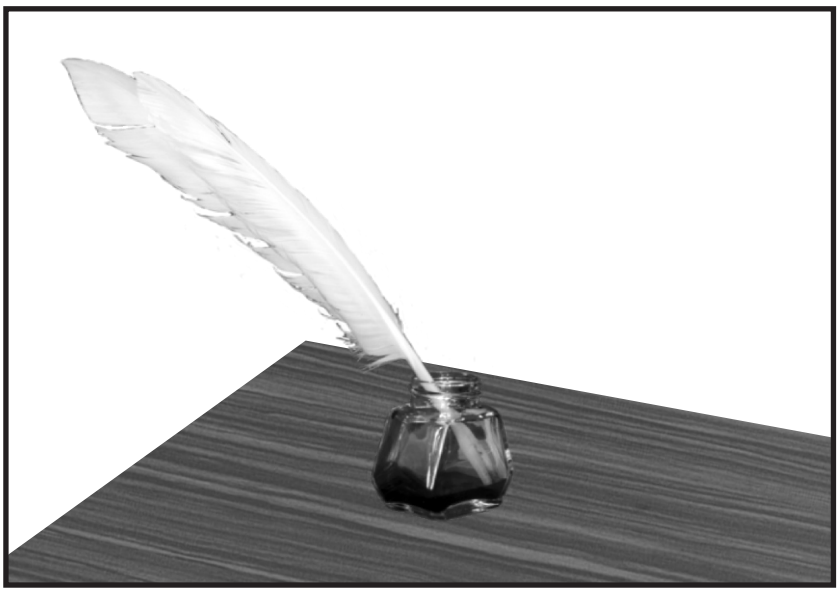

Army Institute of Law

Sector 68, Mohali

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AIRCRAFT HIJACKING AND THE LAW: A CRITIQUE OF INDIA'S ANTI HIJACK POLICY WITH SPECIAL REFERENCE TO THE ANTI HIJACKING ACT, 2016

Dr. Ajaymeet Singh*

Mr. Adhiraj Bhandari**

"Once you have tasted flight, you will forever walk the Earth with your eyes turned skyward, for there you have been, and there you will always long to return."

-Leonardo Da Vinci[1]

Introduction

Unlawful seizure of an aircraft, or hijacking as it is more commonly known, has been a long standing threat to security of passengers in civil aviation. It was in the late 60's and early 70's when the instances of hijacking increased significantly, that the request was made by several countries to have a specific convention to address this issue. This process began in September 1968, when the sixteenth assembly of the International Civil Aviation Organization (ICAO), requested the Council of ICAO to initiate a study on measures to cope with the problem of hijacking of aircraft, at the earliest possible date. As images of hijacked aircrafts crashing into the iconic World Trade Centre flashed across news channels, on September 11, 2001, Governments across the world were eager to decide a course of action that would help them prevent such threats from materializing and combating them, if they arose again. To counter the growing threat of global terrorism, the aggressive War on Terror led by the United States of America in the aftermath of the 9/11 attacks brought about a paradigm shift in the way the world and the aviation sector specifically perceived and chose to combat emerging threats, especially hijacked civil aircrafts, which might be used as weapons of mass destruction.[2] In India, the Cabinet Committee on Security (CCS) in 2005 also adopted the "No Negotiation Policy" as a course of action in the event of the hijacking of aircrafts. The Anti Hijacking Act was enacted in

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1 Leonardo Da Vinci, *Famous Aviation Quotes,* PINTEREST (Aug. 22, 2017), https://www.pinterest.com/pin/386113368034186740/.

2 Hardeep Singh, *Constitutionality of India's Anti Hijack Policy 69-79* CURRENT DEVELOPMENTS IN AIR AND SPACE LAW (National Law University, Delhi) (2012).

2016, which came into force on July 5, 2017.[3]

Brief History of Aircraft Hijacking

In general terms, Aircraft Hijacking is defined as the seizing of control of an aircraft for purposes other than flying to the original destination. There have been instances of self-hijacking in which a commercial airline pilot has seized his craft to take it somewhere other than its scheduled destination. Air hijackings are typically although not universally, politically motivated. The first recorded air hijacking took place on February 21, 1931 in Arequipa, Peru. Armed revolutionaries approached American pilot Byron Rickards and tried unsuccessfully, to force him to fly them to their destination. Initially, Rickards refused to do so. However, when the revolutionaries' uprising was successful on March 2, 1931, he was allowed to go back, but was ordered to fly one of the members of the revolutionaries to Lima, Peru. Although this was not a hijacking in the meaning of the term as it is understood today, it is argued that this was the first hijacking as it led to an unauthorized seizure and use of an aircraft.[4]

A successful air hijacking appears to consist of the following components: the aircraft, hijackers with the will to carry out the hijacking, a crew that can be convinced of the hijackers' ability and willingness to carry out their threats, and a friendly destination. After the first hijacking in 1931, there were relatively few hijackings until World War II. Aircraft hijacking can be divided into five distinct periods: 1931 to 1957, 1958 to 1967, 1968 to 1980, 1980 to 2001, and 2001 to the present.

From 1931 to 1957, a period of 27 years, there were fewer than 20 hijackings worldwide. Several of these were in Eastern Europe by people attempting to flee from Soviet rule there. The year 1958 marked the first hijacking of a plane from Cuba to another destination in an attempt by some Cubans to flee Fidel Castro's rule. The U.S. government openly or tacitly welcomed these hijackings and its official reaction to hijackings from Cuba to the United States was imprudent. These initial hijackings from Cuba were followed, starting in 1961, by hijackings to Cuba. From

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3 PTI, *India's Tough Anti Hijacking Law Comes Into Force,* THE INDIAN EXPRESS (Oct. 1, 2017), http://indianexpress.com/article/india/indias-tough-anti-hijacking-law-comes-into-force-4739270/. The Anti Hijacking Bill, 2014, to repeal and replace the Anti Hijacking Act of 1982 was introduced in the Rajya Sabha by Civil Aviation Minister Ashok Gajapathi Raju on December 17, 2014. The Bill was passed by Rajya Sabha on May 4, 2016 and by Lok Sabha on May 9, 2016. It received the assent of the President of India on May 13, 2016. It was brought into force by a Government notification issued on 5th July 2017.

4 Guinness World Records, FIRST HIJACK OF AN AIRCRAFT (Oct. 4, 2017), http://www.guinnessworldrecords.com/world-records/first-hijack-of-an-aircraft/.

1958 to 1967, around 40 hijackings took place worldwide, many of them between Cuba and the United States.[5]

In 1968 a number of significant developments took place. First, the number of hijackings jumped dramatically. As many as 31 hijackings took place in that year alone. Second, the number of places where hijackings were taking place increased substantially. There were hijackings in China and India. In 1969, the number of hijackings increased to 82. Now, it was clear that something had to be done to combat the menace of hijacking. The year 1973 marked a significant turning point in aircraft hijacking history. The United States and Cuba entered into a reciprocal agreement to prosecute hijackers. That, along with similar agreements between other countries, e.g. Taiwan and China, more stringent security measures, and better scanning equipment at airports resulted in a decrease in aircraft hijacking and by 1980 the number of hijackings had dropped significantly. When Fidel Castro abrogated the bilateral agreement in 1977, hijackings from the United States to Cuba resumed; when the agreement was restored, the hijackings stopped again. From 1968 to 1977 there were roughly 41 hijackings per year; from 1978 to 1988 there were roughly 26 hijackings per year.[6]

From 1980 to 2000 the combination of security measures mentioned above hadn't eliminated aircraft hijackings but they weren't becoming more numerous or more dangerous, either. That changed with the aircraft hijackings of September 11, 2001. That was the first time that hijackers had used commercial airliners as weapons of war and it marks the first time a coordinated attack using hijacked airliners was mounted. Until that time, the risk of air hijackings fell mostly on airlines and air passengers. In the terrorist attack of September 11, 2001, most of those killed were on the ground and a humongous loss of property was also caused on the ground. That marked the beginning of a period of enormously heightened risk from aircraft hijacking, not from the standpoint of irrelevant statistics like passenger miles but from the standpoint of potential costs and those who were assuming the risk. It also meant that reciprocal agreements between countries were no longer effective in reducing the cases of aircraft hijacking. When the hijacked airliners were weapons of war, a friendly destination was no longer required.[7] The number of hijackings has dwindled since 2001. About 50 hijackings have been reported since

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5 Dave Schuler, *A Short History of Air Hijacking,* THE GLITTERING EYE (Oct. 10, 2017), http://theglitteringeye.com/a-short-history-of-air-hijacking/.

6 *Ibid.*

7 *Ibid.*

September 11, 2001, and none in the U.S., according to the Aviation Safety Network. Since 2010, only 8 instances of hijacking have been reported, which also include 4 attempted hijackings.[8]

Aircraft Hijacking and International Law

In general terms, aircraft hijacking, also known as "skyjacking", means the unlawful seizure of an aircraft by an individual or a group. The legal definition of aircraft hijacking is given in Article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 (also known as the Hague Convention).[9] The International Law pertaining to aircraft hijacking is laid down in the following four international conventions:

I. Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963 (Tokyo Convention).

II. Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 (Hague Convention).

III. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971 (Montreal Convention).

IV. International Convention Against the Taking of Hostages, 1979.

A brief summary of these Conventions is given below:

I. Tokyo Convention, 1963

This Convention was signed on September 14, 1963 and came into force on December 4, 1969 on ratification by 12 States. As of October 2017, it has 186 Contracting States. The purpose of this Convention is to protect the safety of the aircraft and of the persons or property thereon and to maintain good order and discipline on board. The aircraft commander, members of the crew and, in specific circumstances, even passengers on board, are empowered to prevent the

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8 Bart Jansen, *Hijackings Rare After 9/11 Security Improvements,* USA TODAY (Oct. 12, 2017), https://www.usatoday.com/story/news/2016/03/29/hijackings-rare-after-911-security-improvements/82375474/. In 2017, no aircraft was hijacked till November 10. The most recent case of a successful aircraft hijacking was reported from Libya on December 23, 2016. Flight 209, carrying 119 passengers from Sebha to Tripoli in Libya was diverted to Malta International Airport by two men claiming to be carrying a hand grenade. The hijackers threatened to blow up the aircraft, but eventually surrendered before the Maltese authorities. No loss of life was reported.

9 Convention For The Suppression Of Unlawful Seizure Of Aircraft (The Hague Convention, 1970) (Oct. 15, 2017) https://www.mcgill.ca/iasl/files/iasl/hague1970.pdf. Article 1 of the Hague Convention, 1970, provides that any person who on board an aircraft in flight: (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or (b) is an accomplice of a person who performs or attempts to perform any such act commits an offence.

commission of such acts and to disembark the person concerned. The aircraft commander may also disembark the offender or, if the offence is serious, deliver him to the competent authorities of a Contracting State when the aircraft lands. The Convention protects the aircraft commander and any crew member or passenger assisting him in imposing the measures he finds necessary from any proceedings in respect of actions taken by them. The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board. Each Contracting State is obliged to take the necessary measures to establish its jurisdiction as the State of registration. The Convention does not eliminate existing or future jurisdiction in States other than the State of registration. A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in certain cases, for instance, when the offence has been effected in the territory of the State overflown, when the offence has been committed by or against a national or permanent resident of that State, and when the offence is against the security of that State.[10]

II. Hague Convention, 1970

This Convention was signed on December 16, 1970 and came into force on October 14, 1971 on ratification by 10 States. As of October 2017, it has 185 Contracting States. The Convention defines the act of unlawful seizure of aircraft and the Contracting States have undertaken to make such an offence punishable by severe penalties. Under the provisions of The Hague Convention, a State is obliged, whether or not it is the State of registration, to take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him. If there is no extradition treaty between the States concerned and the offender is in the territory of a Contracting State and that State refuses to extradite the offender, then it must submit the case to its competent authorities for the purpose of prosecution under its criminal law. The Convention requires any Contracting State in which the aircraft or its passengers or crew are present to facilitate the continuation of the journey of the passengers and crew as soon as possible and to return the aircraft and its cargo to the persons lawfully entitled to possession without delay.[11]

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10 Convention on Offences and Certain Other Acts Committed on Board Aircraft (The Tokyo Convention, 1963) (Oct. 17, 2017) https://treaties.un.org/doc/db/terrorism/conv1-summary.pdf.

11 Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague Convention, 1970) (Oct. 17, 2017) https://treaties.un.org/doc/db/Terrorism/Conv2-summary.pdf.

III. Montreal Convention, 1971

This Convention was signed on September 23, 1971 and came into force on January 26, 1973 on ratification by 10 States. As of October 2017, it has 188 Contracting States. The Convention deals with acts other than those covered by the Tokyo and The Hague Conventions. The Montreal Convention defines a wide spectrum of unlawful acts against the safety of civil aviation and the Contracting States have undertaken to make these offences punishable by severe penalties. The Convention contains detailed provisions on jurisdiction, custody, prosecution and extradition of the alleged offender similar to those of The Hague Convention. Like the Tokyo and The Hague Conventions, the Montreal Convention does not apply to aircraft used in military, customs or police services. This Convention attempts to establish a form of universal jurisdiction over the offender, as provided in Article 5(1) of the Convention. In the case of air navigation facilities mentioned in Article 1, sub-paragraph 1(d), the Convention applies only if the facilities destroyed, damaged, or interfered with are used in international air navigation.[12]

IV. Convention Against the Taking of Hostages, 1979

This Convention was signed on December 18, 1979 and came into force on June 3, 1983 on ratification by 22 States. As of October 2017, it has 176 Contracting States. The objective of the Convention is to develop international co-operation between States in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking hostages as manifestations of international terrorism. The act of hostage taking for the purposes of the Convention refers to any person who seizes or detains and threatens to kill, to injure or to continue to detain a hostage in order to compel a State, an international inter governmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage. Any person also commits such an offence if that person attempts to commit an offence as set forth above or participates as an accomplice of anyone who commits or attempts to commit an act of hostage taking. Each State party is required to make this offence punishable by appropriate penalties. Where hostages are held in the territory of a State party, the State party is obliged to take all measures it considers appropriate to ease the situation of the hostages and secure their release. States parties are also required to take alleged offenders into custody, prosecute or extradite alleged offenders,

12 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (The Montreal Convention, 1971) (Oct. 17, 2017) https://treaties.un.org/doc/db/Terrorism/Conv3-summary.pdf.

cooperate in preventive measures, and exchange information and evidence needed in related criminal proceedings.[13]

The first three Conventions were drafted under the auspices of International Civil Aviation Organization (ICAO) and the last one was adopted by the General Assembly of the United Nations. The most regretful shortcoming of all these Conventions is that the State that receives the hijackers and where the aircraft lands, could still welcome them as political refugees, which would provide them immunity against any extradition or prosecution proceedings.[14]

Aircraft Hijacking and The Defence of Duress

In some cases, the hijackers have successfully established the defence of duress[15] to the charge of aircraft hijacking and have obtained asylum as well in the country where they landed the aircraft.

In the case of ***R v. Abdul Hussain***,[16] seven Iraqi Shia Muslims hijacked an aeroplane from Sudan, which was bound for Jordan and forced the pilots to take it to Stansted Airport, London. One of the hijackers named Abdul Hussain had been sentenced to death in Iraq following a confession which had been extracted by torture. The other hijackers were also fugitives facing death sentences in Iraq. They were living in Sudan and feared being deported to Iraq by the Sudanese authorities. In order to save themselves from deportation, they planned to hijack an

13 International Convention Against the Taking of Hostages (The Hostages Convention, 1979) (Oct. 17, 2017) https://treaties.un.org/doc/db/terrorism/summary-18-5.pdf.

14 Jayati Gupta, *Aerial Hijacking and The International Law,* LEGAL INDIA (LEGAL NEWS AND LAW RESOURCE PORTAL) (Oct. 16, 2017), http://www.legalindia.com/article/article/aerial-hijacking-and-the-international-law-2384-1.html.

15 The defence of duress is a complete defence operating in favour of those who commit crimes because they are forced or compelled to do so by circumstances or threats by another. There exist two defences of duress, i.e., duress by threats and duress of circumstances. Duress of circumstances is the most recent development in criminal law and is closely linked to duress by threats and the defence of necessity. Duress by threat and duress of circumstances are largely governed by the same criteria. Thus many of the cases are authority for either type of duress. Where the defence of duress is successfully pleaded, it absolves the defendant of all criminal liability. The rationale behind the defence of duress is that whilst the defendant clearly has the *mens rea* to commit the crime, in committing the crime, he is acting out of compulsion and is therefore not exercising freedom of choice. In this respect, the defence of duress differs from most defences to criminal liability which seek to demonstrate the defendant lacked the *mens rea to commit the crime.* For example, intoxication, insanity and mistake. In India, the defence of duress is available to the accused under Section 94 of the Indian Penal Code, 1860, which provides that "Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint."

16 [1999] Crim LR 570 Court of Appeal (United Kingdom).

aircraft in order to escape to London. After negotiations for 8 hours, the hijackers surrendered at the Stansted Airport, London.[17]

At their trial in London for the offence of hijacking, they pleaded duress as a defence. The trial court judge refused to accept their argument and held that the defence of duress of circumstances could not be put before the jury as there was lack of the requirement of immediacy. Duress can be pleaded as a defence only when the danger or threat is imminent. The trial court convicted them for the offence of hijacking. The hijackers filed an appeal before the Court of Appeal, United Kingdom, against the decision of the trial court. The Court of Appeal allowed their appeal and quashed their convictions. The Court of Appeal held that the execution of the threat need not be immediate. The Court observed that the defence of duress is available to those who hijack an aircraft, although in such cases the terror induced in innocent passengers will raise issues of proportionality for determination.[18]

On 6th February 2000, nine Afghan men hijacked a local Afghan Airlines Flight from Kabul, which was bound for Mazar-e-Sharif. They hijacked the plane in order to avoid being executed by the Taliban regime and forced the pilots to take the plane to Stansted Airport, London, after stopovers in Tashkent, Aktobe and Moscow. They surrendered at the London Airport on 10th February 2000 and were put on trial for the offence of hijacking and false imprisonment.[19]

At their trial they pleaded the defence of duress of circumstances. The trial court judge observed that the defence of duress was available only if the defendants were under an actual objective threat. Therefore, the trial court convicted them for hijacking and false imprisonment and sentenced all of them to 5 years of imprisonment. They filed an appeal before the Court of Appeal against the decision of the trial court. The Court of Appeal reversed the judgement of the trial court and quashed the convictions of the appellants in 2003. The Judges of the Court of Appeal ruled that in law the perception of a threat can be enough for the defendants to present duress as a defence. In 2004, a panel of adjudicators ruled that returning these hijackers to Afghanistan would breach their human rights in accordance with the UK Human Rights Act

17 Case Summaries, *R v. Abdul Hussain,* E-LAW RESOURCES (Oct. 22, 2017), http://www.e-lawresources.co.uk/cases/R-v-Abdul-Hussain.php.

18 *Ibid.*

19 James Sturcke, *Judges Overrule Reid in Afghan Hijack Case,* THE GUARDIAN (Oct. 23, 2017), https://www.theguardian.com/uk/2006/aug/04/immigration.immigrationpolicy.

1998. Therefore, these nine hijackers were granted "temporary leave to remain in the United Kingdom." In 2006, they were granted "discretionary leave to remain," which entitled them to work and earn money in the United Kingdom.[20]

Pre 2016 Anti Hijacking Law In India

In 1982, an Act was passed by the Parliament of India for suppression of unlawful seizure of aircrafts registered in India. It was titled as the Anti-Hijacking Act, 1982. According to the Act, whoever on board an aircraft in flight attempts by force or threat and intends to control the aircraft for unlawful purposes shall be charged with the offence to commit a hijack. The punishment under such charge, if proved, was life imprisonment and fine.[21] This Act also punished acts of violence connected with hijacking.[22]

India's Anti Hijack Policy, 2005

There have been 9 instances of hijacking of Indian planes till date. The first hijacking took place in 1971,[23] while the last one took place in 1999 which brought India down to its knees and forced the Indian Government to adopt a tough anti hijack policy.[24] Indian Government adopted its Anti Hijack Policy in 2005, when it was approved by the Cabinet Committee on Security (CCS). The policy among other things states that:

I. No foreign hijacked aircraft will be allowed to land in India.

II. A hijacked Indian aircraft will be forced to land in India, and once a hijacked

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20 Staff and Agencies, *Afghan Hijackers Win Asylum Ruling,* THE GUARDIAN (Oct. 23, 2017), https://www.theguardian.com/uk/2006/may/10/immigration.afghanistan.

21 The Anti Hijacking Act, 1982, No. 65, Acts of Parliament, 1982 (India) (Oct. 23, 2017), http://dgca.nic.in/nat_conv/NatConv_Chap9.pdf. Section 4 of the Anti Hijacking Act, 1982.

22 *Ibid.* Section 5 provided that whoever, being a person committing the offence of hijacking of an aircraft, commits, in connection with such offence, any act of violence against any passenger or member of the crew of such aircraft, shall be punished with the same punishment with which he would have been punishable under any law for the time being in force in India if such act had been committed in India.

23 FPJ Web Desk, *Seven Plane Hijacks That Terrified India,* THE FREE PRESS JOURNAL (Oct. 22, 2017), http://www.freepressjournal.in/weekend/seven-plane-hijacks-that-terrified-india/789209. The first hijack that commenced terror happened on January 30, 1971, when an Indian Airlines plane was hijacked on its way from Srinagar to Jammu by a 16 year old teen named Hashim Qureshi and his cousin Ashraf Butt. The aircraft named Ganga was hijacked with a toy pistol and a wooden grenade and flown to Lahore, Pakistan where the passengers and the crew were released and the plane was burnt on February 1. It was alleged that the Pakistani authorities denied permission to retrieve the plane back to India and also helped the militants by supplying petrol to burn the plane.

24 *Ibid.* On December 24, 1999, an Indian Airlines Flight (814) flying from Kathmandu to New Delhi was hijacked and diverted to Kandahar, Afghanistan, which at that time was controlled by the Taliban. Before reaching Afghanistan, the plane was flown to various locations including Amritsar, Lahore and Dubai. During the bargain with the Indian government, the hijackers released 27 of 176 passengers in Dubai but fatally stabbed one and wounded several others. Harkat-ul-Mujahideen, a Pakistan-based Islamic extremist group, was accused of the hijacking. After a week long stand-off India agreed to release three militants who were jailed in India (Masood Azhar, Mushtaq Ahmed Zargar and Ahmed Omar Saeed Sheikh) in exchange for the hostages.

aircraft has landed in India, all efforts shall be made to stop it from taking off again.

III. In case of any suspicious activity by the aircraft, the Air Traffic Service (ATS) Watch Supervisory Officer, shall inform the Joint Control and Analysis Centre (JCAC), manned by Indian Air Force officials.

IV. In case the aircraft does not pay heed to the communication with the ground controller, it shall be branded as 'rogue' aircraft, and in case it aligns itself to a strategic target like Rashtrapati Bhawan, or the Parliament, the aircraft shall be branded as a 'threat'. Once an aircraft is declared a threat, the CCS can take a decision to shoot down the aircraft. The CCS is the apex body for handling such decisions. However, in case of an emergency, the Prime Minister, Minister of Defence or under extreme circumstances, a Senior Officer of the Indian Air Force (not below the rank of Assistant Chief of Air Staff) can take this decision.[25]

The terrorist attacks of 9/11 in USA, therefore not only exposed fundamental human errors in security procedure but they also brought forth new modus operandi of terrorists wherein aircrafts were used as guided missiles. Around the world, strategists and policy makers looked in disbelief at the apparent ease with which aircrafts brought down the twin towers of the World Trade Centre, and with that the warm sense of security and belief that the skies were now secure. The anxiety of the State, over combating such attacks in the future led to this policy, which although very strict in the literal terms, is in contradiction with the Indian Constitution.[26]

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25 *Supra* note 2, at 79. In 1983, a South Korean passenger plane was shot down by the Soviet Air Force for suspected spying. On September 1, 1983, Korean Airlines (KAL) flight 007 was on the last leg of a flight from New York City to Seoul, with a stopover in Anchorage, Alaska. As it approached its final destination, the plane began to veer far off its normal course. In just a short time, the plane flew into Russian airspace and crossed over the Kamchatka Peninsula, where some top-secret Soviet military installations were known to be located. The Soviets sent two fighters to intercept the plane. According to tapes of the conversations between the fighter pilots and Soviet ground control, the fighters quickly located the KAL flight and tried to make contact with the passenger jet. Failing to receive a response, one of the fighters fired a heat-seeking missile. KAL 007 was hit and plummeted into the Sea of Japan. All 269 people on board were killed. Despite the heated public rhetoric, many Soviets and American officials and analysts privately agreed that the incident was simply a tragic misunderstanding. The KAL flight had veered into a course that was close to one being simultaneously flown by a U.S. spy plane; perhaps Soviet radar operators mistook the two. In the Soviet Union, several of the military officials responsible for air defense in the Far East were fired or demoted. It has never been determined how the KAL flight ended up nearly 200 miles off course.

26 *Ibid.* The Constitution of India grants upon all citizens the fundamental rights, which are part of the basic structure of the Constitution. These fundamental rights are guaranteed, and any violation of these by the State can be challenged in the Supreme Court of India and the High Courts. India's Anti Hijack Policy, 2005, leaves many questions unanswered. The text of Article 21 reads as follows: "Protection of life and personal liberty: No person

Anti Hijacking Act, 2016

The Anti Hijacking Act, 2016, was enacted by the Indian Parliament to give effect to the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), 1970, and for matters connected therewith.[27] This Act also gives effect to the Supplementary Protocol to the Convention signed by India on September 10, 2010, which deals with unlawful acts against Civil Aviation. The Act defines various terms like Aircraft,[28] Hostage,[29] Military Aircraft,[30] Security Personnel,[31] etc. The Act defines hijacking as unlawfully and intentionally seizing or exercising control of an aircraft in service by force, threat, coercion, or by any other form of intimidation.[32] An attempt, abetment or credible threat to commit hijacking is also included within the definition of hijacking.[33] For the purposes of this Act, an aircraft shall be considered to be "in service" from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing and in the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.34

The offence of hijacking is punishable with death or imprisonment for life and confiscation of movable and immovable property of the accused.[35] This Act also punishes acts of violence

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shall be deprived of his life or personal liberty except according to procedure established by law". Do the people who are onboard the aircraft which is hijacked, involuntarily lose their right to life as enshrined under this Article? Whether a policy passed by the CCS falls under the definition of 'procedure established by law' under the definition of Article 21?

27 The Anti Hijacking Act, 2016, No. 30, Acts of Parliament, 2016 (India) (Oct. 18, 2017), http://www.indiacode.nic.in/acts-in-pdf/2016/201630.pdf. Long Title of the Act.

28 *Ibid.* Section 2(b) defines Aircraft as any aircraft, whether or not registered in India, other than a military aircraft or an aircraft used in customs or police service.

29 *Ibid.* Section 2(f) defines Hostage as a passenger or a crew member of an aircraft or any security personnel on board the aircraft or a ground support staff involved in the maintenance of the aircraft, who is unlawfully seized or detained without his consent, or with his consent obtained by fraud or duress, by an individual or by a group of persons, during the transit of an aircraft or when it is stationed at an airport, with an intention to secure any demand or fulfilment of any condition made by such individual or such group of persons.

30 Ibid. Section 2(g) defines Military Aircraft as an aircraft of the naval, military, air force or any other armed forces of any country and includes every aircraft commanded for the time being by a person in any such force detailed for the purpose.

31 *Ibid.* Section 2(i) defines Security Personnel as personnel deployed by the Central Government or appointed by any agency authorised by that Government to ensure security of civil aviation against acts of unlawful interference.

32 *Ibid.* Section 3(1) of the Act.

33 *Ibid.* Section 3(2) of the Act.

34 *Ibid.* Section 3(4) of the Act.

35 *Ibid.* Section 4 of the Act provides that whoever commits the offence of hijacking shall be punished (a) with death where such offence results in the death of a hostage or of a security personnel or of any person not involved in the offence, as a direct consequence of the office of hijacking; or (b) with imprisonment for life which shall mean

connected with hijacking.[36] However, before instituting a prosecution under this Act, previous sanction of the Central Government is required.[37] The Anti Hijacking Act, 1982, was repealed by this Act as it had become obsolete.[38]

The aim of the act is to broaden the scope of the term 'hijacking' by including in its definition even the making of a threat to commit an offence of hijacking. It is now also an offence to unlawfully and intentionally cause any person to receive a threat under circumstances that indicate that the threat is credible. Additionally, the amended definition includes within its scope those who organise or direct others to commit the offence and also holds such individuals guilty of abetment of hijacking. Another notable feature of the new legislation is universal jurisdiction, which includes inter-alia, if the hijacker is Indian, or if the hijacked aircraft is registered in India or if any foreign registered aircraft lands in India with the alleged offender still on board or when the aircraft is hijacked anywhere in the world and an Indian citizen is on board. The Act goes a step forward by even defining the term "in service."

On October 31, 2017, Birju Kishore Salla, a Mumbai based multi millionaire jeweller, became the first person to be arrested and booked under the Anti Hijacking Act, 2016. He also became the first person to be put on the "National No Fly List" and thus barred from boarding a Jet Airways flight for the next 5 years. On October 30, 2017, he allegedly planted a threatening note in the washroom of the Jet Airways flight bound to Delhi from Mumbai with 115 passengers and 7 crew members on board. The note was written in Urdu and English stating that "instead of going to Delhi, the flight should be diverted to Pakistan Occupied Kashmir. There are 12 hijackers on board and there is a bomb in the cargo area. If the pilots try to activate the landing gear in order to land the plane in Delhi, the bomb will explode and everyone on board would die. Allah is great." After an airhostess found the note in the washroom, the flight was diverted to Ahmedabad (Gujarat). After his arrest, he told the Police that he planted the threatening note so that Jet Airways would shut down and his girlfriend in the Delhi based office of the airline would

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imprisonment for the remainder of that person's natural life and with fine, and the movable and immovable property of such person shall also be liable to be confiscated.

36 *Ibid.* Section 5 provides that whoever, being a person committing the offence of hijacking of an aircraft, commits, in connection with such offence, any act of violence against any passenger or member of the crew of such aircraft, shall be punished with the same punishment with which he would have been punishable under any law for the time being in force in India if such act had been committed in India.

37 *Ibid*. Section 15 of the Act provides that no prosecution for an offence under this Act shall be instituted except with the previous sanction of the Central Government.

38 *Ibid.* Section 21(1) of the Act.

quit her job and come over to stay with him in Mumbai.[39] The National Investigation Agency took over the investigation of the case from the Gujarat Police on November 4, 2017 and is probing it from terror angle as well. The NIA is trying to find out whether the accused is in touch with terrorists across the border or other anti social groups. On November 15, 2017, the NIA Special Court rejected his bail application.[40] The case is still pending for adjudication before the NIA Special Court. If convicted under the Anti Hijacking Act, 2016, the accused can be sentenced to imprisonment for life and shall also be liable to pay fine.

Shortcomings of the Anti Hijacking Act, 2016

Despite being a great improvement to the Anti Hijacking Act, 1982, which was last amended in 1994, the Anti Hijacking Act, 2016, suffers from some shortcomings which are listed below:

I. The term 'aircraft' is identified as any aircraft, whether or not it is registered in India. But it excludes an aircraft that is used in customs or police service, which should have been included.[41]

II. It would have helped if there was also a provision to cover 'hoax calls' with appropriate punishment. Hoax calls create panic, resulting in serious complications and delay for passengers. They also cause a nightmare for security agencies who end up wasting precious resources and time to verify the authenticity of the call.[42]

III. The act should also have considered providing extra-territorial status or immunity from jurisdiction for the benefit of the passengers and the crew in the State to which an aircraft may be hijacked. This type of rule, which should also apply to all cases of unscheduled landings in a foreign country, is urgently needed, particularly in the event of the unlawful seizure of an aircraft.[43]

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39 NDTV News Desk, *Mumbai Millionaire Planted Hijack Threat on Plane Over Girlfriend: Cops,* NDTV (Nov. 1, 2017), https://www.ndtv.com/india-news/mumbai-millionaire-birju-kishore-salla-planted-hijack-threat-on-plane-over-girlfriend-cops-1769319.

40 *Hijack Hoax: NIA Special Court Rejects Birju Kishore Salla's Bail Application,* AHMEDABAD MIRROR (Nov. 16, 2017), https://ahmedabadmirror.indiatimes.com/ahmedabad/crime/hijack-hoax-nia-special-court-rejects-birju-kishore-sallas-bail-application/articleshow/61649761.cms.

41 Devyani Sultania, *Death For Hijackers: All You Need To Know About The New Anti Hijacking Act,* INTERNATIONAL BUSINESS TIMES (Oct. 23, 2017), http://www.ibtimes.co.in/death-hijackers-all-you-need-know-about-new-anti-hijacking-act-733791.

42 *Ibid.*

43 Satvik Varma and Vikrant Pachnanda, *The Anti Hijacking Act, 2016: An Explainer,* THE WIRE (Oct. 23, 2017), https://thewire.in/39975/the-anti-hijacking-act-2016-an-explainer/.

Conclusion

Even though the Hague Convention is definitely an improvement over the Tokyo Convention, but it also suffers from some deficiencies. The Hague Convention still fails to recognize the act of hijacking as a crime under International law. Secondly, it still provides for no relief or rewarding of damages to the innocent passengers and crew members hijacked aboard. The Montreal Convention resembles greatly to the Hague Convention but also extends to acts of unlawful interference against international civil aviation which have not been covered in the Hague Convention. The most regretful shortcoming of all the treaty laws is that the State that receives the hijackers and where the hijacked flight lands, could still welcome them as political refugees and grant them asylum, which would provide them immunity against any extradition or prosecution proceedings. The hijackers have been successful in establishing the defence of duress to the charge of hijacking in some cases in the United Kingdom and have obtained asylum as well.[44]

After the hijack of Indian Airlines IC 814 Flight in 1999, which led to the release of three dreaded terrorists, India was constrained to enact a tough Anti Hijack Policy and Law. [45] The Anti Hijacking Act, 2016, repealed the Anti Hijacking Act, 1982. On the whole, the new legislation is a welcome move as India tightens its stand on dealing with hijacking incidents. Aircraft Hijacking has become a very significant issue of international aviation law, causing great concern globally, especially after the terrorist attacks of 9/11 in USA. India has showed its concern by updating its legislative machinery and by establishing effective means of combating aircraft hijacking. It is suggested that in order to make the Anti Hijacking Act, 2016 more deterrent, a provision must be added to it to punish hoax callers with imprisonment as well as fine. Let's hope that the Indian security forces and intelligence agencies work efficiently to prevent any hijack in future and we don't have to invoke the Anti Hijacking Act, 2016, again and again in the coming years. We conclude this paper with the following quote by the great Greek philosopher Socrates-

"Man must fly above the Earth, to the top of the atmosphere and beyond, for only then he will fully understand the world in which he lives." [46]

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44 *Supra* note 16.

45 *Supra* note 24. Out of these 3 terrorists, Masood Azhar and Mushtaq Ahmed Zargar are still active in Pakistan and are accused of planning and master minding several terrorist attacks in India.

46 Socrates, *Famous Aviation Quotes,* PINTEREST (Oct. 25, 2017), https://www.pinterest.com/browsetheramp/aviation-quotes/.

REGULATING BITCOINS IN INDIA AND UNITED STATES OF AMERICA: NEED FOR LEGAL INNOVATION

Mr. Amrit Subhadarsi*

Introduction: Understanding Bitcoins

Origin

Bitcoin is a digital currency gaining prominence after the recent financial crisis. Literature suggests the genesis of the concept of virtual currency in 1998 when Wei Dai and many other scholars provided the basis for the existence of such a currency. Therefore, although the concept is not new, what is novel is the implementation of the idea of a virtual currency. The origin of the bitcoin is attributed to an individual or a group of individuals named, Satoshi Nakamoto, who nine years ago, posted a research paper online on the future of digital currency. Many commentators have argued that the timing of the publication of the research paper coincided with the outbreak of the financial crisis when the mistrust in the central banks and paper currency was at its peak. During this time of turbulence in the financial markets, many people feared the failure of government-controlled currencies and sought an alternative.[1]

Nakamoto, has, after the publication of the research paper disappeared from the mainstream media and has been known to keep very limited contacts through the use of e-mails. At the date of writing, there are still speculations about the real identity of this individual. Nakamoto has relied on Wei Dai's publication for advocating the use of digital currency. He sought to create a medium of exchange that avoided the need for intermediaries in electronic transactions and one in which government involvement was non existent.

Nature of Bitcoin

With the advent of digital economy facilitating business, payment has come to be addressed by an emerging dominant economic idea of bitcoins, a virtual currency. The digital currency can be downloaded from the internet as open source software and installed on a user's computer. Bitcoin proponents have argued that bitcoins unlike paper currency, exist as a unique string of numbers comprising of units of the currency and these units exist in a network of users governed by a uniform source code acting as a level playing ground to ensure that users of the network play

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1 Kelsey L. Penrose, *Banking on Bitcoin: Applying Anti-Money Laundering and Money Transmitter Laws,* 18 N.C. Banking Inst. 529, 531 (2014).

by the proper rules.

Users can download the bitcoin software and this software operates as a bitcoin wallet where users can store their digital currency. The software also helps in generating addresses for future bitcoin transactions after being installed in the computer and being present in the computer's hard drive. Any transaction which takes place in the bitcoin network is automatically published in the network through blockchain technology, without revealing the user's identity and therefore this has helped users to have confidence on the confidential nature of the transaction. The nature of the transaction is such that when the software generates a new address, one does not have to give any personal data.

We do not have to register on any network, but simply start the application and using the various addresses, the digital 'coins' are received and saved on the computer in our electronic wallet. [2] The bitcoin software installed on one's computer has a pair of public and private keys stored in the bitcoin wallet file. When a user wishes to engage in the transaction, the user has to make use of his private key and the buyer of the bitcoins has to provide the sender of the digital currency with his public key, without which the entire process remains incomplete.

The software uses the private key of a user in the form of a digital signature and a user may provide his sole public key or any one of the public keys if he has more than one, so that the seller of the currency can use the buyer's public key in the software and provide the required amount of currency. Paper currencies have value because they're backed by the power of the state, which defines them as legal tender and accepts them as payment for taxes. Bitcoins, however, derive their value, if any, purely from self-fulfilling prophecy, the belief that other people will accept them as payment.[3]

Bitcoin mining is another unique feature of this digital currency. Unlike physical mining of minerals, in the case of bitcoin mining, what is required is a complex network of computers manned by users where the collection of bitcoins is contingent upon the solving of a complex mathematical algorithm and the number of computers which are connected to the same network. The sooner the algorithm is solved and the fewer computers on the same network, the more quanta of bitcoins are mined.

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2 Eszteri Daniel, *Bitcoin: Anarchist Money or the Currency of The Future?,* 151 STUDIA JURIDICA AUCTORITATE UNIVERSITATIS 27, 23-46 (2013).

3 Paul Krugman, *The Anti-Social Network of Bitcoins,* THE NEW YORK TIMES (Apr. 16, 2013), (Oct. 18, 2017), https://mobile.nytimes.com/2013/04/15/opinion/krugman-the-antisocial-network.html.

However, bitcoin mining has come to be seen as a complex procedure because of logistical support and lack of awareness, which is why many who deal with bitcoins, have used online exchanges, where after payment of certain transaction fees, bitcoins are delivered in exchange of dollars or other paper currency. Extant literature also points towards the fact that bitcoins can be earned either by way of mining or through bitcoin exchanges and also by way of transactions with another individual or entity where bitcoins are bought in exchange for paper currency. The entire process of creation of bitcoins ensures that online transactions are secure, efficient and free of third party presence, whether that third party is a government, bank, payment network, or clearing house.[4] This is why bitcoins are also called crypto currency, as it is based on cryptographic proof, which is free from interference by third parties, whether government or private.

This effectively means that the currency reduces transaction costs for both consumers and merchants.[5] According to bitcoin proponents, laissez faire approach and distrust over the handling of monetary policy by the government are at the root for the bitcoin regime being decentralized. The virtual currency would have a finite supply that no government or institution could ever change, eliminating the ability of central authorities to enact harmful inflationary programs.[6] Another logical consequence of the internet economy is that the increasing use of bitcoins for varied purposes ranging from drugs, medicines, use for consultancy services, to use for money laundering and tax evasion, has orchestrated a situation where there exists an ambitious idea of finding balance between the personal commercial rights of the individual and the government's need to enforce crimes against fraud and drug trade.[7]

Issues With Respect to The Currency

Tax evasion and Money Laundering

There has been some speculation on the applicability of tax and money laundering laws in the context of bitcoin regulation. Despite an international consensus that bitcoins are by no means similar to characteristics showed by paper currency, the fact that bitcoins are used for trade and businesses like regular currency has been the genesis for a raging debate on whether tax evasion

4 Nikolei M. Kaplanov, *Nerdy Money: Bitcoin, The Private Digital Currency, and The Case Against its Regulation,* 25(1) LOY. CONSUMER L. REV. 111, 116 (2012).

5 Joshua J. Douguet, *The Nature of the Form: Legal and Regulatory Issues Surrounding the Bitcoin Digital Currency System,* 73 LA. L. REV. 1119, 1152 (2013).

6 Supra note 1, at 531.

7 Derek A. Dion, *I'll Gladly Trade You Two Bits on Tuesday For a Byte Today: Bitcoin Regulating Fraud in The E-Conomy Of Hacker-Cash,* 1 U.ILL. J.L. TECH. & POL'Y 165, 167 (2013).

and money laundering can be done through virtual currencies. Hence, the need arises for an analysis of the relationship between the applicability of such issues and bitcoins.

Money laundering is the process of concealing illicit sources of money to make it appear like legitimately earned money. Such money which is evidently the proceeds of a crime is referred to as dirty money. The methods by which money may be laundered are varied and can range in sophistication. The use of digital currency eliminates the need for complex layering methods for international money laundering. This is because there is lack of paper trail in bitcoin transactions. In fact, extant literature suggests that bitcoins which attracted users post the US financial crisis have negligible transaction costs which provide scope for money laundering to criminal enterprises to potentially circumvent law enforcement agencies.[8]

There have been a number of indictments and legal proceedings in relation to money laundering through virtual currencies like bitcoins. In 2013, Liberty Reserve, a virtual currency exchange was indicted with money laundering charges by the US Department of Justice (DoJ) for six billion US dollars money laundering scheme. The firm exchanged US dollars for LR, a virtual currency used by unscrupulous entities to send the virtual currency to third parties with no sign of the paper trail. Similarly, Silk Road, accessible only through an anonymous internet browser, facilitated trade 1.2 billion US dollars worth of illicit goods and the website transacted in bitcoins for over two years before it was charged with the laundering of money.[9]

Also, a landmark indictment relating to money laundering and virtual currency deserves mention. The currency, E-gold, was created by a company called E-gold Ltd. Accounts were generated on company website without user identification and purchase of the virtual currency was with a credit card. Further, the currency was exchanged with users on the website who had a similar account on authorized digital currency exchanges backed by the company website. It was only after the platform becoming a money laundering haven that the company was charged with conspiracy to launder monetary instruments.[10] In July 2017, an online black market was shut down by law enforcement.[11]

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8 Jared A. Kleiman, *Beyond The Silk Road: Unregulated Decentralised Virtual Currencies Continue to Endanger U.S. National Security and Welfare,* 4(1) NATIONAL SECURITY LAW BRIEF 60, 59-78 (2013).

9 *Ibid.*

10 Catherine Martin Christopher, *Whack-a-mole: Why Prosecuting Digital Currency Exchanges Won't Stop Online Money Laundering, 18*(1) LEWIS & CLARK LAW REVIEW 24, 1-36 (2014).

11 Debanjan Chatterjee, *Improving Financial Safety With Blockchain,* MONEYLIFE (Sep. 18, 2017), (Oct. 22, 2017), http://www.moneylife.in/article/improving-financial-safety-with-blockchain/51607.html.

Instances such as these have scope for widening the scope for legitimate and unlawful uses for digital currency. The aforesaid instances also appear to fit the definition of money laundering propounded by the US Supreme Court,[12] that money laundering is taking steps to make funds appear legitimate. The above instances are sufficient to convince one that the anonymity of bitcoin transactions is a loophole which raises eyebrows as to susceptibility of virtual currencies to financial regulation. Thus, cryptocurrencies are of special interest to those who value their privacy, whether that desire springs from personal or political views, a desire to evade taxes, or for other nefarious purposes such as money laundering.[13] This does not imply that conventional banking channels are of course immune from such activities. For instance, HSBC was in controversy with regards to it being used as a conduit for illicit financial transactions by a number of states and non-state actors.[14] However, it is pertinent to note that the emergence of financial technology like crypto currency makes financial regulation more challenging and demanding for financial regulators the world over.

The central governments of many jurisdictions are grappling with money laundering in relation to paper currency, and, virtual currency has aggravated this debate. This is because in cases of conventional money laundering, some information on personal details of the individuals or the entities involved can be traced due to the involvement of traditional banking channels and financial institutions generating a paper trail. However, in case of bitcoins, the digital wallets which contain the bitcoins contain no information about the user making it quite a challenge for investigators to sort out the criminal's pattern for laundering cash.[15]

This is why some have argued that bitcoins and money laundering are worthy of introspection. Another major issue is self-regulation. It has been documented that many bitcoin exchanges have recently engaged in self-regulatory behaviour, apparently giving an impression of complying with relevant laws on financial regulation. However, this self-regulation is insufficient to achieve the goals of preventing money laundering and other criminal activity.[16] This makes the legal risks associated with money laundering for bitcoin very real.[17]

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12 Cuellar v. United States, 553 U.S. 550, 558 (2008).

13 Stephen T. Middlebrook & Sarah Jane Hughes, *Regulating Cryptocurrencies in The United States: Current Issues and Future Directions,* 40(2) WILLIAM MITCHELL LAW REVIEW 816, 813-848 (2014).

14 Christopher Hall, Anything For You Big Boy: *A Comparative Analysis of Banking Regulation in the United States and the United Kingdom in the Light of the LIBOR Scandal,* 34 NW. J. INT'L & BUS. 153, 175 (2013).

15 *Supra note* 7, at 186.

16 Sarah Gruber, *Trust, Identity, and Disclosure: Are Bitcoin Exchanges The Next Virtual Havens For Money Laundering And Tax Evasion,* 32 (1) QUINNIPIAC LAW REVIEW 141, 135-208 (2013).

17 Ruoke Yang, *When Is Bitcoin A Security Under U.S. Securities Law?,* 18 J. TECH. L. & POL'Y 99, 128 (2013).

Besides the above, there are concerns relating to tax evasion. Though conceptually both money laundering and tax evasion are different, in most cases one survives with the other because unaccounted money on which tax has not been paid is ultimately used to launder money through legitimate channels so that the source of ill-gotten wealth is concealed. Therefore, it becomes imperative that if bitcoin is vulnerable to money laundering, tax evasion through currency may not be far behind. Further, though the idea of internet money existed since the late nineties, the utility of the virtual currency rose to prominence only a year after the financial crisis. Hence, the uncertainties relating to the application and interpretation of the regulatory framework, including for money laundering and tax evasion.

Bitcoin's inherent features, like anonymity, decentralization and use of encryption techniques, make it a currency which makes it nearly impossible to identify suspicious monetary patterns, difficulties in identifying account owners or their location.[18] This has implications for tax evasion as well. There have been growing calls among commentators and financial regulators for applicability of the tax regime as is the case for paper currency, and if not, then an equally robust alternative for regulating such matters. Firstly, there is the issue of increase in capital gains while dealing with bitcoins as the value tends to fluctuate constantly which gives them potential for speculative investing.[19] However, many argue that bitcoin is not legal tender and is dependent on the quantum of users using it, hence ideally outside the domain of taxation laws. There are also suspicions that small businesses which transact only in cash, can switch to bitcoins (as there are negligible transition costs) and evade taxes without oversight.

Secondly, it has also been documented that use of bitcoins for commercial transactions can lead to a situation where payments for goods and services can be received through bitcoins, but the seller or the merchant may still pay tax on that transaction as though the payment was made in dollars. Ultimately, due to the anonymity, there is the potential for individuals to withhold reporting Bitcoin related income and thus evade taxes. [20]

Further, these exchanges, in absence of regulatory oversight do not seek identification of the

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18 Peter *Twomey, Halting A Shift in The Paradigm: The Need for Bitcoin Regulation,* 16 TRINITY C.L. REV. 67, 70 (2013).

19 Paul H. Farmer *Jr., Speculative Tech: The Bitcoin Legal Quagmire & The Need for Legal Innovation,* 9(1) JOURNAL OF BUSINESS & TECHNOLOGY LAW 100, 85-106 (2014).

20 Matthew Kien-Meng Ly, *Coining Bitcoin's "Legal-Bits": Examining The Regulatory Framework For Bitcoin and Virtual Currencies,* 27 (2) HARVARD JOURNAL OF LAW AND TECHNOLOGY 596, 588-608 (2014).

customer before opening their accounts. Hence, it is not surprising that, these exchanges do not provide proper documentation for taxation on investment gains.[21] This adds to the inconsistencies in deriving the taxable component in bitcoin transactions. A third issue concerning bitcoins and taxation is with regard to their intrinsic nature. While, it is true that bitcoins are a new emerging phenomenon in the world of money and finance, there is lack of consensus with regards to classification as a security, currency or taxable property. Further, the lack of any statute or court judgment makes matters worse.

Data Security Breaches

Theft of data is the norm today rather than exception. This is because of the prevalence of the internet economy integrated with information and communication technology. The proliferation in digital transactions has made the world more connected and integrated on the one hand, whereas, vulnerable to a range of cyber attacks capable of decrypting any number of complex security measures. Therefore, it is only a myth that data protection measures are adequate to protect one from such attacks.

The recent instances of ransom ware and loss of data from mobile wallets in India are only the tip of the iceberg. It would however be naïve to assume that such flaws are confined to countries like India, because the international scenario is also gloomy. For instance, a recent report by Equifax suggests that data breaches in September 2017 affected more than 143 million US customers, amounting to almost half the country's population. The compromise of data happened at one of the most sophisticated data centres giving access to names, social security numbers.[22]

This is relevant in the context of bitcoin exchanges which though give access to bitcoins on the basis of unverified personal information;the scope for compromise of stealing bitcoins still exists. Evidently, such exchanges are susceptible to compromise of customers' currency. This is so because an entire industry devoted primarily to processing and disseminating personal information has arisen, and this industry is not well regulated.[23] Further, issues such as the above, ensure that in the thriving digital era, the law of privacy is even more disorganized as new controversies keep arising.[24]

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21 *Supra note* 7, at 195.

22 Yogesh Sapkale, *Is Protection from Data Leaks Possible?,* MONEYLIFE (Oct. 16, 2017), (Oct. 20, 2017), http://www.moneylife.in/article/is-protecton-from-data-leaks-possible/51869.html?

23 Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection,* 2 UNIVERSITY OF ILLINOIS LAW REVIEW 357, 359 (2006).

24 Aishwarya C.R., Privacy *In Cyber Space- Concerns And Challenges,* BHARATI LAW REVIEW 166, 169 (2016).

Similar concerns havebeen raised by many with regards to transactions concerning bitcoins. Before drawing an analogy between data protection and bitcoins, it is crucial to shed light on this technological development. It is nobody's case that bitcoins offer anonymity to the users, use encryption techniques, also termed cryptographic proof, and also involve blockchain technology used for a detailed recording of all such transactions. However, with regard to data protection issues, there exists some diversity in literature.

Some studies emphasize that due to the aforesaid techniques, privacy is enhanced.[25] Similarly, some commentators have also pointed out, the ability of the bitcoin network to propagate a number of security features.[26] However, real life case studies and scholarly works exist which can help many to question the aforesaid assertions. Firstly, many bitcoin exchanges have been victims of hacking resulting in theft of bitcoins. For instance, Bitfloor, an exchange was hacked resulting in theft of bitcoins. Similarly,Instawallet, a digital wallet service provider, lost more than thirty five thousand bitcoins, owing to a hacking attack and likewise, Mt. Gox, the largest bitcoin exchange in 2013, found itself caught in a Distributed Denial of Service (DDoS) attack, owing to which it had to declare bankruptcy. In all of these cases, the response has been a temporary shutting down of operations.

Also, many commentators have also emphasized that bitcoin systems' anonymity is not so privileged as is often made out to be and through usage of complex statistical tools, or an inadvertent leaving of account information online, there can be breach of bitcoin security systems.[27] Thus, public key encryption techniques allow bitcoin transactions to be secure acting as a mail address to which bitcoins are to be sent and the receiver uses the private key to receive the bitcoins.[28] But this does not guarantee the confidentiality of the bitcoin network.

Many bitcoin users engaged in the process of developing sophisticated tools to search for such fraudsters.[29] However, data breach over a secured virtual currency network is a challenging issue which throws up interesting questions for libertarians, cyber law experts, financial regulators and the other users of the crypto currency. In light of such pressing issues, many

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25 *Supra note* 5, at 1119.

26 Issac P Flaum & Emmeline Hatley, A Bit of *a Problem: National and Extraterritorial Regulation of Virtual Currency in The Age of Financial Disintermediation,* 45 GEO. J. INTL L. 1169, 1180 (2014).

27 Reuben Grinberg, *Bitcoin: An Innovative Alternative Digital Currency,* 4 (1) HASTINGS SCIENCE AND TECHNOLOGY LAW JOURNAL 179, 159-208 (2012).

28 Nicholas A. *Plassaras, Regulating Digital Currencies: Bringing Bitcoin Within the Reach of the IMF,* 14 (1) CHICAGO JOURNAL OF INTERNATIONAL LAW 385, 377-407 (2013).

29 *Supra note* 7, at 186.

commentators have also believed that whether the bitcoin program is truly anonymous, or private, is subject to debate.[30]

Regulatory Obstacles

United States

A regulation of a country's economy is to a significant extent dependent on how well the intricacies of currency management are managed. Consequently, the central banks of all jurisdictions have the relevant regulatory framework in place because the currency in question is paper currency. Currency management for such currency thus adds to the stability in a fiscal system of one jurisdiction, while at the same time it also adds to the stability in the functioning of global financial markets. With the emergence of bitcoins in the era of digital economy and rising mistrust over financial regulators, there is inevitable uncertainty as to the appropriate regulatory framework. Hence, this part shall address such issues and assess India's position with regard to international developments, more particularly the US, since most of the regulatory action has been in the US.[31] Post this analysis, the answer to the question on the necessity for regulating bitcoins in India can truly be answered.

To begin with, the emergence of virtual currency has generated debate among the financial regulators in many jurisdictions collectively. Though there is concern among countries regarding the potential for virtual currency to replace paper currency, there is near unanimity in upholding the view that virtual currencies must be subject to regulation. The only uncertainty is with respect to the manner of regulation. Thus, for instance, while countries like China and Japan have banned financial institutions from trading in bitcoins, others such as Israel, Belgium and Germany have allowed bitcoins to be used.[32]

However, crucial debates have arisen in US with regards to usage of the virtual currency, which becomes the researcher's focus in this part. An analysis of literature reveals that both commentators and regulators have shown uncertainties in approach towards treating bitcoins as part of money services business and also whether bitcoins should be treated as currency, property or a tradable security. Thus, the use of bitcoins poses many questions which can lead to

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30 Thomas Slattery, *Taking a Bit Out of Crime: Bitcoin and Cross-Border Tax Evasion,* 39 (2) BROOKLYN JOURNAL OF INTERNATIONAL LAW 866, 830-873 (2014).

31 Mohan R. Lavi, *Bit of a Regulatory Dilemma,* THE HINDU BUSINESS LINE (Dec. 17, 2013), (Oct. 20, 2017), http://m.thehindubusinessline.com/opinion/bit-of-a-regulatory-dilemma/article5470523.ece.

32 Sanya Samtani & Varun Baliga, *On Monopolistic Practices In Bitcoin: A Coded Solution,* 11 THE INDIAN JOURNAL OF LAW & TECHNOLOGY 113, 107-116 (2015).

a legal quagmire.Though no specific regulatory framework is yet in existence to legislate bitcoins, concerns regarding money laundering, tax evasion and other criminal activities merit attention to general statutes to address these issues. [33]

The Bank Secrecy Act, 1970 was the first legislation passed at the federal level to deal with money laundering. The objective of the Act is to identify the flow of money through conventional banking channels as conduit for conversion of ill gotten wealth into legitimate money. Also, banks and financial institutions are directed to report suspicious transactions over ten thousand US dollars and keep record of financial transactions. The record keeping helps to preserve paper trail of all transactions. The Act has been amended several times in keeping pace with the changing demands of economic regulation. Pursuant to several amendments, all money transmission services are required to implement anti money laundering program which mandates provisions to develop internal policies.

Also the Act classifies money service businesses as those entities which are engaged in issuance of travelers' cheques, exchange of currency and the like. The Financial Crimes Enforcement Network (FINCEN) is the main government authority to enforce the legislation. Interestingly, the US Constitution though prohibits states from coining money, and reserves rights with the federal government to prosecute counterfeiters, there is no express prohibition as to existence of other currencies when the likelihood of confusion with the federal currency is not real. Many commentators have thus argued that since the digital currency is nothing like paper currency, it becomes unlikely that Bitcoin will be confused with the nation's federal currency.[34]

However, this does not mean that there is uniformity in approach regarding bitcoins. At this juncture, it becomes imperative to point out that money laundering and tax evasion are issues most frequently associated with fiat currency and the relevant laws are applied. Such consequentiality in applying the laws is not reflective of inconsistency, but the lack of coherent standards applicable for enforcement of each of the separate laws as a hindrance. For instance, extant literature suggests that apart from the money laundering laws, a host of other legislations can be applied such as the Uniform Commercial Code (UCC), which thought not binding law, governs all commercial contracts.[35] Similarly, the Electronic Fund Transfer Act (EFTA), 1978 applies to entities engaged in electronic fund transfer and remittance systems and governs their rights and duties. Also, the Stamp Payments Act (SPA), 1862 can be made applicable because

33 Leslie Gutierrez, *Bolstering Competition in The International Remittance Market: A Proposal for Reforming the Current Regulatory Licensing Framework Governing Money Transmission Businesses,* 10 (1) HASTINGS

the objective is to protect federal currency from unofficial currencies. Lastly, security laws also bear significance as securities are broadly defined under the Securities and Exchange Act, 1934 as notes, stocks and investment contracts.

The applicability of each of the above legislations has been viewed with skepticism at best. Firstly, with regards to the EFTA, the statute applies to financial institutions which act as intermediaries to facilitate electronic fund transfers.[36] But, all bitcoin transactions are peer to peer and do not involve third party. Secondly, in the absence of a third party it is questionable as to what part of bitcoin payment system qualifies as a financial institution. Moreover, it cannot be said that bitcoin exchanges are financial institutions as they only act as platforms for exchanging bitcoins for paper currencies. But, legislations like the Patriot Act, 2001, which introduced key amendments to the BSA, amended the definition of financial institutions to include bitcoin exchanges.

Also, with respect to the SPA, it becomes clear that there are practical difficulties in enforcing this statute against bitcoins. Firstly, from a regulatory perspective, scholarly work provides evidence that it's uncertain whether bitcoin qualifies as a currency, investment or something else.[37] Secondly, even if deemed currency, there is enough evidence to point out that they are to be in circulation for limited time only and scope for competition with federal currency is thus reduced. Thirdly, there is a necessity for a central financial authority for issuing currency.[38] This is absent in case of bitcoins which are generated through bitcoin mining by every subsequent user.

With regards to the debate as to bitcoin being a security tradable on stock exchange, there has been some apprehension. The definition of securities is wide enough to encompass notes, stock and investment contracts. With regards to notes and stock, it is clear that bitcoin satisfies neither requirement because unlike a currency note which bears an express promise to pay, no such promise exists in case of bitcoins. Also, stock implies a portion of share capital owned by someone in anticipation of rise in equity value and dividends, whereas bitcoins are created through a network of computers on the internet with no allegiance to any company which issues

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BUSINESS LAW JOURNAL 213, 207-224 (2014).

34 Danton Bryans, *Bitcoin and Money Laundering: Mining for An Effective Solution, 89 IND.* L.J. 441, 448 (2014).

35 *Supra note* 20, at 598.

36 *Id*., at 599.

37 *Supra note* 18, at 73.

38 *Supra note* 2, at 38.

such bitcoins as part of its share capital for investment. Naturally, this also means that bitcoins are not investment contracts because as propounded by case laws, money is invested into an enterprise for profits, but in case of bitcoins, money is not invested but exchanged for more bitcoins, without there being any enterprise.[39]

A major regulatory hurdle is whether bitcoins can be classified as some sort of intellectual property. The process of creating bitcoins involves mining them and usage of algorithm to solve equations to obtain them. But it is debatable whether; such characteristic enables bitcoin to be an intellectual property.[40] The problems are further compounded by the question of the entity which is supposed to be regulated. The only tangible and prominent entities in bitcoin transactions are the bitcoin exchanges in an otherwise anonymous transaction where the sender and receiver of bitcoins are hard to trace. This is akin to the idea that in most jurisdictions, including US the online intermediary is often within the realm of the regulators and not the person or the entity which posts something on the internet using the intermediary.With regards to the US treasury and the Internal Revenue Service (IRS), they too have divergent views on the nature of bitcoins as to whether it is property or currency for the purposes of taxation.[41]

India

With regards to India, the regulation of bitcoins is a dicey issue owing to both global and domestic trends. Some of the domestic trends include bitcoin technology startups such as Unocoin raising investment despite RBI advisories.[42] Also foreign exchange violations by bitcoin exchanges and consequent raids by the Enforcement Directorate (ED) and proliferation of domestic virtual currencies seeking RBI approval.[43] Just like the statutory framework in the US, India too has a host of legislations which can be made applicable to bitcoins, but only a deeper examination will reveal the true picture. Hence, statutes such as Prevention of Money Laundering Act, 2002 (PMLA), Payments and Settlement Systems Act (PSS), 2007, Securities Contract Regulation Act (SCRA), 1956, Foreign Exchange Management Act (FEMA), 1999

39 S.E.C. v. W.J. Howey Co., 328 U.S. 293 (1946).
40 *Supra note* 2, at 9.
41 Patrick McLeod, *Taxing and Regulating Bitcoin,* 22 COMM LAW CONSPECTUS 379, 386 (2014).
42 Venkatesh Ganesh, *Unocoin Gets $250,000 Investment from Bitcoin* (Aug. 17, 2014), (Oct. 18, 2017), http://m.thehindubusinessline.com/money-and-banking/unocoin-gets-250000-investment-frombit coin/article 632622 3.ece.
43 *Bitcoin Impact: Laxmicoin Seeks Regulatory Clarity for Launch* (Jan. 7, 2014), (Oct. 20, 2017), http://www.thehindu.com/business/Economy/bitcoin-impact-laxmicoin-seeks-regulatory-clarity-for-launch/article5549324.ece.

along with intellectual property laws like Copyright Act, 1957 need a relook.

With regards to the debate on bitcoins and intellectual property, it is to be noted that bitcoins are mined after solving a complex set of algorithms which connect users on a peer to peer computer network. Theoretically, algorithms can fall within the definition of 'literary work' under Indian copyright law. But, bitcoins can be an exception because there is no legitimate way to determine who the real owner of a certain set of bitcoin is, let alone tracing the person or entity creating the algorithms in the first place. Hence, it can be said that though bitcoins satisfy the requirement of the human brain being applied for creativity and invention, a lot of uncertainty still exists around their nature, resulting in a lack of coherent standards for regulation, let alone by way of intellectual property.

With regards to the PSS Act 2007, online payment transactions can occur through a number of methods like electronic banking, credit and debit card payments, electronic and mobile wallets, and even most recently Aadhar based payment systems. The legal regulation for such payment modes is through the PSS Act, 2007. These methods qualify as payment systems as they facilitate payments between payers and beneficiaries through a payment or a clearing service. Thus, services of PayTM, MobiKwik and other such payment modes qualify as payment systems.

Akin to requirement of license from RBI for commencement of banking operations, under this statute, any entity which operates a payment system must apply for authorization. Examples of entities which have obtained permission from RBI are American Express Banking Corporation and Airtel M Commerce Services Ltd with respect to their mobile wallets. The RBI has issued Issuance and Operation of Prepaid Payment Instruments in India (Reserve Bank) Directions, 2009, which deal with payment instruments.

Further, RBI has strengthened norms regarding the Know Your Customer (KYC) rules for electronic wallets mandating them to comply with KYC within a year of opening customer accounts.[44] However, from the perspective of bitcoins, applying this legislation can be a challenging task. Firstly, bitcoin users would object to regulation by the RBI as it would mean

44 RBI to *Allow Money Transfer Between E-Wallets and Banks Through* UPI, MONEYLIFE (Oct. 12, 2017), (Oct. 21, 2017), http://www.moneylife.in/article/rbi-to-allow-money-transfer-between-e-wallets-and-banks-through-upi/51892.html.

interference in the anonymity of bitcoin transactions. Secondly, even assuming RBI regulates, there is still no clarity on the liability of the e-wallet provider as a banking and financial entity. [45]

With regards to the SCRA, 1956, the term 'security' has been explained in section 2(h) to include shares, scrips, stocks, bonds, debentures, debenture stock, marketable securities of a like nature of any body corporate, derivatives along with government securities, rights or interest in securities, units issued in mutual fund schemes or collective investment schemes, any instruments declared to be securities by the Central government.Thus, theoretically, the inclusive definition allows bitcoins to be considered security, but doing so can cause practical problems.

This is so as, defining securities in normal parlance means holding a portion of the share capital of a company, and in the present case bitcoins are merely obtained for other paper currencies and not linked to any legal entity. Further, the Securities and Exchange Board of India (SEBI) has in the recent past faced flak owing to inability to take care of investors in cases such as the Sahara case.[46] Also, most recently, there has been criticism in relation to flash crashes in algorithmic trading.[47] Investments in conventional securities causing such problems to retail investors will compel the regulator for a cautious approach towards bitcoins.

With respect tomoney laundering and foreign exchange violations, PMLA and FEMA both have disclosure and reporting requirements to be made by the financial institutions before the RBI, coupled with the requirement of maintenance of suspicious activity reports. However, issues exist. Literature suggests greater use of public sector banks for reporting of suspicious account activities and further, lack of reliability of estimates of illicit wealth abroad. This, compounded by the problems of lack of coordination with foreign governments under information sharing agreements, coupled with exclusion of tax evasion from the definition of predicate offences leads to a regulatory gap.[48] There are also serious loopholes in Indian data protection law as there are no such existing laws. This view has also been endorsed by Pawan Duggal, Supreme

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45 Nirmalendu Jajodia & Arvind Krishnaswamy, *A Cashless Society, Cyber Security and the Aam Aadmi,* LII (14) ECONOMIC AND POLITICAL WEEKLY 35, 36 (2017).

46 Sahara India Real Estate Corporation Ltd. and Ors. v. Securities and Exchange Board of India and Anr., (2013) 1 SCC 1 (India).

47 Sucheta Dalal, *SEBI Tries to Fix the HFT Issue Without Closing the NSE Probe,* MONEYLIFE (Aug. 16, 2016), (Oct. 20, 2017), http://www.moneylife.in/article/sebi-tries-to-fix-the-hft-issue-without-closing-the-nse-probe/47829.html.

48 Suranjali Tandon, *Bringing Money Back,* L II (17) ECONOMIC & POLITICAL WEEKLY 18, 19 (2017).

Court Advocate and India's leading expert on cyber security laws.[49]

Lastly, the RBI has preferred an ex post rather than an ex ante approach for regulating bitcoins. An analysis of recent trends proves this. The first press release warning Indian consumers was issued in 2013, wherein it was stated that usage of bitcoins could lead to loss of data, tax evasion and money laundering and consumers using them were at their own risk. Similar press releases were released in February and March 2017.[50] In December 2015, the RBI acknowledged the benefits of blockchain technology as a mode of transforming financial markets.[51] But no clear position on bitcoins was taken. However, there are trends which the RBI can no longer afford to ignore. As of August 2016, there are a number of bitcoin exchanges such as BTCX India, Coinsecure, Unocoin and Zebpay and the number of bitcoin users in India stood at 50,000 and growing.[52] Blockchain technology was put to use by ICICI Bank with respect to financing of international trade which enabled it to track and authenticate ownership of assets digitally, becoming India's first blockchain transaction.[53]

However, there are some roadblocks as well. For instance, it has been reported that after bitcoins gained prominence, several other crypto currencies like One Coin have been marketed in India under the pretext of selling educational content. This is akin to the ponzi schemes which have duped many investors in India of late. The scam involves luring members to purchase educational packages using euros. Each package includes tokens, which can be used to mine One Coins. However, the problem is a lack of public and transparent blockchain.[54] There are also reports which indicate that the ransom ware attack which affected computers globally also infected machines for mining digital currency. However, no such threat has been detected in India.[55] The silver lining however are cases showing that, in economic policy matters, the state

49 Nishant Arora, *India Woefully Under-Prepared to Protect Data Users' Rights on Internet,* MONEYLIFE (Sep. 28, 2017), (Oct. 20, 2017), http://www.moneylife.in/article/india-woefully-under-prepared-to-protect-data-users-rights-on-internet/51753.html.

50 Arnav Joshi, *Bitcoin: Can RBI Ignore the Elephant in the Room?,* MONEYLIFE (Mar.3, 2017), (Oct. 21, 2017), http://www.moneylife.in/article/bitcoin-can-rbi-ignore-the-elephant-in-the-room/49904/ html.

51 Sucheta Dalal, *Does Digital Currency Have a Bright Future?,* MONEYLIFE (Jan. 19, 2016), (Oct. 21, 2017), http://www.moneylife.in/article/does-digital-currency-have-a-bright-future/45011.html.

52 Supra note 49.

53 Yogesh Sapkale, *Is Blockchain the Future of Digital Transactions?,* MONEYLIFE (Mar. 20, 2017), (Oct. 21, 2017), http://www.moneylife.in/article/is-blockchain-the-future-of-digital-transactions/49967.html.

54 *Beware: One Coin Luring Indians by Selling Tokens for Cryptocurrency,* MONEYLIFE (Sep. 9, 2016), (Oct. 20, 2017), http://www.moneylife.in/article/beware-onecoin-luring-indians-by-selling-tokens-for-cryptocurrency/48099.html.

55 No Report Yet of Global Cryptocurrency Attack in India: CERT-In, MONEYLIFE (May 18, 2017), (Oct. 21, 2017), http://www.moneylife.in/article/no-report-yet-of-global-cryptocurrency-attack-in-India-cert-in/50538.html.

has more leeway and judicial interference is restricted unless violation of statute or constitution exists.[56] Thus, for instance, RBI is in the process of developing its own crypto currency which may become a game changer.[57]

Conclusion

Analysis from above leads us to draw certain conclusions. Firstly, bitcoins regardless of the turbulence they have caused can only be deemed a phenomenon which will have limited application because of their intrinsic nature, namely limited creation of such crypto currencies upto a certain time. However, that does not mean that global regulators should adopt hands off approach, because many such virtual currencies are on the rise. Secondly, the technology on which such currencies rely on, blockchain, has certain inherent benefits like antidote to counterfeiting and revolutionizing global payment systems, but at the same time, interference by financial regulators will be perceived as interference into the anonymity of bitcoin transactions by their supporters.

In the researcher's view, such dichotomy has prevented clarity on coherent standards to regulate such phenomena. Lastly, with regards to India, with the push towards a cashless economy, the increasing numbers of electronic commerce transactions and growth in internet connectivity, the RBI has to adopt a stance where it shifts from reactive regulation to a proactive regulation. For this to happen, the first step must be to acknowledge inconsistencies in application of the relevant laws and fix such loopholes. In light of the above, the following suggestions may be considered:

1. Usage of John Dow orders (as used for instance, in illegal sports broadcasts) can lead to restricting harm caused by money laundering and tax evasion due to anonymous bitcoin transactions.
2. Retailers like Walmart and others who accept bitcoins may be asked to share requisite information in exchange for relaxed FDI rules.
3. There are already instances of many universities accepting bitcoins, who can thus collaborate with many technological startups and spread awareness on

56 Balco Employees' Union (Regd) v. Union of India and Ors., (2002) 2 SCC 333.

57 *Cryptocurrency Policy is Being Prepared by RBI,* MONEYLIFE (Oct. 18, 2017), (Oct. 21, 2017), https://advisor.moneylife.in/article/cryptocurrency-policy-is-being-prepared-by-rbi/2443.html.

bitcoins through Massive Open Online Courses (MOOCs).

4. Instances of technology startups raising investment are there, and such startups may be directed to seek assistance on those investment bankers who conduct 'cyber due diligence,' specifically on bitcoins or virtual currencies.
5. Lastly, information sharing mechanisms among countries needs to improve in order to monitor money laundering effectively through bitcoins.

THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013: A CRITICAL ANALYSIS

Mrs. Amrita Rathi*

Introduction

Sexual harassment has been recognized as the most intimidating, degrading and violating form of violence against women. Within the workplace, it creates a hostile work environment and reinforces the perception of subjugation and suppression of women by men in all areas of their lives. In the context of the workplace, the rejection of attempts at sexual harassment may affect a decision concerning the employment status, conditions of work, compensation and other terms & conditions of employment. Sexual harassment is considered as a violation of human rights as it is a form of sex discrimination.[1] Women have been made to face all kinds of violence, physical abuse, denial of right to live, subordination and neglect. The acts of abuses like eve-teasing, molestation, sexual abuse and rape cover both physical and verbal abuses. However, they all are different parts of what is commonly known as sexual harassment or sexual misconduct. The concept like eve-teasing gained nationwide attention in the 1960's but today eve-teasing has evolved as a huge issue in many metropolitan cities of India. A large numbers of Indian women have faced or are facing this menace. Another form of violence against women is that of molestation, or what is commonly known as 'sexual abuse' or 'sexual assault'. It is the forcing of sexual behavior by a man over the women. Further, rape is one of the most extreme forms of sexual violence committed against women. It is an act of physical violence and assault which is expressed through sexual means. The position and status of women has been a very dynamic concept since ages. Beginning from the Vedic period till today's time, the status of women has gone through innumerable changes.[2] But one thing that has been common throughout these phases is the disadvantaged status of the women. The most heinous and shameful of such acts is the act of violence against women. Violence against women is a wide term that encompasses multifarious acts of violence, abuse and torture against women. It does not simply refer to the physical violence which a woman has to bear, but also verbal abuse, emotional torture,

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1 M. Pallavi Jane Periera, *Sexual harassment at Workplace in India: Medico Legal aspects,* 36 JOURNAL OF INDIAN ACADEMIC FORENSIC MEDICINE (2014).

2 T.P.Nijeesh, *Kerala row over women campaigners in Hijab,* THE ECONOMIC TIMES (Oct. 10, 2018) http://articles.economictimes.indiatimes.com.

economic deprivation and social disregard. No women are born to be treated in an inhuman manner and to be deprived of her right to life. Any sort of violence committed against a woman is a direct attack on her human rights and is the most shameful violation of human rights. Women of all ages, from all kinds of background and from all walks of life go through some sort of violence in different phases of their lives. It may be in the form of domestic violence, sexual abuse, physical and verbal abuse, rape, trafficking in women and young girls, forced prostitution, dowry-related violence, dowry deaths, female foeticide or infanticide and other inhuman practices. They are victimized and neglected in all fields of life and have to face discrimination in every sphere of human activity. Thus, women across the world face these practices in almost all spheres of life; this may include education, employment, at home, at workplace, in marriage, or even in childhood.[3]

Sexual Harassment: Objectives of the Law

1. The act has been enacted to provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment.[4]

2. It aims to prevent violation of fundamental rights of a woman to equality enshrined under Articles 14 and 15 of the Constitution of India and her right to life and to live with dignity as per Article 21 of the Constitution. It has also been considered as a violation of a right to practice or to carry out any occupation, trade or business under Article 19(1) (g) of the Constitution, which includes a right to a safe environment free from harassment.[5]

3. It was enacted to give effect to the international conventions and instruments such as Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)[6] for the protection of women against sexual harassment at workplace.

Meaning Of The Term Sexual Harassment

The definition of Sexual Harassment in the Sexual Harassment Act is in line with the Supreme Court's definition in the Vishaka Judgment and includes any unwelcome sexually determined behaviour (whether directly or by implication) such as physical contact and advances, demand or request for sexual favours, sexually coloured remarks, showing pornography, or any other

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3 Vandana, SEXUAL VIOLENCE AGAINST WOMEN: PENAL LAW AND HUMAN RIGHTS PERSPECTIVES 145 (2009).

4 The Sexual Harassment of Women at Workplace (Prevention, Prohibition And Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

5 *Ibid.*

6 Ratified by Government of India on June 25, 1993.

unwelcome physical verbal or non-verbal conduct of sexual nature.[7]

Prevention of Sexual Harassment

1. The Sexual Harassment Act stipulates that a woman shall not be subjected to sexual harassment at any workplace.[8]

2. As per the statute, presence or occurrence of circumstances of implied or explicit promise of preferential treatment in employment; threat of detrimental treatment in employment; threat about present or future employment; interference with work or creating an intimidating or offensive or hostile work environment; or humiliating treatment likely to affect the lady employee's health or safety may amount to sexual harassment.[9]

Critical Analysis of The Act

Despite being a comprehensive legislation, it too has lacunas which are required to be overcome for the wholesome and effective implementation of the law.

1. Discrimination in Scope and Ambit

• In an era, where the force of the law thrives for creating equal opportunity and focuses on eliminating discrimination of every kind possible, this particular Act is not at all gender neutral. The Act provides protection against acts of sexual harassment only for women and not men.[10] This act has completely ignored the sexual harassment faced by the males in their work place. Men choose to suffer in silence and very often there are no reports of cases of sexual harassment faced by men at workplace. This happens because of the social ridicule that men would face if they would report any case of sexual harassment being faced by them especially in a patriarchal country like ours.

• Judging from the findings of a recent Economic Times-Synovate survey, the men need to be incorporated in the bill as soon as possible. Of the 527 people queried across seven cities – Bangalore, Chennai, Delhi, Hyderabad, Kolkata, Mumbai and Pune – 19% said they have faced

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7 Section 2(n), The Sexual Harassment of Women at Workplace (Prevention, Prohibition And Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

8 Section 3(1), The Sexual Harassment of Women at Workplace (Prevention, Prohibition And Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

9 Section 3(2), The Sexual Harassment of Women at Workplace (Prevention, Prohibition And Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

10 Geetanjali Ramesh Chandra & Sonia Mahapatra, *The Sexual Harassment of Women at Workplace Act, 2013: A Long Due Hasty Legislation,* 6 INTERNATIONAL JOURNAL OF HUMAN RESOURCE MANAGEMENT AND RESEARCH 23 (2016).

some kind of sexual harassment at office. In Bangalore, 51% of the respondents had been sexually harassed, while in Delhi and Hyderabad, 31% and 28% of those surveyed said they had been sexually harassed. Around 38% of the respondents across 7 cities in India said that in today's workplaces, "men are as vulnerable to sexual harassment as women." [11]

- As Article 14 of the Indian Constitution provides for equality before law and equal treatment before law, the legislation does not take into account the sexual harassment faced by men and is only concerned with women fraternity. In order to prevent the violation of this right, there must be 'equal access to justice' for both men and women.[12]

2. Definitional Ambiguity

A. Section 2(n)- "Sexual Harassment"[13]

After carefully analysing the legal intent of the definition, following ambiguities arises-

- Ignores technological advancements:

The definition of sexual harassment, which forms the core of the act, clearly ignored the sexual harassment by electronic means. Taking into account the present day scenario, where technology occupies a major portion of a person's professional and personal life, an omission of the said nature will narrow down the scope of the act. [14]

- "Unwelcome"

Further the definition runs into the problem of subjectivity by using the word 'unwelcome' in clause (v).[15] The perspective of 'reasonable man' comes into picture with this which is very difficult to measure or quantify. Therefore there might be vastly different perspectives of

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11 Aasawari Dogra & Nimrit Kaur Ahluwalia, *The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013: A Critical Analysis,* ACADEMIKE: ARTICLES ON LEGAL ISSUES (Aug. 2, 2017), http://www.lawctopus.com/academike/sexual-harassment-workplace-prevention-prohibition-redressal-act-2013-critical-analysis/.

12 Anahita Gaind, *Access to Justice in India Viz a Viz Darkest Secret of War: Sexual Harassment of Men,* RACOLB LEGAL (Aug. 3, 2017), http://racolblegal.com/access-to-justice-in-india-viz-a-viz-darkest-secret-of-war-sexual-harassment-of-men/.

13 Section 2(n)- "sexual harassment" includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely:-
(i) Physical contact and advances; or
(ii) A demand or request for sexual favours; or
(iii) Making sexually coloured remarks; or
(iv) Showing pornography; or
(v) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

14 Gibran Naushad & Susanah Naushad, *The Sexual Harassment of Women at Workplace: An Unmanned Territory,* INDIA LAW JOURNAL (Aug. 2, 2017), http://indialawjournal.com/volume8/issue-1/article9.html.

15 *Supra* note 12.

unwelcomed that might exist in the society, and it becomes difficult to stipulate a standard by taking into account one of those perspectives. Thus the definition needs to be more evolved, so as to arrive at a more determinate standard for assessing cases of sexual harassment.[16] The subjective perception of different women ought to have been included in determination of whether the act is "unwelcome" or not.[17]

- Potential victimization by employer:

The definition of "sexual harassment" has also neglected to grant protection against potential victimization of the complainant by an employer. The timeline between making of complaint till a decision is made can be effectively misused by the employer to exert undue pressure on the employee of any nature whatsoever.[18]

B. Section 2(o) - "Workplace"

- The definition in its clause (v)[19] includes "any place visited by the employee which arises within the course of employment", thereby enhancing the liability of the employer for those venues as well where he has no control or influence. This provision seems to be extending the scope of the Act more than required, i.e. the "workplace" is being used to incorporate exceedingly unnecessary venues thus putting the employer in a position where in his liability continues irrespective of his presence or control over the situation.
- The problem arises again because majority of Indian women do not work in institutions or enterprises, or in developed cities as covered under this definition. They work in the informal sector such as fields, on the roads, or as self- employed producers or vendors. Their workplaces are everywhere, and there is no mechanism to prevent the everyday forms of sexual harassment that they may undergo.[20]

3. Section 3(iii) – Prevention Of Sexual Harassment

As the mentioned clause states that the implied or explicit threat about her present or future employment status may amount to sexual harassment, it will not be conducive for speedy redressal of complaints, because in a professional work environment the employees including female employees are bound to receive certain remarks or feedback with regard to quality of

16 *Supra* note 13.
17 *Supra* note 9.
18 *Ibid*.
19 Section 2(o)(v) - workplace includes any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey.
20 *Supra* note 9.

work and the improvements required thereof which might not always be positive.[21] So, if the female employees will take such feedback or remarks otherwise i.e. derogatory to their dignity, then frivolous complaints can be filed by them on the ground that such feedback was creating an unhealthy work environment.

4. Sections 4 And 7–Constitution Of Internal Complaints Committee And Local Complaints Committee

The criticism of the constitution of these committees has been dealt with in the following manner:

- Sections 4(2)(c) and 7(1)(c) mandates the appointment of a member from a non-governmental organization (NGO) or association "committed to the cause of women". No adequate specifications have been given as to the extent to which there needs to be commitment to the cause and what work they should have done in that particular field. Further in this regard, the Tribunal said that *"if members of the committee of the adjudicatory committee are to be committed to an ideology, there mental frame will be such that it would give an opportunity for unwelcomed bias and their finding also will be in resonance of their personal commitment."* [22] Moreover no requirement for an 'expert in the field of law' has been provided as a qualification for the members. The only requirement is that they need to have legal knowledge, which is a highly broad standard for an Act like sexual harassment.[126] Further, including third-parties such as NGOs as members of the committee will also raise concerns of confidentiality due to the sensitive nature of such internal matters.[23]
- Also, the composition of the committee members should have compulsorily been an odd number to enable the committee to reach a majority-based decision.
- Another self-negating factor is that the employer is supposed to nominate members to the committee, i.e. the Internal Committee. This provision completely ignores the power dynamics that is generally prevalent in the workplace. Hence such a provision gives an upper hand to the employer who might be the perpetrator himself, or to an employer who is in direct competition with the victim.[24]
- Another practical difficulty lies in the formation of the Internal Complaints Committee

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21 *Ibid.*
22 *Supra* note 2.
23 *Supra* note 13.
24 *Supra* note 9.

at every level where high level establishments have hundreds of offices spread across the country to comply with the said provision.[25] Further the non-compliance of the provision will entail the punishment.[26]

5. Sections 9 and 11 – Complaint and Inquiry Into Complaint

• There is no provision of suo motu power for ICC/LCC for any serious case of harassment or anything else as the case will be only be registered when aggrieved woman or her legal heir will file the complaint according to Section 9.[27]

• Section 11 vests the Committees with powers of a civil court hence making it a quasi-judicial entity. It is to be noted that none of the members constituting the committee is from legal background and still the provision confers them with the powers of a civil court which seems inappropriate. Also, this may be interpreted as an instance of colourable legislation, as powers of courts cannot arbitrarily be conferred on domestic committees.[28]

6. Section 13(3) – Inquiry Report

• Section 13 states that where the alleged sexual harassment is proved, the committee is empowered to take action against sexual harassment in accordance with the prescribed service rules, or to deduct adequate compensation from the salary of the employee, or to recover the compensation from the accused employee as land revenue but the seriousness of this offence demands more drastic action, such as dismissing the accused from employment or suspending him for a considerable time period without any pay.[29]

• Penalizing such an act by compelling payment of compensation seems to undermine the gravity of the offence and equates it to offences wherein the harm or damage can be undone by monetary means.[30]

• The Punishment after conviction of an offence shall be as per service rules of the employer if exist and otherwise as per rules under this act. But act is silent on situation where

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25 *Supra* note 13.

26 Section 4(1) - every employer of a workplace shall, by an order in writing, constitute a committee to be known as the "internal complaints committee":

Provided that where the offices or administrative units of the workplace are located at different places or sub-divisional level, the internal committee shall be constituted at all administrative units or offices.

27 Section 26(1) - where the employer fails to constitute an Internal Committee under sub-section (1) of section 4, he shall be punishable with fine which may extend to fifty thousand rupees.

28 Mahesh Arora, *Critical Analysis of Sexual Harassment at Worplace Bill,* OMABC (Aug. 4, 2017), http://www.omabc.com/national/indian-laws/strategic-affairs/shw-2013/critical-analysis-sexual-harassment-workplace-bill/.

29 *Supra* note 9.

provisions under service rules of employer are not strict in nature.[30]

7. Section 14 – Punishment For False or Malicious Complaints and False Evidence

• Another unwelcome provision comes in the form of 'false and malicious complaint;'[31] which in a way renders the objective of the act null and void as this goes against the very purpose of this. legislation by penalizing women for false or malicious complaints. The criteria of falsity here is evidence of forged documents or proof of malicious intent. It has not been able to consider that there may be a case wherein the complaint is filed and later not sufficiently proved, would possibly be a frivolous complaint.[32]

• Also, it places a presumptive notion in the minds of the people that the complaint could be filed for ulterior motives also, thereby perpetuating the hatred against women and diminishing the cause of woman, rather than promoting it.[33]

8. Section 15(d) – Determination Of Compensation (Income And Financial Status Of Respondent)

The compensation to be paid shall be dependent on status (income & financial) of respondent alleged for harassment according to section 15(d) of the act, which means lower executive have to pay less in respect of senior executive. [34]

9. Section 26 – Penalties For Non-Compliance

Under section 26, no penalty is imposed on the employer for the non-compliance of section 19.[35] Although the said provision of the Act stipulates certain duties for the employer, there is no provision to ensure mandatory compliance of such duties, i.e. no penalty in case of non-compliance. No stipulation exists for compensation from the employer, which could highly contribute in the reluctance of the employer in taking the duties seriously. Thus these provisions need overhauling and modification in relation to the object and purpose of the act. [36]

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30 *Ibid.*
31 *Ibid.*
32 *Supra* note 28.
33 Section 14(1)-where the Internal Committee or the Local Committee, as the case may be, arrives at a conclusion that allegation against the respondent is malicious or the aggrieved woman or any other person making the complaint has made the complaint knowing it to be false or the aggrieved woman or any other person making the complaint has produced any forged or misleading document, it may recommend to the employer or District Officer to take action against the woman or the person who has made the complaint under sub-section (1) or sub-section (2) of Section 9, in accordance with the provisions of the service rules applicable to her or him or where no such rules exist, in such manner as may be prescribed.
34 *Supra* note 9.
35 *Supra* note 13.
36 *Supra* note 28.

Observations

After critically analysing the legislation, the report has arrived at following observations:

- The foremost point which is need to be considered is that the application of the act should be widened enough to include men within its ambit so that the sexual harassment faced by them can also be put to an end.
- Secondly, the definition part requires a review for the effective implementation of the act. As mentioned earlier that there are certain ambiguities in the term sexual harassment so that has to be taken care of.
- The provision can be made to include at least one person who has special knowledge of law in both the complaints' committees to avoid erroneous decisions due to lack of legal experience.[37]
- Moreover, as already stated that the committee should compulsorily be constituted in odd number so that a majority-based decision can be made.
- Under this Act aggrieved woman is required to file a complaint under section 9 to the complaints committee. But woman should be free to file a complaint either to the committee or before any authority at the workplace and authority should be bound to transfer the complaint to the complaints committee.[38]
- Also, the Suo motto power shall be given to ICC/LCC especially in cases of grave offences for better implementation of this act.[39]
- Section 10 pertaining to conciliation also needs reconsideration as providing a mechanism of compromise for an act of sexual violence undermines the dignity of women. Moreover this provision also undermines the fact that many women, particularly in the

37 Section 19(a)- Every employer shall provide a safe working environment at the workplace which shall include safety from the persons coming into the contact at the workplace.

38 *Supra* note 13.

39 *Supra* note 28.

40 Nareshlata Singla & Mukesh Kumar, *The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 in India: An Analysis,* 1 INTERNATIONAL JOURNAL OF INTERDISCIPLINARY AND MULTIDISCIPLINARY STUDIES (2014) (Aug. 5, 2017), http://www.ijims.com/uploads/d632fa1fcd9651ca089c4.pdf.

unorganized sector, aren't adequately aware about the remedies that are available to them and hence would be easily coerced into entering in a settlement with the perpetrator.[40]

- The punishment or compensation provisions require more emphasis rather than dependency on service rules of employer only as mentioned under section 13.[41]
- Section 14 also undermines the underlying objective of the act as it prevents women to file complaints against sexual harassment in one way or another.
- Penal provisions should be made comprehensive so as to include the penalties for the non compliance of vital provisions as well for e.g. non-compliance of section 19 does not entail any punishment.
- The high power vigilance and monitoring committee shall meet at least twice in a calendar year to review the implementation of the provisions of the Act and other matters connected therewith, prosecution of cases under the Act, role of different officers/agencies responsible for implementing the provisions of the Act.[42]
- Awareness programmes should be conducted especially in remote areas where women are unable to avail the remedies provided by the said act due to their lack of knowledge.

Conclusion

Despite of the presence of a comprehensive legislative framework which guards the women against sexual harassment, still sexual harassment is faced by them at large due to certain loopholes in the legislation which are need to be seriously addressed. Not only the women, but men also need the protection of the act which it fails to provide as it exclusively caters women. Therefore, appropriate measures to fulfil this gap must be institutionalised. There is also a need to introduce certain amendments to the provisions providing for the constitution of complaints' committees to achieve more efficiency in work and proper disposal of cases. Keeping in mind, the illiteracy rates and unawareness, campaigns and education must be provided to the general population of India. The act fails to maintain a balance between the nature of liabilities imposed on employer, for instance there is no penalisation for the non-fulfilment of duties by employer and there are some areas which are over-imposing in nature and thus increasing the burden on

41 *Supra* note 28.
42 *Supra* note 13.
43 *Supra* note 28.
44 *Supra* note 10.

employers. There are certain provisions regarding conciliation and punishment for false complaints which render the women helpless, hence it is required to revisit the act in order to remove such intricacies. Thus, I would like to conclude by saying that after considering the observations made over the course of time and with the help of continuous endeavours, this act will emerge as a more effective tool to curb this menace and improve the conditions of our society.

A PERUSAL OF RIGHT OF PRIVACY IN THE LIGHT OF K. S. PUTTASWAMY VS. UNION OF INDIA

Dr. Arvindeka Chaudhary*

Ms. Aneet Kaur**

"Privacy is an inherent human right, and a requirement to maintain the human condition with dignity and respect."

-Bruce Schneier

Introduction

In India, "government is for the people, of the people and by the people" and peopleare not for the Government. The utmost object of any law is to create an atmosphere of trust,quality and fearless co-existence among the people.[1] As Law is a living process, it changes accordingto the changes in society, science, ethics and so on.Part III of the Constitution of India, very well known as *Magna Carta of India,* provides for the Fundamental Rights. These rights represents the basic values cherished by the people of this country since Vedic times and they are calculated to protect the dignity of an individual and create conditions in which every human being can develop his personality to the fullest extent.[2] The aim behind the declaration of these rights is to make them impervious by thebudge majorities in the legislatures.[3] These rights strike balance between individual liberties and social needs.

Article 21 of the Indian Constitution provides that No person shall be deprived of his life or personal liberty except according to a procedure established by law. This right has been held to be the heart of the Constitution, the most organic and progressive provision in our living Constitution, the foundation of our laws. Article 21 secures two rights:

1. Right to life
2. Right to personal liberty

The Article prohibits the deprivation of the above rights except according to a procedure established by law. Article 21 corresponds to the *Magna Carta* of 1215, the Fifth Amendment to the American Constitution, Article 40(4) of the Constitution of Eire 1937, and Article XXXI of

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1 Anuradha Chadha, *Human Rights and Custodial Deaths,* CRIMINAL LAW JOURNAL 16 (2006).
2 Maneka Gandhi v. Union of India, AIR 1978 S.C. 597 (India).
3 A.K. Gopalan v. State of Madras, AIR 1950 S.C. 27 (India).

the Constitution of Japan, 1946.

Article 21 applies to natural persons. The right is available to every person, citizen or alien. Thus, even a foreigner can claim this right. It, however, does not entitle a foreigner the right to reside and settle in India, as mentioned in Article 19 (1)(e). 'Everyone has the right to life, liberty and the security of person.' The right to life is undoubtedly the most fundamental of all rights. All other rights add quality to the life in question and depend on the pre-existence of life itself for their operation. As human rights can only attach to living beings, one might expect the right to life itself to be in some sense primary, since none of the other rights would have any value or utility without it. There would have been no Fundamental Rights worth mentioning if Article 21 had been interpreted in its original and literal sense.

'Life' in Article 21 of the Constitution is not merely the physical act of breathing. It has a much wider meaning which includes right to live with human dignity, right to livelihood, right to health, right to pollution free air, etc. Right to life is fundamental to our very existence without which we cannot live as a human being and includes all those aspects of life, which go to make a man's life meaningful, complete, and worth living. It is the only Article in the Constitution that has received the widest possible interpretation. Under the canopy of Article 21, so many rights have found shelter, growth, and nourishment. Thus, the bare necessities, minimum and basic requirements that are essential and unavoidable for a person is the core concept of the right to life.By the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed.[4]

In ***Sunil Batra v. Delhi Administration,***[5] the Supreme Court reiterated with the approval the above observations and held that the "right to life" included the right to lead a healthy life so as to enjoy all faculties of the human body in their prime conditions. It would even include the right to protection of a person's tradition, culture, heritage and all that gives meaning to a man's life. It includes the right to live in peace, to sleep in peace and the right to repose and health.

In ***Maneka Gandhi v. Union of India,***[6] the Supreme Court gave a new dimension to Art. 21 and held that the right to live is not merely a physical right but includes within its ambit the right to

4 Kharak Singh v. State of U.P. AIR 1963 S.C. 1295 (India).
5 AIR 1978 S.C. 1675 (India).
6 AIR 1978 S.C. 597 (India).

live with human dignity.

Right To Privacy: An Extended Horizon Of Right To Life

Although not specifically referenced in the Constitution, the right to privacy is considered a 'penumbral right' under the Constitution, i.e. a right that has been declared by the Supreme Court as integral to the fundamental right to life and liberty. Right to privacy has been culled by Supreme Court from Art. 21 and several other provisions of the Constitution read with the Directive Principles of State Policy. Although no single statute confers a crosscutting 'horizontal' right to privacy; various statutes contain provisions that either implicitly or explicitly preserve this right.

For the first time in ***Kharak Singh v. State of U.P.,***[7] question whether the right to privacy could be implied from the existing fundamental rights such as Art. 19(1)(d), 19(1)(e) and 21, came before the Court. "Surveillance" under Chapter XX of the U.P. Police Regulations constituted an infringement of any of the fundamental rights guaranteed by Part III of the Constitution. Regulation 236(b), which permitted surveillance by "domiciliary visits at night", was held to be in violation of Article 21. A seven-judge bench in the said case held that:

"The meanings of the expressions "life" and "personal liberty" in Article 21 were considered by this court in Kharak Singh's case. Although the majority found that the Constitution contained no explicit guarantee of a "right to privacy", it read the right to personal liberty expansively to include a right to dignity. It held that "an unauthorized intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man -an ultimate essential of ordered liberty, if not of the very concept of civilization."

In a minority judgment, in this case, Justice Subba Rao held that:

"The right to personal liberty takes in not only a right to be free from restrictions placed on his movement, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his 'castle'; it is his rampart against encroachment on his personal liberty."

This case, especially Justice Subba Rao's observations, paved the way for later elaborations on

7 AIR 1963 S.C. 1295 (India).

the right to privacy using Article 21. In ***Govind v. State of Madhya Pradesh***,[8] the Supreme Court took a more elaborate appraisal of the right to privacy. In this case, the Court was evaluating the constitutional validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations, which provided for police surveillance of habitual offenders including domiciliary visits and picketing of the suspects. The Supreme Court desisted from striking down these invasive provisions holding that:

"It cannot be said that surveillance by domiciliary visit would always be an unreasonable restriction upon the right of privacy. It is only persons who are suspected to be habitual criminals and those who are determined to lead a criminal life that is subjected to surveillance."

The Court accepted a limited fundamental right to privacy as an emanation from Arts.19 (a), (d) and 21. Mathew J. observed in the instant case,

"The right to privacy will, therefore, necessarily, have to go through a process of case by case development. Hence, assuming that the right to personal liberty. the right to move freely throughout India and the freedom of speech create an independent fundamental right of privacy as an emanation from them that one can characterize as a fundamental right, we do not think that the right is absolute…Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right that fundamental right must be subject to restrictions on the basis of compelling public interest"

In ***R. Rajagopalan v. State of Tamil Nadu,***[9] the right to privacy of citizens was dealt with by the Supreme Court in the terms that the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a 'right to be let alone.' A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. None can publish anything concerning the above matters without his consent, whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

The rule aforesaid is subject to the exception that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the

8 AIR 1975 S.C. 1378 (India).
9 AIR 1995 S.C. 264 (India).

right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicized in press/media."

The landmark case that makes up the 'privacy quintet' in India was the case of ***PUCL v. Union of India,***[10] the Supreme Court observed that:

"We have; therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy; Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law."

K S Puttaswamy v. Union of India: A New Facet of Right To Privacy

The judgement in ***K S Puttaswamy v. Union of India***[11] has been delivered by a bench of 9 judges The Hon'ble Chief Justice Jagdish Singh Khehar, Justice R. K.Aggrawal, Justice S.Abdul Nazeer and Justice D. Y.Chandrachud. Justice J Chelameswar, Justice S A Bobde, Justice Abhay Manohar Sapre, Justice Rohinton Fali Nariman and Justice Sanjay Kishan Kaul have delivered separate judgments.

The point of law involved in this judgement was whether the right to privacy is a fundamental right or not? While deliberating on this issue the judges revisited the basic principles of the Constitution. More than just laying down a rule of law, the fact that this judgement dealt with the interpretation of the Constitution makes it one of the most historical judgements in the history of Indian legal jurisprudence.

It was only after the Bench of three judges of the Hon'ble Supreme Court of India noted that there was a dichotomy amongst various judgements of the Supreme Court on August 11, 2015, as to whether the right to privacy was a fundamental right or not that it was decided by a larger bench. Then finally on 18th July 2017, a Constitution Bench of 5 judges comprising of Chief Justice of India J.S. Khehar, Justice D.Y. Chandrachud, Justice Jasti Chelameswar, Justice S.A. Bobde and Justice S. Abdul Nazeer decided that the matter shall be taken up by a Bench of 9 Judges.

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10 AIR 2003 S.C. 2363 (India).

11 Writ Petition (Civil) No. 494 of 2012, Judgement delivered on 24th August, 2017.

There was a chain of Supreme Court decisions dealing with the status of the right to privacy. However, its position as a law remained unstable over the past 50 years leading to the quagmire situation. Commencing with ***MP Sharma v. Satish Chandra, District Magistrate, Delhi***[12] (a Bench of 8 Judges) and ***Kharak Singh v. State of Uttar Pradesh***[13] (a Bench of 6 Judges) wherein it was held that right to privacy was not a fundamental right. On the other hand in ***Rustom Cavasji Cooper v. Union of India***[14] (a Bench of 11 Judges), the law laid down in ***AK Gopalan v. State of Madras***[15] was held to be bad and it was this case only which had earlier formed the basis of the judgement in ***MP Sharma*** **and** ***Kharak Singh*** case. Also, it was in ***Maneka Gandhi v. Union of India***[16] (a Bench of 7 Judges) that the majority decision in Kharak Singh was overruled and the Minority decision of Justice Subba Rao was upheld and right to privacy was held to be an elemental principle of the Constitution. Right to privacy has also been held to be a fundamental right in ***Gobind v. State of Madhya Pradesh***,[17] ***R Rajagopal v. State of Tamil Nadu***[18] and ***People's Union for Civil Liberties v. Union of India.***[19]

The questions involved in this particular case were:[20]

1. Whether there is a constitutionally protected right to privacy?
2. If there is a constitutionally protected right, whether this has the character of an independent fundamental right or whether it arises from within the existing guarantees of protected rights such as life and personal liberty?
3. The doctrinal foundations of the claim to privacy.
4. The content of privacy, and
5. The nature of the regulatory power of the state.

States that were in favour of the fundamental right to privacy were States of Karnataka, West Bengal, Punjab, Kerala, and Pondicherry. Finally, it was reiterated and reaffirmed by the nine-judge bench that individual is the raison d'etre of the State. The Court while overruling ***M.P. Sharma***[21] explained that it dealt with an issue completely unrelated to the present case. The

12 (1954) SCR 1077 (India).
13 (1964) 1 SCR 332 (India); AIR 1963 SC 1295 (India).
14 (1970) 1 SCC 248 (India).
15 AIR 1950 SC 27 (India).
16 (1978) 1 SCC 248 (India).
17 (1975) 2 SCC 148 (India).
18 (1994) 6 SCC 632 (India).
19 (1997) 1 SCC 301 (India).
20 Justice K S Puttaswamy v. Union of India, at 9.
21 (1954) SCR 1077 (India).

issue was of the right against self-incrimination. ***Kharak Singh***,[22] was a confusing decision that held, on the one hand, that the intrusion into a person's home is a violation of liberty (relying on a US judgment on the right to privacy), but on the other hand went on to say that there was no right to privacy contained in our Constitution. Justice Chandrachud has cited a long history of political thought to point out the essential nature of the right to privacy.

He mentioned that Aristotle had distinguished the public sphere of political life (the polis) from the personal sphere *(the oikos)*.[23] Aristotle's distinction between the public and private realms can be regarded as providing a basis for restricting governmental authority to activities falling within the public realm and on the other hand, activities in the private realm are more appropriately reserved for "private reflection, familial relations, and self-determination".[24] Even John Stuart Mill in his essay, 'On Liberty' (1859) gave expression to the need to preserve a zone within which the liberty of the citizen would be free from the authority of the state.[25] He made the same distinction in more absolute terms and limited state power to the public sphere. This distinction cannot exist without the right to privacy. For example, the secret ballot is an extension of privacy principles into the public space and political system. Without it, elections would be a farce.

Key conclusions from the judgment are:-

1. The decision in ***M P Sharma*** which holds that the right to privacy is not protected by the Constitution and stands over-ruled.
2. The decision in ***Kharak Singh*** to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled.
3. The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.
4. Decisions subsequent to ***Kharak Singh*** which have enunciated the position in (3) above lay down the correct position in law.[26]

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22 *Supra* note 13.

23 Michael C. James, *A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe,* 29 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 261 (2014).

24 *Ibid.*

25 Justice K S Puttaswamy (Retd.), and Anr. v.Union of India and Ors, Writ Petition (Civil) No. 494 of 2012, Judgement delivered on 24th August, 2017, pg 27; JOHN STUART MILL, ON LIBERTY 13 (Batoche Books 1859).

26 Justice K S Puttaswamy (Retd.) and Anr. v. Union of India and Ors, Writ Petition (Civil) No. 494 of 2012, Judgement delivered on 24th August, 2017, at 3 of the Order of the Court.

The Three Aspects of Fundamental Right To Privacy

The 9 Judge bench has given a 3-tiered approach to privacy. This approach is a perfect balance between the two: the need to safeguard the privacy of the people on one hand and need to become a successful digital economy.

Intimate Zone: This is the most intimate zone of privacy, concerning marriage, sexuality and relations with family. The law should frown upon any intrusion. The State may still intrude on this zone in exceptional circumstances, subject to meeting stringent norms.

Private Zone: This involves the parting of personal data, through use of credit cards, on social networking platforms, IT declarations, etc. Here, the data can be used only for the purpose for which it had been shared.

Public Zone: This is where minimum regulation is required for privacy protection. In this zone, personal data shared does not mean that the right to privacy has been surrendered. The individual retains his privacy to body and mind.[27]

Need of Privacy in The Growing Digital World

"Privacy on the internet? That's an oxymoron."

Andy Grove has rightly said, "Privacy is one of the biggest problems in this new electronic age." The mobile revolution has transformed sections of our population into global authors, global transmitters and global broadcasters of data.[28] In that context, it becomes extremely important that the privacy of data of Indians as also their personal privacy be adequately protected. India is on the cusp of a new digital revolution.[29] The Digital India Programme has already been launched by the government with the objective of transforming India into a digital economy and knowledgeable society. Given the fact that India does not have a dedicated law on protection of digital privacy, privacy is even more important.

There are two interrelated trends that make technology manipulative. The first is the objective of personalisation. Nowadays with the help of data analyst and computer software, the behavioural trends can be collected and studied. For example, Google can determine which news a person is

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27 *Id.*, at 4.

28 Asheeta Regidi, *SC outlines three-tiered approach to privacy, keeping in mind use of personal data in economy,* FIRST POST (Oct. 12, 2017, 10:33 PM), http://www.firstpost.com/india/sc-outlines-three-tiered-approach-to-privacy-keeping-in-mind-use-of-personal-data-in-economy-3888797.html.

29 Pavan Duggal, *Right to Privacy: Supreme Court judgment mirrors people's aspirations,* HINDUSTAN TIMES (Oct. 9, 2017, 1:21 AM), http://www.hindustantimes.com/analysis/right-to-privacy-supreme-court-judgment-mirrors-people-s-aspirations/story-ThUAv5bwGmXGduXRrHfvZK.html.

more likely to read, Amazon can direct a person to goods and services he might already want.[30] People bargain to trade personal information in real time for tailored news, music, books, restaurant recommendations and a host of other services. Second, business models are shifting from monetising data to structuring behaviour to intervene and modify it for profit.

In the present era, when we allow algorithms to tailor our lives, specific to our needs and biases, we lose out on what traditional public forums offered – a mix of randomness and unpredictability, which stimulates independent thought and allows individuals to mature socially and politically, for example, Donald Trump's 2016 campaign employed Cambridge Analytica, a firm that 'uses data to change audience behaviour.' This power allowed Trump to tailor political messages to individuals, feeding into their cognitive biases about specific issues and limiting how they were informed.[31]

K S Puttaswamy v. Union of India: A Critical Appraisal

Although the right to privacy has been upheld as a fundamental right, it is not free from lacunas. Some of the observations are mentioned hereunder:

1. Privacy is a subjective concept and is too wide. Privacy is only a sociological notion.Defining the contours of privacy is not possible.
2. People 'consent' to trade and share their personal and private information on social networking sites and various other places and considering the omnipresent influence of technology, the principles of consent, purpose and notice needs to be reframed in order to limit the ability of government and enterprises to influence our preferences, choice and behaviour.
3. Sharing of information is indigenous to the Indian culture since Indian society has its roots in the joint family system. In no time India will emerge as a digital economy and most of the information will be available in the public domain but our country does not have a dedicated law on privacy. Moreover, The Indian Information Technology Act, 2000, is not sufficient enough to safeguard privacy in the digital and mobile ecosystem.
4. Privacy has been given protection under the Contract Act, 1872, defamation under Torts and Indian Penal Code, 1860, but these laws are not sufficient to

30 *Ibid.*

31 Akhil Deo, *How the Right to Privacy Judgement Will and Won't Impact India's Data Protection Regime,* THE WIRE (Oct 9, 2017, 11:17 PM), https://thewire.in/170689/right-to-privacy-data-protection/.

deal with the new challenges and issues that would come up before the Court to upheld privacy.

5. Now since the right to privacy has been held to be a fundamental right, there will be an increase in the litigation under Article 32 and 226 of the Constitution to preserve the newly added right.

6. Any enactment which infringes the right to privacy of the citizens or put unreasonable restrictions on the enjoyment of this right would be struck down by the Courts and therefore every Act must pass through the scrutiny of Right to privacy under Article 21 along with the reasonable tests of other fundamental rights.

7. The judgement is such an exemplary job of righting the mistakes of the past. But now, things have become no less easy because the right to privacy will have to be judged on a case-to-case basis. There is no hard and fast rule to determine what privacy is. So if the judgement could have only shifted perspective while legislating for the future, we'd have got a judgement that was truly perfect by every measure.

8. The tests and the constraints that will be imposed in the future to protect privacy could have a chilling effect on our ability to get the most out of modern technology.

9. Most of the new technologies rely on big data and machine learning which in turn depend on access to large datasets in order to do their magic. Requiring data controllers to restrict themselves by proportionality and purpose could have a chilling effect on these new business models.[32]

10. In the virtual world, there are chances of 'AGE PLAY' as well. 'Age Play' is a situation when a person (who can be an adult or a child) impersonates as a child in the form of an 'avatar' in the digital world. In the digital world, the 'avatars' can indulge in any activity involving a sexual act as well. So a person viewing this sexual act between two avatars on the digital world commits an offence of 'child pornography' because this act is technically between a child and an adult. In this situation, the right of privacy of the person impersonating as an

32 *Ibid.*

33 Rahul Matthan, *The good and the bad of the privacy ruling,* LIVE MINT (Oct. 7, 2017, 6:08 PM),

avatar is infringed by the person viewing it.

Conclusion

Now that right to privacy has been given the status of a fundamental right and according to Article 21, the right can be curtailed only according to procedure established by the law.The judgement has its effect on almost all spheres of life commencing from the extent of privacy, its reasonable restrictions, regulations, the effect on the beef ban, Right to Information Act, 2005, LGBT community, the fate of Aadhaar.

Rules and Regulations have to be drafted to deal with the personal information of people already collected and to be collected in the future and the requirement of seeking the consent of the people before making use of the personal information collected for any purpose. As a consequence of this judgement, Section 377 of the Indian Penal Code will have to be considered again because the right to privacy also includes right to choose sexual orientation. After all Right to Privacy is nothing but the state of being free from intrusion or disturbance in one's private life or affairs.[33] A new enactment to deal with the extent of privacy, the monitoring, regulation, curtailment and usage of the private information on the basis of the Justice A.P. Shah Committee report is need of the hour.

"Civilization is the progress toward a society of privacy. The savage's whole existence is public, ruled by the laws of his tribe. Civilization is the process of setting man free from men."

-Ayn Rand[34]

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http://www.livemint.com/Opinion/CTEJVl3bEVNe1JKPOHxQeM/The-good-and-the-bad-of-the-privacyruling. html.

34 Distt. Registrar and Collector v. Canara Bank, 2005 (1) SCC 496 (India).

35 Ayn Rand, *Ayn Rand Quotes,* BRAINY QUOTE (Oct. 10, 2017), https://www.brainyquote.com/quotes/ayn_rand_147957.

EVE-TEASING VIS-A-VIS SEXUAL HARASSMENT: CHANGING DIMENSIONS AND LEGAL CONTOURS

Dr. Babita Devi*

Mr. Deepak Thakur**

"There will never be a generation of great men, until there has been a generation of free women."

-Robert Green Ingersoll[1]

Introduction

All individual are entitled to certain basic rights under any circumstances. These include social, economic, political and civil rights. But the most fundamental right is the right to life and physical safety which is generally violated. Crime against women in general is on the increase. Recently, the gang rape of the girl 'Nirbhaya (media name)' which caused serious injuries resulted into death of that girl led to mass street protests and tightening of Indian laws.[2] It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for their honor. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes.

We know Indian society is male dominated society. We have plethora of laws for the protection of women's rights but the most basic structure of society is showing no signs of improvement. Eve teasing is such a big problem which creates obstacle for the women empowerment and we know women constitute half of the population and if half of the population is not empowered there cannot be development of the country. Eve teasing is a most obnoxious and gravest form of human rights violation. Generally offence of eve-teasing is treated as low priority crime though it is a very serious issue causing immense mental torture and humiliation to women and girls when they are insulted and sexually harassed especially on roads and public transport.[3] Eve teasing is a violation of human rights and dignity. All efforts must be made to eliminate it. Such act of eve-teasing, apart from dehumanizing act, is an unlawful intrusion on the right of privacy

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1 Robert Green Ingersoll, *Robert Green Ingersoll Quotes,* QUOTE HD (July 27, 2017, 8:00 PM), http://www.quotehd.com/Quotes/robert-green-ingersoll-quote-there-will-never-be-a-generation-of-great.

2 Indrani Basu, *848 Women are Harassed, Killed, Raped Every Day,* HUFFPOST (July 28, 2017, 10:05 AM), http://www.huffingtonpost.in/2014/12/16/crime-against-women-india_n_6330736.html.

3 *Provisions on Eve Teasing,* EGALPOINT (Aug. 10, 2017, 12:30 PM), http://www.egalpoint-india.blogspot.in/2010/08/legal-provisions-on-eve-teasing.html.

and sanctity of a female. It is a serious blow to her supreme honor and offends her self-esteem and dignity.

Forms of Eve Teasing

Eve-teasing is probably the most common act of public violence against women which includes various forms of harassments like making vulgar comments, indecent proposals, unwelcome gestures with hands, legs, fingers or other organs, attempting to make physical contact etc. Any kind of verbal or non-verbal behavior, physical conduct or display of objects or pictures and comments about a woman's looks or body can also be considered as eve teasing.[4] The Indian Journal of Criminology and Criminalistics (January-June 1995 Edition) has categorized eve teasing into five heads viz.

1. Verbal Eve Teasing;
2. Physical Eve Teasing;
3. Psychological Harassment;
4. Sexual Harassment; and
5. Harassment through some objects.[5]

The term sexual harassment came to be used in the public media only from the year 1975 onwards. Till then no term existed to describe what is now universally called sexual harassment, though the phenomenon itself was well known to women. Other terms used to describe this malady are 'unwanted intimacy' in the Netherlands, 'sexual molestation' in Italy, 'sexual blackmail' in France and 'sexual solicitation' in Canada.[6] Thus, the old connotation of eve-teasing has been substantially substituted with the new one i.e. sexual harassment, and it is this terminology which has become the center point of concern or discussion among various national and international bodies.

Sexual harassment may be best conceptualized as one manifestation of the way in which sexual violence against women is committed in society. In the rape – prone culture, women are socialized to expect violence in their everyday lives, and such violence is treated as normal.

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4 Moly Kuruvilla & Fathimath Suhara, *Response Patterns of Girl Students to Eve-teasing: An Empirical Study in a University Setting,* 3(3) INTERNATIONAL JOURNAL OF EDUCATION AND PSYCHOLOGICAL RESEARCH 60-64 (2014).

5 *Supreme Court on Eve Teasing of Women,* HUEIYEN LANPAO (Sept. 27, 2017, 1:25 PM), http://www.hueiyenlanpao.com/articles/item/6559-%E2%80%98supreme-court-on-eve-teasing-of-woman%E2 %80%99-and-%E2%80%98its-guidelines%E2%80%99.

6 ALOK BHASIN, LAW RELATING TO SEXUAL HARASSMENT AT WORK 3 (Eastern Book Company, Lucknow, 1st ed., 2002).

Sexual violence is the most graphic and visceral tool of women's subordination and sexual harassment is a tool of oppression. Even those women who do not experience any direct form of sexual violence, experience fear which invade nearly all aspects of their public and private lives.[7]

Reasons For Increase in Cases of Sexual Harassment

Sexual harassment in public places has been a perennial problem. Most of the sexual harassment occurs near schools and colleges. Boys generally follow girls from their houses when they leave for school or college. They pass lewd comments, force and threat to make a relationship with them. Working women and college going girls are always in danger of being eve teased. Many cases of sexual abuse through Internet have also been reported. Through social networking sites like Facebook and Twitter, young boys and girls, especially teenagers, start chatting and sharing sensitive information and thus come close to each other. Sometimes, the boys exploit the girls by morphing their photographs by using modern technology, which can be easily downloaded from these social networking sites. The boys then blackmail the girls and go to the extent of seeking sexual favours from them. Sometimes the boys encourage the girls to watch some restricted sites as a result they fall into the victim of the sexual extreme world. It is the most dangerous form of violence through technology.[8] Sexual harassment is major problem in school, colleges, universities and institutions, and its percentage is increasing day by day.[9]

Sexual harassment must be understood to exist on the continuum of sexual violence against women. Sexual harassment is a personal attack on women's minds and bodies, instilling fear and violating a woman's right to bodily integrity, education and freedom of movement.[10] The basic reason for violence against women is their inferior status in a male dominated society as educationally, economically, politically and socially. Lack of evidence and lack of guidance, loop holes in existing laws,[11] inequality and continuation of culture of silence, discrimination, lack of self confidence, absence of family education, alcoholism and drug addiction, obscene

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7 Suman Gupta, *Sexual Harassment in Employment and Education: Causes, Consequences and Prevention,* 26 DELHI LAW REVIEW 68-69 (2004).

8 Zobaida Akhter, *Eve Teasing, Tears of the Girls: Bangladesh Open University Towards Women Empowerment,* 2 INTERNATIONAL WOMEN ONLINE JOURNAL OF DISTANCE EDUCATION 5-6 (2013).

9 Sheethal Menon, *Protection of Women From Sexual Harassment at Workplace,* LEGAL SERVICES INDIA (Aug. 2, 2017, 11:15 AM), http://www.legalservicesindia.com/article/article/sexual-harassment-of-women-at-workplace-2114-1.html.

10 VANDANA, SEXUAL VIOLENCE AGAINST WOMEN: PENAL LAW AND HUMAN RIGHTS PERSPECTIVES 29 (Lexis Nexis, Nagpur, 2009).

11 *Violence Against Women,* GOVERNMENT OF ODISHA (Aug. 2, 2017, 11:15 AM), http://www.odisha.gov.in/portal/LIWPL/event_archive/Events_Archives/123violence_against_women.pdf.

cinema, drama and song,[12] man's resentment and exercising control over woman for viewing her as economic competitor, women not aware about their rights etc. are some of the reasons for the rise in crime of eve teasing against women

Sexual harassment frequently occurs in all walks of life – on the street, on public transportation, in educational institutions and at the workplace.[13]Touching, harassment and forced intercourse are all seen as normal to masculinity.[14] Men often see behavior that women characterize as harassment, as 'just good fun' and even 'complimentary'. Women perceive sexual harassment as violence perpetrated against them whereas for men, it may be a piece of good fun which is in contrast to the perceptions and experiences of women.[15] There are, apparently, two reasons why young women do not recognize sexual harassment: one is that they have never been in sexually abusive situations and therefore really do not have the emotional background to recognize what's happening and the other is that they simply do not want to know because that would mean that they would have to deal with the reality of being abused or harassed.[16]

Sexual Harassment Under International Perspectives

To recognize sexual harassment as a form of discrimination and violence against women many international bodies have formulated stringent laws. But the effort yet lacks uniformity.[17] Universal Declaration of Human Rights, 1948 declares that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[18] Discrimination (Employment and Occupation) Convention, 1958 predates widespread awareness of the issue of sexual harassment.[19] The Ontario Human Rights Code, 1962 prohibits all forms of discrimination based

12 Rajib Bhattacharyya, *Eve Teasing: A Societal Epidemic in India,* 1 INTERNATIONAL JOURNAL OF RESEARCH (2014).

13 Supra note 10.

14 Justice J.S. Verma, et. al., *Report of the Committee on Amendments to Criminal Law,* 2013, PRS INDIA (Sept. 11, 2017, 10:00 AM), http://www.prsindia.org/uploads/media/Justice%20 verma%20committee/js %20verma%20committe%20report.pdf.

15 *Supra* note 10, at 241

16 NANDITA SAIKIA, INDIAN WOMEN: A SOCIO-LEGAL PERSPECTIVE 76 (Serials Publication, 1st ed., New Delhi, 2008).

17 Ankita Chakrabarty & Rashi Aditi Ghosh, *Sexual Harassment at Workplace: Violence in Disguise,* ZEE NEWS (Sept. 12, 2017, 10:18 AM), http://www.zeenews.india.com/exclusive/sexual-harassment-at-workplace-violence-in-disguise_6355.html.

18 Article 5, *The Universal Declaration of Human Rights,* UNITED NATIONS (Sept. 11, 2017, 10:30 AM), http://www.un.org/en/universal-declaration-human-rights/. See also, General Assembly resolution 217A (III), UN Doc. A/810.

19 Deirdre McCann, *Sexual Harassment at Work: National and International Responses,* 13 CONDITIONS OF

on sex, and includes provisions that focus on sexual harassment.[20] Sexual harassment at workplace was recognised as violation of human rights by the CEDAW, 1979. This was the time when awareness of sexual harassment was only beginning to emerge. The Committee on the Elimination of Discrimination against Women, set up under the CEDAW, explicitly addressed the problem. It's General Recommendation Number 19 of 1992 recognized sexual harassment as a form of violence against women. It defined sexual harassment as unwanted sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. The Committee recommended that the States Parties needed to include in their reports information on sexual harassment, and measures taken to protect women from sexual harassment.[21] According to the Third World Conference on Women, 1985 appropriate measures should be taken to prevent sexual harassment in job or sexual exploitation in specific jobs, such as domestic service[22] and particular attention be given to it.[23]

The UN Declaration on the Elimination of Violence against Women, 1993 recognizes sexual harassment and intimidation of women at work, in educational institutions and elsewhere, trafficking in women and forced prostitution as a form of violence against women.[24] The Vienna Declaration, 1993 specially condemned gender based violence and all forms of sexual harassment and exploitation.[25] It further lays that gender-based violence and all forms of sexual harassment and exploitation are incompatible with the dignity and worth of the human person, and must be eliminated.[26] The Cairo Conference, 1994 stated that all countries should make greater efforts to promulgate implementation and enforce national laws and international conventions to which they are party, such as CEDAW, that protect women from all types of economic discrimination and from sexual harassment, and to implement fully the Declaration

WORK AND EMPLOYMENT (Series No. 2).

20 *Preventing Sexual and Gender Based Harassment,* ONTARIO HUMAN RIGHTS COMMISSION (Sept. 11, 2017, 9:50 AM), http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment/9-human-rights-protection-against-sexual-harassment#sthash.eSRh4nKE.dpuf.

21 Anagha Sarpotdar, *Sexual Harassment of Women at Workplace in India: Journey From a Workplace Problem to a Human Rights Issue,* 3(7) JOURNAL OF BUSINESS MANAGEMENT & SOCIAL SCIENCES RESEARCH 20-21 (2014).

22 Para 139, Third World Conference on Women, 1985.

23 *Id.,* Para 287.

24 Article 2(b), *The UN Declaration on the Elimination of Violence against Women,* 1993, UN GENERAL ASSEMBLY (Sept. 12, 2017, 11:00 AM), http://www.un.org/documents/ga/res/48/a48r104.htm.

25 K. Vijaya Lakshmi, *Women's Rights are Human Rights,* 96 AIR JOURNAL 23 (2009).

26 Article 18, *Vienna Declaration and Programme of Action, 1993,* UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Sept. 12, 2017, 11:30 AM), https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx.

on the Elimination of Violence against Women.[27] The 1995 United Nations' Women's Conference at Beijing drew up a Platform of Action of objectives and actions to advance women's rights, including outlawing sexual harassment at work.[28] The Beijing Declaration and the Beijing Platform for Action has made clear provisions about sexual harassment and intimidation in its definition of violence against women. It further states that sexual harassment is an affront to a worker's dignity and it prevents women from making their contribution commensurate with their ability.[29]

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 also known as the Maputo Protocol, holds to protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices.[30] South African Development Community Protocol on Gender and Development, 2008 defines 'sexual harassment' as any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another[31] and appeals for enacting legislative provisions and adopting and implementing policies, strategies and programs which define and prohibit sexual harassment in all spheres, and provide deterrent sanctions for perpetrator of sexual harassment.[32] Article 40 of the Istanbul Convention, 2011 which deals with sexual harassment provides that State Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is a subject to criminal or other legal sanction.

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27 Para 4.5, *International Conference on Population and Development (Cairo Conference),* 1994, UNITED NATIONS POPULATION FUND (Sept. 12, 2017, 11:45 AM), https://www.unfpa.org/icpd.

28 Charanjiv Singh, *Law to Prevent Sexual Harassment at Workplace in India: An Analysis,* 7 PUNJABI UNIVERSITY LAW JOURNAL 33 (2013).

29 Faisal Ali Khan, *The Law Relating to Protection of Women from Sexual Harassment at Workplace,* 43(2) INDIAN BAR REVIEW 184 (2016).

30 Article 12(1)(c), *Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa,* 2003, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (Sept. 14, 2017, 8:00 PM), http://www.achpr.org/instruments/women-protocol/.

31 Article 1(2), *South African Development Community Protocol on Gender and Development,* 2008, SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (Sept. 14, 2017, 8:30 PM), https://www.sadc.int/documents-publications/show/Protocol_on_Gender_and_Development_2008.pdf.

32 *Id.*, Article 22.

Sexual harassment remains a significant problem in many countries, especially for migrant women working as domestic workers.[33] Sexual harassment laws are greatly influenced by UN Covenants, Human Rights Recommendations, and ILO Conventions, etc. However, different practices have grown in different countries.[34] Currently, there are some 36 countries with legislation specifically targeted against sexual harassment.[35]

Sexual Harassment Under National Perspectives

The term "sexual harassment" is of relatively recent origin, though the behaviors it describes are, of course, centuries old; the term itself is said to have emerged in the mid-1970s in North America, and was subsequently adopted in the UK in the early 1980s.[36] Sexual harassment is an issue that largely remained in closet in India till about the eighties. The SAHELI report (1998) said sexual harassment was often trivialized as eve teasing and hardly recognized as an issue in the Indian society. There was a general tendency to belittle it or ignore it.[37]

The recognition of the right to protection against sexual harassment is an intrinsic component of the protection of women's human rights. It is also a step towards providing women independence, equality of opportunity and the right to work with dignity. The Constitution of India not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favor of women for neutralizing the cumulative socio, economic, educational and political disadvantages faced by them.[38]

Sexual harassment results in violation of the fundamental rights of a woman guaranteed under the Constitution of India. These rights include the right to equality,[39] right to life and to live with dignity,[40] and right to practice any profession or carry on an occupation/trade/ business,[41] a right

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33 Para 209, *Beijing Plus 15: A Fifteen-Year Review of The Implementation of The Beijing Declaration And Platform For Action,* 2010, UN WOMEN (Sept. 14, 2017, 8:45 PM), http://www.un.org/womenwatch/daw/beijing15/.

34 B.D. Singh, *Issue of Sexual Harassment – A Legal Perspective,* 36(1) INDIAN JOURNAL OF INDUSTRIAL RELATIONS 83 (2000).

35 Bharat Bhushan Das & Sunanda Padhy, *Sexual Harassment of Women at the Workplace: A Socio-Legal Study,* 64 THE INDIAN JOURNAL OF SOCIAL WORK 510 (2003).

36 Manoj Kumar Sinha, *Sexual Harassment: A Wrong Beyond Discrimination,* 41 JOURNAL OF THE INDIAN LAW INSTITUTE 478-488 (1999).

37 *Supra* note 21.

38 Aadil Bashir & Shabana Khurshid, *Eve Teasing and Molestation – A Case Study of District Srinagar,* 2 INTERNATIONAL JOURNAL OF SCIENCE AND RESEARCH 197 (2013).

39 INDIA CONST. art. 14. Article 14 deals with the right to equality and confers on men and women equal rights and opportunities in political, economic and social sphere.

40 *Id.*, art. 21. Article 21 deals with the right to life and provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law.

41 *Id.,* art. 19(1)(g). Article 19(1)(g) provides to all citizens the right to practice any profession or to carry on any occupation, trade or business.

42 Ten Things You Need to Know About The Sexual Harassment at Workplace Law, CHD IHOLLABACK (Sept.

to safe environment free from sexual harassment.[42] Article 15 prohibits discrimination against any citizen on grounds of religion, race, caste, sex etc. Article 16 provides for equality of opportunities in matters relating to employment or appointment to any office under the State. Article 42 directs the State to make provision for ensuring just and humane conditions of work and maternity relief.

Eve-teasing is an attitude, a mindset, a set of behavior that is construed as an insult or act of humiliation of the female sex. Though the Indian Penal Code does not define the word eve-teasing, there are two sections which deal with crime of eve-teasing. These are sections 509 and 354 of Indian Penal Code. Women experiencing sexual harassment at the workplace had to lodge a complaint under section 354 of the Indian Penal Code that deals with the 'criminal assault of women to outrage women's modesty and section 509 that punishes an individual for using a 'word', gesture or act intended to insult the modesty of a woman.' These sections left the interpretation of outraging women's modesty to the discretion of the police officer.[43] According to National Crime Records Bureau, incidents reported in India under section 354 IPC i.e., assault on women with intent to outrage her modesty were 40613 in 2010, 42968 in 2011, 45351 in 2012, 70739 in 2013 (increased by 56%), 82235 in 2014 and 82422 in 2015. Also, incidents in India under section 509 IPC i.e. insult to the modesty of women were 9961 in 2010, 8570 in 2011, 9173 in 2012, 12589 in 2013 (increased by 37%), 9735 in 2014 and 8685 in 2015. Thus there was a steep rise in incidents of crime against women in the form of sexual harassment from 2012 to 2013.

In ***Bankey v. State of U.P.,***[44] it was observed that section 509 IPC applies to cases which are an insult to the modesty of a woman while in section 354 IPC the modesty is intended to be outraged. The Court held that these sections seem to overlap each other to some extend but they are different as assault is an essential ingredient of section 354 IPC. It has been held that there is no abstract conception of modesty that can apply to all cases[45] as what would constitute an act of outraging modesty would depend upon facts and circumstances of every case.[46]

14, 2017, 14:37 PM), http://chd.ihollaback.org/2013/04/ten-things-you-need-to-know-about-the-sexual-harassment-at-workplace-law/.

43 REENA CHAUDHARY, SEXUAL HARASSMENT: THREAT TO WORKING WOMEN 88-89 (Deep and Deep Publications Pvt. Ltd, New Delhi, 2011).

44 AIR 1961 All. 131 (India).

45 S.P.S. Rathore v. CBI, 2017 Cri.L.J. 537 SC (India).

46 Arvind Kumar v. State of Chhattisgarh, 2015 Cri.L.J. 3268 (India).

47 (1995) 6 SCC 194 (India).

In ***Rupan Deol Bajaj v. K.P.S. Gill,***[47] the Court has explained the meaning of 'modesty' in relation to women. According to Shorter Oxford English Dictionary (Third Edition) modesty is the quality of being modest and in relation to woman means "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct." The word 'modest' in relation to woman is defined in the above dictionary as "decorous in manner and conduct; not forward or lewd; shamefast." Webster's Third New International Dictionary of the English language defines modesty as "freedom from coarseness, indelicacy or indecency; a regard for propriety in dress, speech or conduct." In the Oxford English Dictionary (1933 Edition) the meaning of the word 'modesty' is given as "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions." ***In Tarkeshwar Sahu v. State of Bihar,***[48] it was observed that modesty is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. Under section 354 IPC only women possess modesty that may be outraged, thus men are inviolate and not the repository of socially recognized attributes that shames them or society.[49] In ***Girdhar Gopal v. State,***[50] case it was held that under section 354 IPC only women possess modesty that may be outraged. Thus, men are inviolate and not the repository of socially recognized attributes that shames them or society. It is interesting, however, that the judgment holds that both men and women are capable of outraging women's modesty.

The burden is on the prosecution to prove that the accused had uttered the words or made the sound or gesture and that such word, sound or gesture was intended by the accused to be heard or seen by some woman. Normally, it is difficult to establish this and, seldom, woman files complaints and often the wrong doers are left unpunished even if complaint is filed since there is no effective mechanism to monitor and follow up such acts.[51] Offences under Section 354 and 509, Indian Penal Code, are compoundable in nature, which can be compounded with the permission of the court. The court permission is mainly a formality, which is usually guaranteed on the joint request of the complainant and the accused. A woman who is economically worse

48 (2006) 8 SCC 560 (India), Aman Kumar v. State of Haryana, (2004) 4 SCC 379 (India).
49 Girdhar Gopal v. State, (1953) Cri.L.J. 964 (India).
50 (1953) Cri.L.J. 964 (India).
51 Mukesh Yadav, Supreme Court on Eve-Teasing: Human Rights of Women in India, 35 JOURNAL OF INDIAN ACADEMY OF FORENSIC MEDICINE 99 (2013).
52 *Supra* note 35, at 517

off may choose not to press criminal charges.[52] However, the recent amendment of 2013 to the Indian Evidence Act, 1872,[53] indicates that the female's statement alone is considered as proof in rape and eve teasing cases, the defendant have to prove his innocence and the girl's statement alone is sufficient. The males have to provide evidence for whatever the girls allege has happened, but which they deny, and not the other way around. Thus, in ***Mustaques Sheikh v. State of Jharkhand,***[54] the Jharkhand High Court held that in case of an assault on woman with intent to outrage her modesty, the version of the victim carries considerable force.

In ***Harinder Pal Singh Ishar v. State of Punjab and Others,***[55] a civil writ petition was filed in public interest seeking the issuance of a writ in the nature of mandamus for directing the States of Punjab, Haryana and Union Territory, Chandigarh to take positive steps to ensure the safety of women, particularly, working women and female students so as to put an end to the menace of eve-teasing. In ***Deputy Inspector General of Police and Another v. S. Samuthiram,***[56] the Supreme Court directed the Central Government to legislate effective legislation to prevent eve-teasing and gave following directions:

1. All the State Governments and Union Territories are directed to depute plain clothed female police officers in the precincts of bus-stands and stops, railway stations, metro stations, cinema theatres, shopping malls, parks, beaches, public service vehicles, places of worship etc. so as to monitor and supervise incidents of eve-teasing.
2. There will be a further direction to the State Government and Union Territories to install CCTV in strategic positions which itself would be a deterrent and if detected, the offender could be caught.
3. Persons in-charge of the educational institutions, places of worship, cinema theatres, railway stations, bus-stands have to take steps as they deem fit to prevent eve-teasing, within their precincts and, on a complaint being made,

53 The Indian Evidence Act, 1872, No. 1, Imperial Legislative Council, 1872 (British India). Section 114-A of Indian Evidence Act as substituted by the Criminal Law (Amendment) Act, 2013 reads: " Presumption as to absence of consent in certain prosecutions for rape.-In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent."

54 2017 Cri.L.J. 3006 (India).

55 2004 Cri.L.J. 2648 (India).

56 2012 (11) SCALE 420 (India).

57 Vijay Nagpal, *Sexual Harassment of Women at Workplace: Legal Contours,* 45 PANJAB UNIVERSITY LAW

they must pass on the information to the nearest police station or the Women's Help Centre.

4. Where any incident of eve-teasing is committed in a public service vehicle either by the passengers or the persons in charge of the vehicle, the crew of such vehicle shall, on a complaint made by the aggrieved person, take such vehicle to the nearest police station and give information to the police. Failure to do so should lead to cancellation of the permit to ply.
5. State Governments and Union Territories are directed to establish Women' Helpline in various cities and towns, so as to curb eve-teasing within three months.
6. Suitable boards cautioning such act of eve-teasing be exhibited in all public places including precincts of educational institutions, bus stands, railway stations, cinema theatres, parties, beaches, public service vehicles, places of worship etc.
7. Responsibility is also on the passers-by and on noticing such incident, they should also report the same to the nearest police station or to Women Helpline to save the victims from such crimes.
8. The State Governments and Union Territories of India would take adequate and effective measures by issuing suitable instructions to the concerned authorities including the District Collectors and the District Superintendent of Police so as to take effective and proper measures to curb such incidents of eve-teasing and recommended insertion of provisions in the IPC to criminalize the act of eve-teasing.

Traditionalists in the society are of the view that provisions of Indian Penal Code enshrined in Section 354 and 509 are enough to take care of all kinds of eve teasing including sexual harassment. They are of the view that too much of criminalization of the society is not proper. We have thousands of laws, which are confined only in the books.[57] Also, as per Justice J.S. Verma Committee Report, 2013, strict observance and faithful implementation of the constitutional mandate and the existing laws by a competent machinery is sufficient to prevent,

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REVIEW 108 (2004).

58 *Supra* note 14.

and if need be, to punish any sexual harassment or assault; and the improvement needed in the laws, if any, is marginal.[58] However, according to a different school of thought, sexual harassment is not always the direct result of criminal intention of the person. It has social, cultural, environmental and psychosomatic dimensions too.[59]

Thus, by the Criminal Law (Amendment) Act, 2013 amendment has been made in section 354 IPC and new sections 354-A to 354-D have been inserted in order to curb increasing crime of eve teasing making sexual harassment a specific penal offence under section 354-A IPC, having three key elements:

1. The offence must be committed by a man against a woman; and
2. The behaviour must be unwelcome to the woman concerned; and
3. There must be a sexual content to the behavior.[60]

In ***Pappu alias Ramnath alias Swarup v. State of Chhattisgarh,***[61] it was observed that for attracting section 354-A, IPC the use of either assault or criminal force is not a necessary element which is so in case of section 354, IPC. Thus, in ***Jishu Sengupta and Others v. State of West Bengal and Another,***[62] the Calcutta High Court, IPC, observed that petitioners' clarification during conversation in the television program that they have been speaking in metaphor about their love to the complainant, is clearly an innuendo referring to the sexual relationship with the complainant which has the sexual flavour to bring the same within the ambit of "sexually coloured remarks" to make them liable only under section 354-A IPC and not under section 354 IPC.

Sexual Harassment at the Workplace (SHW) has remained one of the central concerns of the women's movement in India since the early 80's.[63] National Commission for Women conducted a survey which revealed that the Supreme Court's much lauded directories in the year 1997,[63] which aims at restoring respectability to women at their working places seems to have little affect on the sensibility of male dominated establishments.[64] According to the Code of Conduct

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59 *Supra* note 57.
60 *Supra* note 28, at 43.
61 2015 Cri.L.J. 351 (India).
62 2017 Cri.L.J. 1531 (India).
63 Vibhuti Patel, *A Brief History of The Battle Against Sexual Harassment at The Workplace,* INFO CHANGE ANALYSIS (Sept. 17, 2017, 7:00 PM), http://www.hrln.org/admin/Newsroom/subpdf/article%20sex-harass3.pdf.
64 Vishaka v. State of Rajasthan, AIR 1997 SC 3011 (India).
65 MUZAFER ASSADI, HUMAN RIGHTS AND SOCIAL JUSTICE 159-160 (Serials Publications, New Delhi,

at Workplace issued by the National Commission for Women,[65] eve-teasing includes any person willfully and indecently exposing his person in such a manner as to be seen by other employees or use indecent language or behave indecently or in a disorderly manner in the workplace. It will also include any word, gesture or act intended to insult the modesty of a woman by making any sound or gesture of exhibit any object intending that such word or sound shall be heard or that such gesture or object shall be seen by such women or intrudes upon the privacy of a woman employee.

As the cases of sexual harassment of women at workplaces are reportedly increasing day by day, to address the problem the Parliament has enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 in April, 2013, which has came into effect from December 9, 2013.[66] The Sexual Harassment of Woman at the Workplace (Prevention, Prohibition and Redressal) Act, 2013 has been enacted with the objective to provide protection against sexual harassment of women at the workplace, for the prevention and redressal of complaints of sexual harassment and for the matters connected therewith or incidental thereto. The Act was formed on the basis of the guidelines laid down by the Supreme Court in its landmark judgment, ***Vishaka v. State of Rajasthan,***[67] where sexual harassment was first defined. The Act built on these guidelines is much wider in scope which attempts to define very clearly the role, duties and responsibilities of employers in preventing and dealing with the sexual harassment of women at workplace.[68] However, this law provides a civil remedy. If the harassment is of criminal nature, the complaint is to be filed with the Police under Section 354/509 of Indian Penal Code, 1860.[69]

Thus, sexual harassment at workplace is a criminal offence as per the changes made in the Indian Penal Code, 1860 by adding a new section i.e. section 354-A in the Indian Penal Code through the Criminal Law (Amendment) Act, 2013. So a victim can raise a Criminal complaint case as

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1st ed., 2011).

66 *Code of Conduct For Work Place,* CENTRAL COAL FIELDS (Sept. 17, 2017, 7:15 PM), http://www.centralcoalfields.in/czone/pdf/Vishaka_&_Ors_vs_State_Of_Rajasthan_&_Ors_on_13_August_10_12_2013.pdf.

67 Ratna Kumari, *Sexual Harassment of Women at Workplace – Human Rights Perspective,* 189 ANDHRA LAW TIMES 9 (2014).

68 AIR 1997 SC 3011 (India).

69 *Supra* note 27, at 44-45.

70 Vijay Bhatt, *Analysis of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal)*

well as a case with the Internal Complaints Committee and both can run parallel.[70] The provisions of the Act, 2013 shall be regarded as additional statutory measures but these provisions shall not be contrary to the existing provisions of any other law for the time being in force.[71] It means that the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 provides additional means to obtain relief by an aggrieved woman if the relief/compensation is not prohibited under any other Act.[72]

Conclusion

Sexual harassment is real and constant whether a woman lives in rural or urban area, whether she lives at home or works in an office. Eve-teasing cases are either treated as molestation or outraging the modesty of a woman. Some having the myth that dressing style provokes sexual harassment, if this happens then there would not have been any rapes in Islamic Countries. Generally most of women don't prefer to register complaint because of fear of further attack. Parents and brothers advise their daughters and sisters to adjust suffer in silence and ignore atrocities meted against them out of fear of social stigma. There is no special provision in the Indian Penal Code to book an accused for eve-teasing. With the change of time the connotation of sexual harassment has over-showed the wrong of eve-teasing and sexual harassment has also been made a specific offence under civil and criminal laws unlike eve-teasing, but question generally arises that whether law alone be able to stop eve teasing or sexual harassment? Answer is no. No doubt some NGOs are actively paying their role in helping women with harassment problems. But family and society should also come forward to eradicate this evil by giving support and strength to girl to fight against this evil. The police and lawyers must also take cases of eve-teasing more seriously. Female police officers should be stationed in plain clothes at places where there are more chances of eve teasing. The police should be on patrol all the time. There is need to create awareness about women's rights through organizing programs and arrange self defense classes to teach girls and women how to protect themselves while facing this menace. Fast track courts must be set up in every district headquarters to resolve the

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Act, 2013, 42 INDIAN BAR REVIEW 4-5 (2015).

71 *Id.,* at 6.

72 The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India). Section 28 provides that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

73 *Ibid.*

complaints filed by affected women. Installation of CCTV's in buses, in education institutions will be helpful in controlling this evil. The women helpline system must be made more effective and gender friendly. School and college teachers should come forward to motivate students against eve teasing and sexual harassment. Providing moral education by parents particularly to male children can change the outlook of man towards woman otherwise such crimes will keep on happening.

PATENTABILITY OF BIOTECHNOLOGICAL INVENTIONS IN INDIA: A REVIEW

Dr. Charanjiv Singh*
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Introduction

The importance of biotechnology has increased in the recent years and has a major role to play in future particularly in the field of food, energy and protection of environment. Biotechnology has become an important tool for many researchers and industries, after the discovery of recombinant DNA technology. In order to develop a new product, biotechnology companies spend hundreds of millions of dollars and a decade of work goes into doing so. While investing millions of dollars on the long term research and development, they need some assurance to protect their research output so that it cannot be exploited by any other person. Because of the research and investment intensive nature, biotechnology has a very high importance in the light of patent regime. Biotechnology is a new area of science that compounds life sciences and chemical sciences. Non-grant of patents encourages uncontrolled piracy of new inventions and the original owners suffer economic losses because of low returns on their huge investments in the research.[1]

The word "biotechnology" was actually coined early in the twentieth century by an agricultural engineer from Hungary, named Karl Earky, who explained it in such a way that the technology which includes all such work by which the products are produced from raw materials with the aid of living organisms.[2] Classical biotechnology may be defined loosely as the production of usual products by living organisms, and as such it has been with us for a long time. According to the first official broad definition given by the US Office of Technology Assessment "biotechnology includes any technique that uses living organisms (or parts of organisms) to make or modify products, to improve plants or animals or to develop micro-organisms for specific use."[3] It is pertinent to mention here that the meaning of biotechnology has changed

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1 Archana K, *Do We Need Patent Protection to Biotechnology Inventions,* 3(4) INTERNATIONAL JOURNAL OF SCIENTIFIC AND RESEARCH PUBLICATIONS 1 (2013).

2 K.K. Tripathi, *Biotechnology and IPR Regime: In the Context of India and Developing Countries,* BIOTECH PATENT LAW 187 (2007).

3 PHILIP W. GRUBB, PATENTS FOR CHEMICAL, PHARMACEUTICALS AND BIOTECHNOLOGY 245-246 (2006).

over times and the latest development includes three basic techniques of tissue cell culture, recombinant DNA technology and Hybridoma technology.[4]

Origin of Patenting in Biotechnology

In the 1970s, Modern biotechnology began when bacteria was genetically engineered to produce human insulin. Scientists immediately recognized the industrial possibilities of this discovery, but also the potential dangers. In 1973 Herb Boyer and Stanley Cohen of USA showed it was possible to take a human gene and put it in a bacterium that could then mass-produce quantities of that gene. This immediately opened up enormous industrial possibilities by presenting an easy way to mass-produce hormones. In 1976, Herb Boyer, teamed up with a venture capitalist to form Gentech, with the goal of genetically modifying bacteria to produce human insulin. Gentech was the world's first genetic engineering company and Boyer became the first molecular multi-millionaire.[5]

The 1980s saw great advances in biotechnology. In 1980 Cohen and Boyer were awarded US patent for gene cloning that allowed them to make human insulin from genetically modified bacteria. Also in 1980, a landmark decision by the US Supreme Court, ***Diamond v. Chakrabarty,***[6] upheld grant of patent for a GM bacterium that could break down oil. It was held by the court that it was a non-naturally occurring manufactured composition of matter, a product of human ingenuity. The court further held that patent can be granted for anything under the sun that is made by man. After this decision, US came to be regarded as the trend settler in biotechnological patents.[7] Jeremy Rifkin was an important anti-biotechnology activist who argued against awarding the first patent for GM bacteria.[8] In 1985, Organization for Economic Cooperation and Development (OECD) published first investigation of international patent protection in the field of biotechnology. World Intellectual Property organization (WIPO) also began study through its Committee of Experts on Biotechnological Inventions. In 1988, European Commission also recommended for need to solve the problem of biotechnological inventions on uniform basis throughout the community.[9]

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4 N.S. SREENIVASULU & C.B. RAJU, BIOTECHNOLOGY AND PATENT LAW: PATENTING LIVING BEINGS 5 (2008).

5 *The Biotech Revolution: 1970's to Now,* ABC NET (Oct. 25, 2017), http://www.abc.net.au/science/features/biotech/ attitudes.htm.

6 447 US 33 (1980).

7 M.K. BHANDARI, LAW RELATING TO INTELLECTUAL PRTOPERTY RIGHTS 167 (2015).

8 *Supra* note 5.

9 SHIV SAHAI SINGH, THE LAW OF INTELLECTUAL PROPERTY RIGHTS 96-97 (2004).

International Perspective of Patents Related to Biotechnological Inventions

World Intellectual Property Organization (WIPO) established by a Convention signed at Stockholm on 14th July 1967, is a specialized agency of the United Nation and dedicated to ensure worldwide protection to the rights of creators and owners of intellectual property. It is responsible for the administration of various multilateral treaties dealing with the legal and administrative aspects of intellectual property. Its mission is to promote the protection of intellectual property worldwide, but only, "through co-operation among states." There is no formal enforcement mechanism, no dispute resolution system among states in WIPO. The lack of an enforcement mechanism, therefore, led some developed countries to push for discussion on intellectual property under the World Trade Organization (WTO) which was established in 1994.[10] The TRIPS Agreement under WTO concluded in 1995, introduced intellectual property law into the international trading system for the first time and remains the most comprehensive international Agreement on intellectual property till date.[11] Prior to the TRIPS Agreement, countries had widely varying levels of intellectual property protection and enforcement due to various reasons.[12]

TRIPS Agreement sets down minimum standards for various forms of intellectual property regulation as applied to nationals of other WTO Members. TRIPS Agreement under Article 27.1 provides that patents shall be available in all fields of technology, without discrimination, provided that they are new, involve an inventive step and are capable of industrial application. But at the same time Article 27.2 enables a Member to exclude from patentability inventions whose commercial exploitation may be contrary to public order or morality. Further, Article 27.3 also allows Members to exclude from patentability certain subject matter, such as plants and animals.[13]

Before the emergence of TRIPS Agreement, to ease the procedure of obtaining patent in biotechnology, on April 28, 1977, policy makers adopted the WIPO administered Budapest

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10 Paul Salmon, *Cooperation Between the World Intellectual Property Organization (WIPO) and World Trade Organization* (WTO), 11(3) JOURNAL OF CIVIL RIGHTS AND ECONOMIC DEVELOPMENT 432-434 (2003).

11 JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 44 (2005).

12 Donald P. Harris, Trips Rebound: *An Historical Analysis of How The Trips Agreement Can Ricochet Back Against The United States,* 25(1) NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 102 (2004).

13 Namrata Solanki, *Protecting Biotech Inventions: Are We ready?,* 3(1) VOICE OF RESEARCH 27-28 (2014).

Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure. All states party to the Treaty are obliged to recognize micro-organisms deposited as a part of the patent disclosure procedure with an International Depositary Authority (IDA), irrespective of where the depository authority is located. The main advantage of the Budapest Treaty is that for the purposes of patenting procedures, it eliminates the need to deposit multiple samples of the same biological material with biological resource centres in different countries. As such, it offers an efficient, streamlined and cost-effective means of meeting the disclosure requirements associated with patenting micro-organisms and other biological material. Since the Treaty itself does not define a micro-organism nor does it regulate any patentability requirements, so it does not require any substantive change to the national or regional patent legislation by the member countries. In practice this means that the requirement to submit micro-organisms to each and every national authority in which patent protection is sought does no longer exist. [14]

Besides TRIPs Agreement and Budapest Treaty, microbial patents have to satisfy the requirements of the Convention on Biological Diversity (CBD). The CBD was negotiated in 1992 and came into force in December 1993. According to Article 1 of the Convention, it has three main goals. Firstly, it aims for the conservation of biological diversity in the form of insitu and exsitu conservation. Secondly, in the sustainable use of its components, it aims in protecting and encouraging customary use of biological resources in accordance with traditional cultural practices and encouraging cooperation between governmental authorities and the private sector in developing methods for the sustainable use of biological resources.

Thirdly, the fair and equitable sharing of the benefits derived from the use of genetic resources, which is directly linked to the above-mentioned two aims. According to it, benefit sharing takes place as a result of a transaction whereby a host country has authorized another country to use specific biological resources. Once access has been granted by the donor country of micro-organisms, plants or animals, the donor country has the right to obtain a fair share of the benefits derived from use of such biological resources. [15]

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14 *WIPO's Budapest Treaty Facilitates Biotech Patenting, WIPO* (Oct. 27, 2017), http://www.wipo.int/wipo_magazine/en/2015/04/article_0001.html.

15 PHILIPPE CULLET, INTELLECTUAL PROPERTY PROTECTION AND SUSTAINABLE DEVELOPMENT 93-94 (2005).

Legislative Changes in Indian Patent Laws: Patentability in Biotechnology

After signing of TRIPs Agreement, India was required to amend its patent law according to the Agreement as India was only providing process patent and not product patent in certain areas like pharmaceuticals, food and chemicals. But certain transitional arrangements were also made by the Agreement under Article 70.9. Developing countries which do not at present provide product patent protection has up to 10 years to introduce such protection. However, in the case of pharmaceutical and agricultural chemical products they must accept the filing of patent applications from the date of implementation of Agreement i.e. 1 January, 1995 known as mail-box facility. By it the novelty of the invention is preserved from the date of filing the application. But exclusive marketing rights (EMRs, which were quasi-patent rights) for the product for five years, or until a product patent is granted, whichever is shorter shall be granted by these countries, if patent on such application is granted by other WTO Member country. Finally, Article 65 of the Agreement required that product patent shall be introduced in all areas by 1 January, 2005.[16]

India delayed its first amendment till 1999 and made only after USA dragged India before Dispute Settlement Body of the WTO. The Patents (Amendment) Act, 1999 introduced mail-box facility [section 5(2)] and EMRs (sections 24A-24F) into the Patents Act, 1970 (the Act), with retrospective effect from 1 January, 1995. So application for product patent in biotechnological inventions started receiving in India. The Patents (Amendment) Act 2002, among others, introduced section 3(j) to the Act, which was a landmark amendment in terms of broadening the scope of patentability of inventions relating to biotechnology, life sciences and in particular living organisms. Section 3(j) precluded the patentability of "plants and animals in whole or part other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals." It ensured that only micro-organisms prepared by human intervention were allowed to be patented. The definition of chemical processes under section 5 (since omitted) was expanded to include biochemical, biotechnological and microbiological processes. Thus, it can be presumed that the Patent Office has been in a position to examine patent applications claiming biotechnological processes. Finally, the Patents (Amendment) Act, 2005 introduced product patent in all the areas

16 J.K. DAS, INTELLECTUAL PROPERTY RIGHTS 245-246 (2008).

so far left by deleting section 5 of the Act. Consequently, mail-box and EMRs provisions also became redundant.[17]

Patentability Criteria under the Patents Act, 1970

The Act merely states that patent means "a patent granted under this Act."[18] Complying with the TRIPs Agreement, under the Act a patent can only be obtained for an invention. Accordingly, an invention means a new product or process involving an inventive step i.e. the proposed invention is not obvious to a person skilled in the art and capable of industrial application. These attributes of an invention, equally apply to biotechnological inventions.By the amendment of 2005, another definition of the term "new invention" under section 2(1) (l) was introduced in the Act. It means "any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e. the subject matter has not fallen in public domain or that it does not form part of the state of art."[19]

Exclusions Relevant to Biotechnological Patents under the Patents Act, 1970

The Act does not define what can be patented rather some inventions are excluded from patentability under section 3 of the Act. Exclusions relevant for biotechnological patents are the following:

1. Frivolous Inventions and Inventions Contrary to Natural Laws

"Any invention which is frivolous or which claims anything obviously contrary to well established natural laws is not patentable." A frivolous invention is that invention which is out rightly insufficient on its face or which is of no use or importance or does not further human knowledge. Such laws for example are the law of gravitation, the Archimedes principle etc. They are so well established that no one may be permitted to show that they are meaningless.[20]

2. Inventions contrary to Public Order or Mortality

"Inventions whose primary or intended use or commercial exploitation is contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment are not patentable."[21] The phrase 'serious prejudice to human, animal or plant

17 Suresh Kumar K., *The Current Indian Patent Regime and the Scope of Protection in Agricultural Biotechnology: Some Issues and Considerations,* 12 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 344 (2007).
18 The Patents Act, 1970, No. 39, Acts of Parliament, 1970 (India). Section 2(1)(m).
19 D.N. CHOUDHARY, EVOLUTION OF PATENT LAWS 2 (2006).
20 *Supra* note 18, Sec 3(a).
21 T. RAMAPPA, INTELLECTUAL PROPERTY LAW OF INDIA 135 (2010).

life or health or to the environment' was introduced in 2002 to accommodate and clarify the expanding meaning of the words 'public order or morality.'[22] For instance, following inventions are excluded from patentability:

i. Inventions, the established or intended use or commercial exploitation of which is found to be injurious to public, animal or plant life or health, such as, a method of adulteration of food.

ii. An invention, the present or intended use of which is likely to violate the well accepted and settled social, cultural, legal norms of morality, e.g. method of cloning

iii. Terminator gene technology.[23]

3. Discovery is not an Invention

The mere discovery of a scientific principle or the formulation of an abstract theory is not patentable. Discovery of a living thing or non-living substance occurring in nature is not patentable since it is not the result of a person's creative endeavors leading to an invention.[24] Thus, micro-organisms discovered cannot be patented. Likewise, Newton had not get patented the law of gravity. However, if due to discovery, a new and useful thing or result or new and useful method of producing an old thing and result is produced, patent would not be refused. For example, Sir Alexander Fleming discovered penicillin in 1928 and the same was not patented but it was to take 12 years before a team working at Oxford was able to find a patentable method of isolating and storing the drug.[25]

4. Inventions Pertaining to Known Substances etc.

"The mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant,"[26] shall not be an invention within the meaning of this Act.

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22 *Supra* note 18, Sec 3(b).

23 Substituted by the Patents (Amendment) Act, 2002, prior to its substitution, cl (b) was, "an invention the primary or intended use of which would be contrary to law or morality or injurious to public health."

24 The Patent Office, India, *Draft Manual of Patent Practice and Procedure,* 2008, INDIA OPPI (Oct. 29, 2017), https://www.indiaoppi.com/sites/default/files/PDF%20files/DraftPatent_Manual_2008.pdf.

25 *Supra* note 18, Sec 3(c).

26 D.P. MITTAL, INDIAN PATENTS LAW & PROCEDURE 61, 136 (2002)

The effect of the first part is that it allows for the discovery of a new form of a known substance to be treated as an invention only if there will be an enhancement of its known efficacy. It means that the properties pursuant to such discovery which are devoid of any inventive step will not be allowed to be the subject matter of patent. Thus, section 3(d) does not allow patenting of micro-organisms that already exist in nature as the same is considered to be a discovery and is therefore not patentable. But genetically modified versions of the same micro-organisms that result in enhancement of its known efficacies are patentable. The word efficacy means the effectiveness of substance. Efficacy of a drug involves a degree of potency as a drug.[27] On the basis of Dorland's Medical Dictionary definition of 'efficacy' in the field of pharmacology, the Madras High Court in ***Novartis AG v. Union of India*****,**[28] interpreted 'efficacy' as the ability of a drug to produce the desired therapeutic effect and 'therapeutic' as 'healing of disease' i.e. having a good effect on the body. If the ***Novartis Case's*** interpretation is applied then such chemicals/drugs become non-patentable.[29]

Like the first part, second part of section 3(d) also contains an absolute exception to patentability and pertains to a product patent. Unlike the first part which prohibits conditionally patents for known substances and known processes, the second part imposes a complete ban on patenting any new property or new use of a known substance. It will not allow for Swiss claims (a claim to the use of a known pharmaceutically active compound for the manufacture of pharmaceutical compositions)or selection patents (a claim particular compounds to be individually new, but is falling within an earlier disclosure of a broader group of compounds for which protection has already been claimed).[30] The second part of section 3(d) of the Act directly relates to claiming novelty of use by Swiss form of claims. Like the TRIPs Agreement, the Act requires novelty perse so it does not allow for novelty of use. This can be regarded as the distinguishing feature of the Act.[31]

The third part of section 3(d) contains a conditional exception to patentability. It relates to process patents. It states that mere discovery… of the mere use of a known process; machine or

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27 *Supra* note 18, Sec 3(d).
28 FEROZ ALI KHADER, THE LAW OF PATENTS WITH A SPECIAL FOCUS ON PHARMACEUTICALS IN INDIA 65-66 (2009).
29 (2007) 4 MLJ 1153 (India).
30 *C.D. Ohly, What's new?* – Isn't it Obvious?, 13(5) JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 498-508 (2008).
31 *Supra* note 28, at 69.

apparatus unless such known process results in a new product or employs at least one new reactant, shall not be patentable. The discussion on 'new use' of a known substance will apply to 'new use' of a known process, machine or apparatus. But a known process may be regarded as an invention if it results at least in a new reactant. If such process results in a new product satisfying the three tests of patentability; it will be entitled to a product patent.[32] A known substance is defined in the explanation to section 3(d) as substances having similar properties with regard to efficacy. It is made clear that salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.[33] In other words, crystalline forms of known substances are prohibited. What would be a significant difference in efficacy, will vary from case to case and from substance to substance, there being no universally applicable guidelines for the same.

More specifically, section 3(d) aims to prevent ever greening, a process by which a company introduces minor modifications in the patented product by way of "incremental innovation" and then gets a new patent for its product on the basis of the alterations made, hence, can extend the life of the patent. [34] With respect to biotechnology patent applications, section 3(d) is applicable to those inventions relating to a three-dimensional or crystal structure of a polypeptide unless it is proved that such polypeptide differs significantly in properties with regards to therapeutic efficacy.[35]

5. Methods of Medical Treatment of Human and Animals

"Any process for the medicinal, surgical, curative, prophylactic, diagnostic, therapeutic or other treatment of human beings or any process for a similar treatment of animals to render them free of disease or to increase their economic value or that of their products is not patentable."[36] Methods of treatment include e.g. more efficient or less harmful dosages in known treatment, the administration of a bacterium to secure immunity from a disease and employment of known medical equipment for new treatment would remain unpatentable. In other words, the provision

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32 Influence of TRIPS on Indian Patent Law, SHODHGANGA (Nov. 1, 2017), http://shodhganga.inflibnet.ac.in/bitstream/10603/21666/9/chapter-vi.pdf.

33 Patent Facilitating Centre, PFC (Nov. 2, 2017), http://www.pfc.org.in/faqpat.htm.

34 Supra note 18, Explanation to Sec 3(d).

35 Adarsh Ramanujan & Rajshri Sen, *Pruning the Evergreen Tree: Section 3(d) of the Indian Patents Act,* 1970, 31(3) EUROPEAN INTELLECTUAL PROPERTY REVIEW 135-146 (2009).

36 Benjamin N. *Roin, Unpatentable Drugs and the Standards of Patentability,* 87 TEXAS LAW REVIEW 503 (2009).

will not allow Swiss claims.[37] The process of treatment of human or animal ailment with a known instance is not capable of being an invention. Thus, patenting on gene based diagnostics is completely ruled out. The last part of the sub-section may arise in the case of administering any drug to any animal for increasing its yield, for example, milk in the case of cows, hence not patentable. However, patent may be obtained for surgical, therapeutic or diagnostic instrument or apparatus and also the manufacture of prostheses or artificial limbs and taking measurements there for on the human body are patentable.[38]

6. Plant and Animal Varieties

"Plants and animals in whole or any part thereof other than micro-organisms including seeds, varieties and species and essentially biological processes of production or propagation of plants and animals, are not patentable invention."[39]

This provision is in compliance with Article 27(3) (5) of the TRIPs Agreement. Section 3(j) deals with the following three broad classes:-

i. Essentially biological processes: It has been argued that essentially biological process must be read in restricted sense. First, it only applies to processes and hence has no application to a product-by-process claim. Secondly, the exclusion applies only where the process is for the production or propagation of plants and animals. It may not apply if the process results in the death or termination of animals or plants. Thirdly, the exclusion will apply only if the process is essentially biological. This raises the issue of the degree of technical or human intervention required for the process to fall outside the exclusion. It would, thus, be safe to assume that where there is no technical or human intervention, the process will be regarded as 'essentially biological.' Even in cases where the extent of human intervention is trivial or minimal, it has been observed that human intervention may only mean that the process is not a 'purely biological' process; it could still be 'essentially biological' and hence excluded from patentability. For instance, process of conventional breeding will be regarded as essentially biological and hence will not be patentable.[40] However, the Patent Office may grant patents for biological material such as recombinant DNA, plasmids and processes of manufacturing provided they are produced by substantive human intervention. But the same is unlikely to grant

37 *Supra* note 18, Sec 3(i).
38 V.K. AHUJA, INTELLECTUAL PROPERTY RIGHTS IN INDIA 875 (2009).
39 *Supra* note 26, at 67-68.
40 *Supra* note 18, Sec 3(j).

for gene sequences, DNA sequences which do not disclose their functions, if they lack inventive step and industrial application.[41]

However, non-biological and microbiological processes (where micro-organisms or their parts are used to make or to modify products) are patentable. For example, methods of growing yeast and of culturing micro-organisms, e.g. streptomycin are patentable. It means non-natural process that involves some technical interference to a natural process is patentable. Technical reference to a natural or essentially biological process renders it non-biological, which is patentable. On the same lines, products of biotechnological process produced through some technical interference to natural process are non-natural, hence patentable. Discovery of a living thing existing in nature is not patentable as it does not involve any human interference and hence not patentable.[42] It is to be noted hereby that Article 27.3 (b) of the TRIPs Agreement provides for exclusion of non-biological and micro-biological processes. But section 3 (j) does not expressly exclude such processes from patentability. The specific exclusion of essentially biological processes together with the permissibility of patenting micro-organisms indicates an inclination towards grant of patents for micro-biological processes.[43]

ii. Plants and Animals: Plants and animals including seeds varieties and species and essentially biological process of production or propagation of plants are not patentable. What cannot be patented is the natural product of nature. Man-made plants, asexually produced, are patentable. The Act, thus, recognizes "the relevant distinction was not between the living and inanimate things, but between products of nature, whether living or not, and human made inventions." Asexually reproduced plant could be patented. Asexual reproduction occurs by grafting, budding or the like and produces an off spring with a genetic combination identical to the plant being produced. By contrast, sexual production occurs by seed and sometimes involves two different plants. The patent right could be a right to propagate the new variety by asexual reproduction. It does not include the right to propagate by seeds.[44]

Seeds are expressly excluded from patentability of the Act. So far plant varieties are concerned, TRIPs Agreement under Art 27.3(B) requires member countries to provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination

41 LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 400-401 (2000).
42 *Supra* note 28, at 107.
43 *Supra* note 19, at 58.
44 *Supra* note 28, at 104-105.

thereof. India opted for the sui generis system of protection by introducing the Protection of Plant Varieties and Farmers' Right Act 2001 for protecting plant varieties. The model for this was the UPOV Act, an International Convention (Convention of the Union for the Protection of New Varieties of Plants) known as UPOV held in Paris in 1961 and came into force in 1968. Plant varieties have been interpreted to mean the lowest rank plant groupings. Plant varieties will not however include plant cells.[45]

iii. Micro-Organisms: Micro-organisms have become patentable only after the amendment of 2002. Section 3(j) of the Act allows for patents of genetically modified micro-organisms. A micro-organism is a living substance, but so small that it cannot be seen by the naked eye. It will include any microscopic organism or unicellular organisms such as viruses, algae, bacteria, fungi and protozoa. Biotechnological research involves the use of micro-organisms. Article 2 of the Convention on Biological Diversity defines biotechnology as "it means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use". India does not have any specific legislation regarding bio-technological inventions, much less, micro-organisms.[46]

Dimninaco A.G. v. The Controller General of Patents, Designs and Trademark,[47] decided by the Calcutta High Court is a leading case on patentability of micro-organism. After this decision, micro-organisms became patentable in India. This case was decided under the provisions of the Act before the Patents (Amendment) Act 2002 came into force. The said amendment introduced section 3(j) which allows patent for micro-organisms. The grant of patent in respect to micro-organisms depends upon the regulations concerning the requirements for the deposition of micro-organisms under the Budapest Treaty of which India has become member and accessibility of those micro-organisms from the depositories.[48]

Further micro-biological processes are processes in which micro-organisms or their parts are used to make or to modify products. Though Article 27.3(b) of the TRIPs Agreement provides for exclusion of non-biological and micro biological processes, section 3 (j) does not expressly exclude such processes from patentability. However, the Act also does not refer to

45 *Supra* note 26, at 68-69.
46 H.S. Chawla, *Patenting of Biological Material and Biotechnology,* 10 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 46 (2005).
47 *Supra* note 21, at 140-141.

microbiological processes at all. It refers only to the product, i.e. micro-organism. Patents for the micro-organisms as a product are likely to include 'micro-biological processes' or the products of such processes. The specific exclusion of 'essentially biological processes' together with the permissibility of patenting micro-organisms, indicates an inclination towards grant of patents for microbiological processes.[49]

7. Traditional Knowledge

An invention which in effect is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components is not patentable.[50] Traditional knowledge that has evolved over generations is owed to the community that has developed it and no individual including any person in that community may obtain a patent in respect of what belongs to a community. Simple examples are home remedies for ordinary ailments. But traditional knowledge is endangered by unlawful misappropriation by those who claim intellectual property rights over their components. As far as India is concerned, the misappropriation of traditional knowledge relating to the use of *turmeric* in healing wounds as the subject of an application for a patent in the US and *neem* in Europe are examples of a gross abuse of traditional knowledge.[51]

Formal Requirements: Patentability of Biotechnological Inventions

Biotechnological patent applications have also to undergo formal procedural requirements for obtaining patents. These are as under:

1. Deposition of Biological Material

India joined the Budapest Treaty on 17th December 2001. Consequently, section 10 of the Act was amended in 2002 to provide for deposition of the biological material. The Act, as amended, recognizes the International Depository Authorities (IDAs) under the Budapest Treaty.[52] For obtaining biotechnological patents, an applicant must deposit the biological material mentioned in the specification if it is unavailable to the public and cannot be described adequately as per the provisions of the Act. The material must be deposited with an IDA under the Budapest Treaty. The deposit must be made no later than the filing date of the patent application in India. A

48 (2002) IPLR 255.
49 Suja Senan, et. al., *Patenting of Micro-organisms in India: A Point to Ponder,* 100(2) CURRENT SCIENCE 160 (2011).
50 *Supra* note 28, at 104-105.
51 *Supra* note 18, Sec 3(p).
52 *Supra* note 21, at 148-149.

reference to the deposit must be made in the specification within the prescribed period (i.e., three months from the filing date). The specification must include all available characteristics of the biological material that are required for its correct identification such as name and address of the depository institution and the date and number of the deposit. The applicant must also disclose the source and geographical origin of the biological material. If a plant gene sequence has been claimed which is being used to transform other plant material, the applicant must disclose the plant from which the gene sequence has been isolated as well as the plant that is being transformed.[53]

2. Conservation of Sources and Benefit Sharing

After accession to the Convention on Biological Diversity, India, as a part of its commitment, enacted the Biological Diversity Act, 2002 (BD Act). To carry out the objectives of the convention, it establishes the Biodiversity Authority, Boards and nodal bodies to superintend the conservation and benefit sharing. The BD Act provides a mechanism to prevent the misappropriation of biological resources and traditional knowledge by introducing provisions for mandatory prior permission from the National Biodiversity Authority by the applicant for any patent application based on research or any information related to biological resources obtained from India. According to this Act, the applicant has to provide a mandatory disclosure of the source and geographical origin of the biological material in the patent application.[54]

Judicial Initiative

The judiciary has played an active role in explaining the scope of patentability of biotechnological inventions. However, there is no plethora of judicial decisions in biotechnological patents in India.

1. Patenting Life Forms

Living organisms were not patentable until the first patent application for Bursitis vaccine was filed in Indian Patent Office. The leading biotechnological patentability decision of the Indian courts on whether living things can be treated as an invention for the purposes of patent is the ***Dimminaco A.G. v. Controller of Patents, Designs & Trade Marks,***[55] by the Calcutta High Court, where for the first time utility of a biotech invention was demonstrated. The invention

53 *Guidelines for Examination of Biotechnology Applications for Patent,* IP AND BUSINESS (Nov. 2, 2017), http://www.ipandbusiness.com/15-new-guidelines-for-examining-biotech-patent-applications/.
54 *Supra* note 18, Sec 10.
55 *Supra* note 15, at 100.

related to a process for preparation of Infectious Bursitis vaccine. The vaccine was useful for protecting poultry against contagious bursitis infection. Initially the Patent Office rejected the patent application on the ground that the claim did not constitute an invention under section 2(j) of the Act. On appeal before the Controller it was argued by the applicant that there is no bar against allowing the process for preparation of any product, which is patented commodity even if the process contains live virus. The Controller rejected this argument and held that the process for preparation of the said vaccine which has living entity cannot be considered as a manufacture under the Act and vaccine with living organism cannot be considered as substance, hence, a micro-organism cannot be cannot be converted physically or chemically to any other product.

Appellant Dimminaco moved to Calcutta High Court. The Calcutta High Court considered the scope of manner of manufacture under section 2 (j) of the Act, and noted that the word manufacture was not defined in the Act. In such cases, the court took into account, the dictionary meaning of manufacture or its usage in the particular trade or business. Further, in order to decide whether a particular process of manufacture ought to be patented or not, one of the most common tests is the vendibility test. This test is satisfied if the invention results in the production of some vendible item something which can be passed on from one man to another upon the transactions of purchase and sale claimed method, was a patentable invention because the dictionary meaning of the word manufacture does not exclude the process of preparing a vendible commodity which contains a living substance.

2. Method for Producing a Transgenic Plant

Monsanto, an American seed company applied for patent for a method of producing heat, salt and drought-tolerant transgenic plants using cold shock protein in India. But the Indian Patent Office was not fully satisfied and finally rejected the matter due to lack of inventive step, claims falling within the scope of section 3(d) and subject matter not patentable under section 3(j) of the Act, as claims also include essential biological process of regeneration and selection, which includes growing of plant in specific stress condition. Monsanto then filed an appeal before Intellectual Property Appellate Board (IPAB), which has denied Monsanto a patent for a genetically-engineered method of increasing climate resilience in plants. The IPAB, in rejecting the patent claims, said the technology is merely a discovery of a new property of known substance and not an invention under section 3(d) of the Act.[56] An appeal was also turned down

56 *Supra* note 48.

by the Supreme Court. Thus, India has been following a very strict IP policy.

Debatable Issues

India faces recent controversies regarding biotechnology patents. The developed countries are trying to usurp ownership of India's biological resources in the shape of India's traditional knowledge, on the name of intellectual property rights.

1. Basmati Rice

The case titled ***Research Foundation for Science Technology & Ecology v. Ministry of Agriculture,***[57] is unique in the sense that the case is first one to be filed to protect Basmati rice from being patented by US. US patent law is much liberal and anything under the sun can be patented. In order to protect biodiversity of India and to challenge the patenting of Basmati rice, a writ petition was filed by petitioner, Research Foundation for Science Technology & Ecology. After the disposal of petition filed by the Research Foundation for Science, Technology and Ecology (a non-governmental organization run by activist Vandana Shiva), the Government of India decided to challenge the patent grant in US court of law. Rice Tec Inc., a Texas-based company, was selling Basmati rice grown in US under the trademark Texmati and Kasmati. Texmati carried the description "American-style Basmati rice," while the superior Kasmati was described as "Indian-style Basmati rice." Rice Tec was granted a US patent on September 2, 1997. India submitted a detailed re-examination brief on April 28, 2000. On September 11, 2000 Rice Tec withdrew four key claims from the original 20 that it had made to get the patent and which had been challenged in the Indian brief. Three of these claims sought to define Basmati in a way that would have allowed Rice Tec to keep out Indian-grown Basmati. On August 14, 2001, the final decision came revoking the patent and changing the title of the invention from Basmati Rice and Grains to Rice Lines Bas 867, RT 117 and RT 121. This was a victory for India. A patent has been granted for only these three lines which, incidentally, are derived from Pakistani Basmati varieties.[58] The US court ruled that the company did invent new technologies and that the patent is valid. India then re-approached the issue as one of nomenclature and attempted to protect the name 'Basmati' as a geographical indicator (GI). The patent holder now could not claim the unique qualities of basmati rice nor the unique name 'Basmati.'[59]

57 Editorial, *A Just Order,* THE HINDU, April 2, 2014.
58 Sanjay Vijayakumar, *Monsanto's Climate-Resilient Crop Patent Claims Rejected,* THE ECONOMIC TIMES, July 10, 2013.
59 (1999) 1 SCC 655 (India).

2. Turmeric (Haldi)

Turmeric presents a similar case to Basmati rice. Two researchers of Indian origin, based at the University of Mississippi Medical Center in Jackson applied for a US patent on the use of turmeric in wound healing. The patent was challenged by CSIR, India. The claimed subject matter was the use of "turmeric powder and its administration", both oral as well as topical, for wound healing. The patent was granted in 1995 on the basis of limited searches for prior art which did not indicate that the claims were a part of public domain. As per the requirements of US patent law, it was necessary to find adequate evidence in the form of printed and published information that would establish that the manner of use of turmeric as in the claimed invention was known before the patent was claimed and, therefore, the patent was invalid. Despite the fact that the use of turmeric was known to every Indian household for ages, finding published information on the use of turmeric was a difficult task. Fortunately after extensive researches 32 references were located, some of which were more than 100 years old, and were in the languages of Sanskrit, Urdu and Hindi. The patent was revoked on the grounds that the alleged invention was actually a part of traditional knowledge in India.[60]

3. Neem

After a victory in turmeric case another victory for India in the battle to protect traditional knowledge and bio-piracy was over its patent rights to use Neem. Non-governmental organizations both in India and abroad forced the revocation of a patent granted on a fungicide formation from the seeds of Neem by the European Patent Office (EPO) to US. The petition filed had categorically stated that the US patent did not satisfy the basic requirement of novelty for a patent. The legal opposition to this patent was lodged by the New Delhi based Research Foundation for Science, Technology and Ecology (RFSTE), in co-operation with the International Federation of Organic Agriculture Movements (IFOAM) and Magda Aelvoet, former green Member of the European Parliament (MEP), once the environmental minister of Belgium.[61]

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60 *Challenging the Basmati Patent,* FRONTLINE (Nov. 7, 2017), http://www.frontline.in/static/html/fl1710/17100790.htm.

61 RAJSHREE CHANDRA, KNOWLEDGE AS PROPERTY-ISSUES IN THE MORAL GROUNDING OF INTELLECTUAL PROPERTY RIGHTS 309-310 (2010).

62 Gopakumar G Nair, et. al., *Landmark Pharma Patent Jurisprudence in India,* 19 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 310 (2014).

Conclusion

To sum up, the Act provides no inclusive definition of patentable subject matter, providing only a list of what is considered patentable. Unfortunately, these exceptions can be vague; leading sometimes to uncertainty and this is particularly true for biotechnology inventions, due to the complex nature of the technology. Innovators, investors and patent practitioners must analyse their inventions in light of Indian patent law before making any strategic decisions regarding patenting in India. In the present era, patentability of biotechnology inventions is an important aspect because of its research and investment intensive nature. However, the application of patent system to the field of biotechnology has been so far filled with uncertainty and ambiguity because of the ever developing and ever evolving nature of biotechnology. As per the recent case laws, it can be inferred that the biological materials designed in labs which were earlier not available in the nature has earned some right of patentability. India has great potential for inventions in this area but due to unclear law on patentability of biotechnological inventions, fewer applications for patent are being filed in India. It is expected that in the near future, these uncertainties will be solved and common grounds will be laid in the context of inventions related to biotechnology.

63 Staff Reporter, *India Wins Neem Patent Case,* THE HINDU, March 9, 2005.

ROLE OF INFORMATION, COMMUNICATION AND MOBILE TECHNOLOGIES IN ACHIEVING SUSTAINABLE AGRICULTURE AND EMPOWERING FARMERS

Ms. Jasleen Kaur*

Introduction

At the time of India's independence, Jawahar Lal Nehru said, "Everything can wait but not agriculture". But unfortunately, this profound truth is yet to be converted into concrete policies on an adequate scale.[1] The demand for food is expected to increase by 60 percent in the next 37 years as the world's population is estimated to reach 9.2 billion by 2050 and this demand has to be attained under existing and foreseeable constraints such as, the stagnation of expansion of arable lands, scarcity of water resources, advancing environmental degradation, negative impacts of climate change, natural disasters and a declining agricultural labour force, especially the young farmers. So, if we fail to meet these production targets, food shortages may occur, and social and political stability as well as world security and peace might be threatened as we have witnessed in the recent past. Thus, addressing these challenges requires coordinated responses and concerted efforts among all the stakeholders, including the public and private sectors. Significantly, farming is both a way of life and principal means of livelihood for over 1.3 billion people throughout the world which is about close to 40 percent of the global workforce who is engaged in agriculture for their living. Having said that, today, especially in the developing countries, farmers are confronted with a host of constraints like high transaction costs; inefficient marketing of their surplus, inadequate technical information and the list goes on. As a matter of fact, agriculture is probably the most complex commercial system requiring inputs from a large number of sources like soil, water, environment, society and trade. Thus, it is humanely not possible for a farmer to assimilate all the relevant information and to take optimal decisions.[2] Moreover, information regarding quality inputs and prevailing market prices are also not easily available to the farming community specifically in the Asian countries. As a result, the support systems needed by the farmers, like research and extension services; input

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1 SOUNDARI M. HILARIA, INDIAN AGRICULTURE AND INFORMATION AND COMMUNICATION TECHNOLOGY (ICT) (1st ed. 2011).

2 FAO, *Information and Communication Technologies for Sustainable Agriculture: Indicators from Asia and the Pacific,* FOOD AND AGRICULTURE ORGANIZATION (Sept. 22, 2017), http://www.fao.org/3/a-i3557e.pdf.

supply and opportunities for assured and remunerative marketing are in need of review and reforms. So, here Information and Communication Technology (ICT) comes for a rescue that has an engine of growth in various sectors which can be effectively used to enhance the livelihoods of poor and vulnerable farmers as Information technology, however, has now made it possible to combine all this information and knowledge conveniently into one neat package.[3] Among others, mobile technology have been very powerful as at present, 6.8 billion mobile connections have been established for a 7 billion world population. Indeed, the mobile phone technology is widely accessible to all populations and has been playing an invaluable role in improving social, economic and environmental development in emerging markets. Interestingly, by using mobile phone technology, there have been diverse types of innovations taking place in the agriculture sector, which include commodity and stock market price information analysis, meteorological data collection, advisory services to farmers for agricultural extension, early warning indicators for disaster prevention and control, financial services, traceability of agricultural products, agricultural statistical data gathering, etc. The value of these innovative technologies and services should not be underestimated, as improving agricultural extension services to farmers using mobile technology would effectively improve the transmission of agricultural research results for application in farmer's fields.[4] Let us further explore the role of Information and Communication technologies in achieving sustainable agriculture.

Role of Information and Communication Technology (ICT) in Achieving Sustainable Agriculture

Interestingly, Indian Agriculture contributes about 18.6 per cent to India's GDP and approximately 67 per cent Indians derive their livelihood from the agricultural sector. Today's farmers not only want two time bread for their families, but also surplus food production that can be sold in the market to earn them sufficient money to fulfill their other needs. Many new concepts and theories that substitute traditional methods have also been seen and one of them is the introduction of plethora of ICT initiatives, which enables the dissemination of requisite information at the right time.[5] In spite of huge government machinery, Indian farmers still suffer

3 *Supra* note 1.
4 *Ibid.*
5 *Agriculture Growth Rate in India,* BUSINESS MAPS OF INDIA (Sept. 25, 2017), http://business.mapsofindia.com/india-gdp/sectorwise/agriculture-growth-rate.html.

from the absence of right information at the required time. The farmers require timely information on weather conditions, sowing time, availability of inputs including credit, expert advice on maintaining their crop in healthy condition, information on markets and all other areas of interest to him and his family. Herein lies the role of ICT which can efficiently address the concern of the farmers stationed at even remote locations. Low literacy levels, high cost of the computers, poor communication infrastructure makes it impossible for individual partners, particularly small farmers to directly adopt ICT and this calls for institutional efforts to provide ICT based services to the farmers.[6] Furthermore, although over the last two decades, India has emerged as the most preferred destination for outsourcing of ICT services; however, agricultural sector of the economy is lagging behind in utilizing in ICT services. Some efforts have been made in this regard but they are by no means adequate. The rapid strides that the country has registered in the ICT field will remain incomplete unless ICT is fully utilized to ensure more efficient and productive Indian agriculture. Practically there is no area in agriculture in which ICT has no role to play. The face of Indian agriculture can be transformed by a well-conceived deployment of ICT.[7] It is to be noted further that, in the agriculture sector, constant application of latest ideas and better technologies is essential to enhance economic well-being of the farmers. The bane of Indian agriculture is not just the lack of technology, R&D efforts; but the inadequacy and inefficiencies in the dissemination of relevant information to the farming sector. So unquestionably, it can be said that Information and Communication Technology (ICT) in agriculture if extensively implemented, can act as a driving force in the nation's development process.[8] Information and Communication Technology (ICT) can certainly be used effectively to enhance the livelihood of farmers and moreover, these changes can radically lead the country into a new digital era.[9] Moreover, Agricultural marketing information network available to farmers would not only help farmers to sell their products at better prices, but also provide reliable food price information to policy makers to prevent price volatility and speculation. Thus, the role that ICT can play as an instrument of change is potentially transformative. Smallholder farmers, particularly women involved in agriculture, have a huge advantage when

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6 *Supra* note 1.
7 *Ibid.*
8 SARAVANAN R., ICT'S FOR AGRICULTURAL EXTENSION: GLOBAL EXPERIMENTS, INNOVATIONS AND EXPERIENCES 34 (1st ed. 2010).
9 BLESSING MAUMBE, E- AGRICULTURE AND RURAL DEVELOPMENT: GLOBAL INNOVATIONS AND FUTURE PROSPECTS 23 (1st ed. 2012).

the right ICTs are brought into the agriculture value chain. The access to the right information at the right time gives them the capacity to make informed decisions that affect their livelihoods and thereby play a major role in ensuring food security. Together, we must extend these successful innovations and good practices widely and must think of sensible solutions to address the problems of food security thereby achieving sustainable agriculture.[10]

Key ICT Initiatives for Sustainable Agricultural Development in India: Let us have a look at these ICT initiatives as given below:

Farmers Portal

It is envisaged to make available relevant information and services to the farming community and private sector through the use of information and communication technologies, to supplement the existing delivery channels provided for by the department. Farmers' Portal is an endeavor in this direction to create one stop shop for meeting all informational needs relating to Agriculture, Animal Husbandry and Fisheries sectors production, sale/storage for an Indian farmer.

With this he will not be required to sift through maze of websites created for specific purposes. Moreover under the Farmers' Portal, a farmer will be able to get all relevant information on specific subjects around his village/block /district or state level. This information will be delivered in the form of text, SMS, email and audio/video in the language he or she understands. These levels can be easily reached through the Map of India placed on the Home page. Farmers are also be able to ask specific queries as well as give valuable feedback through the Feedback module specially developed for the purpose.[11]

I-Kisan[12]

I-Kisan is an agricultural portal, and a one-stop information resource for the farmer. Ikisan provides online, detailed content on crops, crop management techniques, fertilisers& pesticides and a host of other agriculture related material. It also provides latest updates on related markets, products and weather forecasts. The key services provided by Ikisan covers sharing of information about crops, markets, prices, weather, agricultural news, insurance and credit

10 *Supra* note 1.

11 *Agriculture and Horticulture Corner,* FARMER'S PORTAL: ONE STOP SHOP FOR FARMERS (Sept. 29, 2017), http://farmer.gov.in/M_Aboutus.aspx.

12 Nagarjuna Group, IKISAN: AGRI INFORMATICS AND SERVICES (Oct. 1, 2017), http://www.ikisan.com/what%20we%20offer.html.

information and other allied services and also disseminating knowledge in the form of crop management, pest management, water management, soil management, implements, agriculturalmachinery etc.

MANAGE (National Institute of Agricultural Extension Management)[13]

The mandate of MANAGE vests the institute with the responsibility to work in developing linkages between prominent state, regional, national and international institutions concerned with agricultural extension management, gaining insight into agricultural extension management systems and policies, developing and promoting application of modern management tools for improving the effectiveness of agricultural extension organizations, serves as an international documentation center for collecting, storing, processing and disseminating information on subjects related to agricultural management etc.

Agriwatch.com

Agriwatch.com is brought to you by Indian Agribusiness Systems Ltd. (IASL), a company started by a group of young technocrats and trade professionals who have had a long association with the Indian Agribusiness Sector. The Company primarily aims at filling out the information and communication gap that exists in various sub sectors of the agricultural economy in general and agricultural commodities trade in particular. For achieving this, the Company is making use of the latest developments in information technology and the ultimate objective of the company is to reach the highest level of sophistication in the agribusiness sector so as to achieve a perfect flow of information, analyses, communication and e-commerce.[14]

E-Choupal by ITC

E-Choupal, ITC Company's unique web based initiative, which offers farmers the information, products and services which they need, to enhance productivity, improve farm gate price realization, and cut transaction costs. Moreover, the farmers can also access the latest local and global information on weather, scientific farming practices, as well as market prices at the village level itself through this web portal that too, all in Hindi language.[15]

Information Village MSSRF: The M. S. Swaminathan Research Foundation

MSSRF was established in 1988 as a not-for-profit trust. MSSRF was envisioned and founded

13 National Institute of Agricultural Extension Management, MANAGE (Oct. 4, 2017), http://www.manage.gov.in.
14 AGRIWATCH (Oct. 4, 2017), http://www.agriwatch.com/aboutus.php.
15 E-Choupal, ITC (Oct. 5, 2017), http://www.itcportal.com/businesses/agri-business/e-choupal.aspx.

by Professor M. S. Swaminathan with proceeds from the First World Food Prize that he received in 1987. The Foundation aims to accelerate use of modern science for agricultural and rural development for development and dissemination of technology to improve lives and livelihoods of tribal and rural communities. MSSRF follows a pro-poor, pro-women and pro-nature approach and applies appropriate science and technology options to address practical problems faced by rural populations in agriculture, food and nutrition.[16]

TATA Kendras of TATA Chemicals

Tata Kisan Kendra (TKK) is an initiative by Tata Chemicals Limited (part of the Tata group) with the following objective: "To provide the farmer with a package of inputs and services for optimum utilization of balanced primary nutrients; plant protection chemicals; water; seeds; post-harvest services; and to develop a genuine partnership with the farmer". It is one of the initiatives taken up by big business groups aiming towards improving the quality of life of Indian farmers. TKKs are designed to be one-stop centers for all agricultural problems. They thus offer a wide range of services. They provide the farmers with trusted agro inputs such as seeds, fertilizers, pesticides at affordable prices. They also provide the facility for farmers to lease out farm equipment and implements, enabling farmers to use modern machinery even if they can't afford it.[17]

Gyandoot (Madhya Pradesh)

Gyandoot is an intranet in Dhar district of Madhya Pradesh, connecting rural cybercafes catering to the everyday needs of the masses. The web site is an extension of Gyandoot intranet, for giving global access. The site offers following services such as Commodity/Mandi Marketing Information System; and maps; On-line registration of applications; Income certificate; etc.[18]

Bhoomi (Karnataka)

This project was started by the state of Karnataka which involves computerization of more than 200 treasuries all over the State and it was mainly for computerization of Land Record System. Significantly, the 'Bhoomi' project has successfully digitized 20 million land records of

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16 MS SWAMINATHAN RESEARCH FOUNDATION (Oct. 6, 2017), http://www.mssrf.org/.

17 TATA Kisan Sansar, TATA CHEMICALS LIMITED (Oct. 7, 2017), http://www.tatachemicals.com/Service/Tata-Kisan-Sansar.

18 Gyandoot: *A Mass Based Information Technology Revolution,* DHAR DISTRICT (Oct. 9, 2017), http://www.dhar.nic.in/gyandoot.htm.

ownership of 6.7 million farmers of the state. Now a farmer can easily obtain a copy of land records (RTC/Pahani) by providing owner's name/plot number at government authorized kiosks in 177 taluk offices. You only have to pay Rs 15 for the procedure. Also at the kiosks, provision to see the land transactions is also availed. It is known as mutation details.[19]

DAC (Department of Agriculture Cooperation)

DAC has developed around 80 portals, applications and websites primarily in collaboration with the National Informatics Centre. The important portals include Farmers' Portal SEEDNET, DACNET, AGMARKNET (prices and arrivals in Mandis), RKVY (Rashtriya Krishi Vikas Yojana), ATMA, NHM (National Horticulture Mission), INTRADAC, NFSM (National Food Security Mission) and APY (Acreage, Productivity and Yield). DAC is getting online data entry done right from the District level at least, so as to expedite generation of requisite queries & reports in an efficient manner. Under this Scheme, funds are provided to State/UTs for computerization down to Block level. Furthermore, funds to 26 states have been released under AGRISNET to achieve the objective of providing computers up to Block level. Moreover, state specific software packages have been developed to disseminate information to the farmers. Availability of requisite hardware and locally suitable software packages has resulted in quick retrieval of data, dissemination of information to farmers and provision of farmer centric services to farmers.20

AGRISNET-Agricultural Information Service Network

Department of Agriculture & Cooperation, Ministry of Agriculture, Government of India has implemented a Central Sector Plan Scheme for Strengthening and Promoting Agricultural Informatics & Communications of which one of the component is AGRISNET. The objective of AGRISNET is to provide improved services to the farming community through use of Information & Communication Technology (ICT). [21]

Agricultural Marketing Information Network (AGMARKNET)

Ministry of Agriculture, Government of India has launched the ICT based central state scheme of AGMARKNET in March 2000 to link important agricultural produce markets which are spread all over the country and also the entire state Agricultural marketing boards and

19 Bhoomi, LAND RECORDS (Oct. 11, 2017), https://landrecords.karnataka.gov.in/service0.
20 Department of Agriculture Co-operation and Farmers Welfare, AGRICOOP (Oct. 12, 2017), http://www.agricoop.nic.in.
21 National E-Governance Plan in Agriculture, AGRISNET (Oct. 15, 2017), http://www.tnagrisnet.tn.gov.in.

Directorates. This project is being executed with the technical support of National Informatics Centre (NIC) to facilitate wider market access to farm produce and better price discovery for the vulnerable farmers.[22]

Kisan Call Centres and Kisan Credit Card

Kisan Call Centres scheme is launched by Ministry of Agriculture on January 21, 2004. The basic function of this project is to provide the answers of farmers' questions by making a telephone call. A toll free number '18001801551' is provided to various Kisan Call Centers which is working at 14 different places including states and union territories. The number of Kisan Call Centers can be accessed via mobile phone as well as landlines. There are choices of 22 local languages from which any one can be chosen by the farmers based on their resident area. Hence, answer is replied in the selected language so that farmer can easily understand the information. ICT also provides affordable credit for the farmers in India and the scheme is known as Kisan Credit Card.[23]

ATMA: A Ray of Hope for Farmers

Agricultural Technology Management Agency (ATMA) scheme has been approved by the Indian government whose main aim is to give training to the farmers regarding modernization of the farming systems, farm organization, technology gaps and natural resource management. Through ATMA, farmers get aware about new technologies and latest researches in the agriculture field. Hence, ATMA is connected to the district research organizations, nongovernmental organizations and agencies linked with agricultural development.[24]

Kisanvani: On All India Radio

AIR has further expanded the scope of agriculture broadcasts with the launch of an exclusive project on Mass Media support to Agriculture Extension entitled 'Kisanvani' from Feb. 2004. The purpose is to keep local farmers informed about the daily market rates, weather reports and day to day information in their respective areas at the micro level. Presently Kisanvani is being broadcast from identified 96 AIR stations across the country.[25]

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22 *Connecting Farmer to Markets,* AGMARKNET (Oct. 17, 2017), http://agmarknet.gov.in.
23 KISAAN CALL CENTER (Oct. 20, 2017), http://dackkms.gov.in/account/KKMSFAQ.aspx.
24 My Agriculture Information Bank, Agricultural Technology Management Agency, AGRI INFO (Oct. 23, 2017), http://www.agriinfo.in/default.aspx?page=topic&superid=7&topicid=1473.
25 Kisanvani, ALL INDIA RADIO (Oct. 24, 2017), http://allindiaradio.gov.in/Profile/Kisanvani/Pages/default.aspx.

Role of Mobile Technology in Empowering Farmers in India

The use of smart phones can overcome the shortcomings of current cellular telephone based services. With broadband Internet, 3G and 4G connectivity and cloud computing, these can provide Web based services and apps using centralized databases, knowledge based systems and GIS/map based systems; and also audio and video based services for disseminating new agricultural technologies and enabling diagnostics of pests and diseases. These apps and services can help farmers to make informed decisions and plan, monitor and evaluate their farm productivity and moreover, the agricultural service providers and agribusiness entrepreneurs can now seamlessly link to markets both for farm inputs and outputs. This can assuredly optimize the entire production and market chain for agricultural commodities while ensuring food safety and quality, thus reducing wastage in every stage of production from input, processing to consumption. New ICTs such as smart phones are also bringing another revolutionary change, i.e. the ability for the multiple actors and stakeholders in agricultural production and market chains to participate, as a community in information management. Each actor, from the input supplier, the farmer, the wholesaler, processor to the consumer generates information, which, when shared improves the efficiencies of the production system and the market chain, thus contributing to innovation.

A recent development is participatory Geographic Information System (GIS) and mapping system in agriculture. Moreover, the high resolution based maps in applications such as Google Maps/Earth and Microsoft Bing that are available in the public domain can be used to map land ownership, soil profiles, watersheds, cropping patterns and profiles at seasonal levels, routes of farm service providers such as for equipment and transport. Furthermore, greater efficiencies in terms of time, cost and quality of services and products can be attained in farming by using these technologies.[26] Furthermore, Indian users comprise about 30% of the total volume of the global phone market, making it the second largest in the specified field. In 2016, India had 720 million mobile phone users, out of which 320 million were rural mobile phone users. This estimate also included 50 million Smartphone users with access to internet. Interestingly, Digital India Initiative was launched in 2015 by Indian Prime Minister Narendra Modi, that aims towards the

26 M.S. Jairath & Hema Yadav, *Role of ICT in Decision Making in Agricultural Marketing: A Case of Arid India,* 67 Indian Journal of Agricultural Economics (2012).

promotion of digital literacy and creation of digital infrastructure for empowering rural communities.[27] Considering this fact, the role of Digital Agriculture needs to be considered within the initiative of Digital India which has led to the enormous rise and development of mobile apps thereby helping existing government schemes, and other agriculture based information to reach the farmers in rural India. Undoubtedly, this digital change is acting as a game changer for Indian agricultural conditions.[28] Let us have a look at some of such agriculture based mobile apps mentioned as follows:

M-Kisan: Kisan Suvidha SMS Portal

M-Kisan SMS Portal for farmers enables all Central and State government organizations in agriculture and allied sectors to give information/services/advisories to farmers by SMS in their language preference about the good agricultural practices. A new feature i.e. Push SMS portal has also been inaugurated and since then nearly 49 crore messages or more than 152 crore SMS's have been sent to farmers throughout the length and breadth of the country.[29]

Crop Insurance App

The app helps farmers to calculate the insurance premium for notified crops and provides information about the cut-off dates. It can also be used to get details of normal sum insured, extended sum insured, premium details and subsidy information of any notified crop in any notified area. It is further linked to its web portal which caters to all stakeholders including farmers, states, insurance companies and banks.[30]

RML Farmer: Krishi Mitr

RML Farmer is a one of its kind agricultural app, where farmers can keep up with the latest commodity and mandi prices, precise usage of pesticides and fertilizers, farm and farmer related news, weather forecast advisory and much more. It also provides agricultural advice and news regarding the government's agricultural policies and schemes. The users can choose from over 450 crop varieties, 1300 mandis, and 3500 weather locations across 50,000 villages and 17 states of India. Eg: Crop Doc helps the farmers in identifying problems that affects their crops at

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27 *How Mobile Apps are Helping Agriculture in Achieving Sustainable Development,* SOURCE TRACE (Oct. 26, 2017), http://www.sourcetrace.com/mobile-apps-for-agriculture.

28 *Ibid.*

29 M-KISAN (Oct. 27, 2017), http://mkisan.gov.in.

30 Crop Insurance Mobile App, DIGITAL INDIA: POWER TO EMPOWER (Oct. 29, 2017), http://www.digitalindia.gov.in/content/crop-insurance-mobile-app.

the right time and suggests corrective actions; Farm Nutri provides general and personalized nutrient recommendations and many more such examples exists.[31]

Krishi Gyan

This app works on a similar aspect as very popular social networking app called Whatsapp communication but it is considered to be even better than that as it doesn't require mobile numbers of individuals to stay connected. Apart from providing general information on farming, this application enables Indian farmers to connect with KrishiGyan experts and moreover, the farmers can ask them questions related to farming and get answers within the application through notifications. The farmers as well as agriculture enthusiasts can also share their answers with each other.[32]

Soochna Se Samadhan (Lifeline India): Knowledge Based Services for Farmers on Phone

This project aims to provide connectivity, content and capability via phone based service. Many poor farmers have been using the service successfully to get solutions from experts for their crop related problems. It is an initiative to use the power of voice as the primary means of information dissemination. It facilitates exchange of information among the marginalised communities such that it helps in improving their quality of life. It also aims to provide connectivity, content and capability via phone based service.[33]

Nokia Life Tools Agriculture Services

The Nokia Life Tools Agriculture service offers consumers a choice of 2 plans. The basic plan, available across India at Rs 30/month, provides daily weather updates and relevant agriculture-related news, advice and tips. The premium plan, at Rs 60/month, will be available in 10 states, including Maharashtra, and provides the closest market prices for three crops chosen by the subscriber, as well as weather, news, advice and tips.[34]

Thus, as a matter of fact, all these mobile apps are helping to reduce transportation, corruption and transactional waste in agriculture and also offer a gateway for resource sharing for farmers.

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31 KRISHAK MITRA (Oct. 30, 2017), http://krishakmitra.com.

32 KRISHIGYAN (Oct. 31, 2017), http://krishigyan.com.

33 *Knowledge Based Services for Farmers on Phones,* M-GOVWORLD (Oct. 31, 2017), http://www.mgovworld.org/topstory/soochna-se-samadhan-lifeline-india-knowledge-based-services-for -farmers -on-phones.

34 Nokia Life Tools Launched Across India, NOKIA (Nov. 4, 2017), https://www.nokia.com/en_int/news/releases/2009/06/12/nokia-life-tools-launched-across-india.

Thus, the apps are helping to boost overall business performance thereby reducing the negative environmental impacts of farming. Now, with a click of a button, farmers can access information regarding weather, dealers, market prices, plant protection, agro advisories, etc. Thus, these advancements will definitely help to bring significant changes in the lives of farmers and in the field of agriculture.[35]

Constraints in the Implementation of Information and Communication Technologies in Agriculture Sector

The most critical constraint in most of the poor and developing countries today is accessing the appropriate agricultural content. There is a need for more availability and openness in accessing data and information, making it 'interoperable' and moreover the development of mobile technology is very crucial to effectively and easily process and present this information in a useful way. In most developing countries, public sector agricultural organizations, including those for research, education and extension are the main repositories of data and information but these organizations, due to their lack of capacities, infrastructure and inadequate investment, are not able to make data and information available, accessible and applicable and also unfortunately they do not contribute enough to enable the effective use of this information for agricultural development. Thus, these organizations urgently need to change their policies and strategies for providing data and information, their key products, and reorganize and restructure themselves to manage and share information effectively and efficiently. Moreover, farmers many a times feels averse to adopting new and improved technology as they think that it might result in losing their traditional methods of cropping practices. They simply do not want to use such systems, even if the cost incurred is negligible. Therefore, the attitude and mindset of farmers needs to be changed first and on the top of that, there is a need to win their confidence and create awareness about the benefits of ICT in agriculture.[36]

In addition to these challenges, the ICTs for agricultural extension projects are implemented in very limited geographical areas while covering few hundred or at maximum thousands of farmers. However, it is also to be noted that, continuous updating and maintaining web portals requires sufficient resources, which are drastically lacking in the poor countries.[37] Thus it can be

35 *Supra* note 22.
36 G.M. Yogisha, et al., *Information and Communication Technologies (ICTs) in India: An Insight Into Progress of Rural Economy,* 40(1) NATIONAL JOURNAL OF AGRICULTURE AND RURAL DEVELOPMENT (2008).
37 *Ibid.*

said that no single institution or organization can succeed in the task of E-powering farmers in rural India and at the same time, scattered and half hearted attempts cannot be successful in meeting the objectives.

So, these are some crucial areas that now needs attention as there is a huge potential for agricultural knowledge services providers but the key question at the moment is who and how this emerging vacuum can be filled? Let us analyze some concrete suggestions given as follows.

Conclusion and Suggestions

There is no denial to the fact that, the Information and Communication Tools (ICT) tools are gaining attraction in agriculture due to their affordability, accessibility, and adaptability; however, an appropriate framework of policy and investment is required to harness its potential in enhancing the rural economy and quality of life of poor farmers. ICTs now must act as an agent for changing agrarian and farmers' life by improving the access of information and sharing of knowledge as ICT tools holds the potential to change the ideas, activities, and knowledge of the farmers so that the farmers feel empowered and can adopt appropriate measures at the time of need. It can be concluded safely that, ICT has immense potential to address the needs of farmers and therefore, if properly implemented, will definitely serve as an important tool for agricultural development in this digital world.

Key Suggestions

Firstly, there is an urgent need to create awareness about the ICT potentials, skills and capacity development programs and its' benefits in the agriculture sector, not just among the public/private agricultural extension service providers and but also among the farmers and other stakeholders in the agricultural extension systems which if implemented properly can bring a revolutionary change in the agriculture sector.

Secondly, in spite of the fact that technological barriers in the rural areas are the major challenges, nevertheless, a better customer care, better service providers reach to the farmers will be of immense help in reaching the farmers thereby limiting the constraints faced by the farmers in accessing the technology. Moreover, customizing the service as per the needs of the small and marginal farmers and a customized solution will go a long way in making the exchange of information a fruitful experience.[38]

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38 L. Ammayappan, et al., *Agriculture Web Portal in India: National Conference of Agricultural Librarians and User Community,* AGRICULTURE INFORMATION MANAGEMENT IN DIGITAL ERA 126 (2014).

Thirdly, the farmers should be efficiently trained in the use of technology and to solve troubles encountered while using the technology and moreover, the Government should also educate the farmers on the role and the benefits of ICT in development of agriculture, so as to boost user's trust on ICT and for that matter, special training programs for the farmers and the communities of various states should be designed to build capacity as well as to bridge information gaps.

Lastly, specialized Indian Institutions that cater to various aspects of agriculture can definitely play a crucial role in designing the necessary applications, databases and services. So, it calls for urgent measures to introduce technologies, such as remote sensing, geographical information systems, bio engineering, satellite technology and the like, to effectively monitor agricultural performance.

TRANSFORMING LEGAL AID THROUGH TECHNOLOGY: A STEP TOWARDS EQUAL ACCESS TO JUSTICE

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Ms. Tanmeet Kaur Sahiwal**

"Injustice anywhere is a threat to justice everywhere."

-Martin Luther King Jr.

Introduction

The quest for justice is as pervading as the air we breathe - it is universal, life-giving and a matter of absolute right. The fight for justice is being fought for as long as we can remember. Justice was one of the hallmarks of the French Revolution;[1] justice was the battle cry of the Indian struggle for Independence.[2] Unfortunately enough, justice still eludes a majority of our citizens. We cannot claim with certainty that our legal fraternity has been able to make an equal, effective and quick rendition of justice a reality.

However, to say that no efforts have been made for the same would also be a fallacy. Humanism and justice have been the hallmarks of the Indian creed.[3] To this end, the right to legal aid has been made elevated to the status of a constitutional right in India.[4] Enacted in pursuance of the recommendations of the Law Commission's XIVth report, Article 39-A was introduced as a Directive Principle of State Policy, to serve as a guiding light for all further legislation and policies relating to legal aid. Article 39-A, read along with Article 14,[5] Article 22,[6] Article 41[7]

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1 Department of Justice, *The French Revolution and the Organization of Justice,* GOVERNMENT OF CANADA DEPARTMENT OF JUSTICE (Aug. 15, 2017, 12:57 P.M), http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/rev1/index.html.

2 Press Information Bureau, Government of India, *Independent India is a Faithful Reflection of The Legacy of Our National Movement:* Vice President, PIB GOVERNMENT OF INDIA (Nov. 5, 2017, 11:27 A.M), http://pib.nic.in/newsite/PrintRelease.aspx?relid=151246

3 MAMTA RAO, PUBLIC INTEREST LITIGATION: A RENAISSANCE IN SOCIAL JUSTICE 338-388 (Eastern Book Company, 2nd Ed., 2004).

4 INDIA CONST. art. 39-A. Article 39-A provides that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

5 *Law Commission of India Fourteenth Report,* MINISTRY OF LAW (Nov. 5, 2017, 11:30 A.M), lawcommissionofindia.nic.in/1-50/report14vol1.pdf.

6 *Supra* note 4, art. 14. Article 14 provides that the State shall not deny to any person equality before the law and equal protection of laws within the territory of India.

7 *Supra* note 4, art. 22. Article 22 provides that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice

and Article 46[8] of the Constitution of India translate the right to legal aid as an effective and indispensable mode of administration of justice in the country. Legal aid is not only a duty of a welfare state and an indispensable facet of a healthy democracy, it is equally essential for the maintenance of the rule of law and establishment of social equality, justice and equity.[9]

In pursuance of the aim set out by Article 39-A[10] of the Constitution of India, the Parliament enacted the Legal Services Authorities Act in 1987. Contrary to the pervading attitude towards legal aid before the enactment of the Legal Services Authority Act, the Act was seen as an attempt towards dedicated and streamlined action to eliminate social inequality and injustice perpetuated due to lack of quality legal aid services.[11] The Act, which came into force on 9th November 1995 enables the establishment of a nationwide uniform network for providing free and competent legal services to the weaker sections of the society.[12] To promote the idea of 'equality of justice on the basis of equal opportunity', the Act provides for the establishment of the National Legal Services Authority (NALSA). The NALSA works in close coordination with the various State Legal Services Authorities, District Legal Services Authorities and other agencies to make the constitutional vision of equality before law a reality.[13] Public awareness, equal opportunity and deliverable justice are the cornerstones on which the edifice of NALSA is based. The principal objective of NALSA is to provide free and competent legal services to the weaker sections of the society and to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats for an amicable settlement of disputes. Apart from the abovementioned, functions of NALSA include spreading legal literacy and awareness, undertaking social justice litigations etc. [14]

The Act thus seeks to 'promote an inclusive legal system in order to ensure fair and meaningful

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8 *Supra* note 4, art. 41. Article 41 provides that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want

9 *Supra* note 4, art. 46. Article 46 provides that the State shall promote, with special care, the education and economic interests of the weaker sections of the people, and, in particular of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of social exploitation

10 DR. S.S. SHARMA, LEGAL SERVICES, PUBLIC INTEREST LITIGATIONS AND PARA-LEGAL SERVICES 62-75 (Central Law Agency, 2nd ed., 2006).

11 *Supra* note 4.

12 *Supra* note 3.

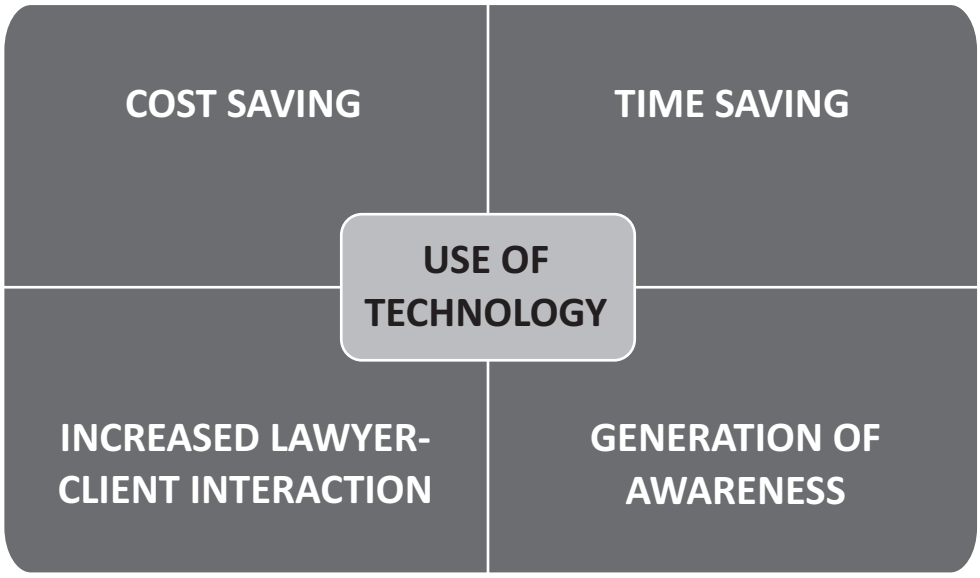
13 *Introduction,* NATIONAL LEGAL SERVICES AUTHORITY (Oct. 20, 2017, 5:13 P.M), http://nalsa.gov.in/content/introduction.

14 *Supra* note 1.

justice' by providing free legal aid to the marginalized and disadvantaged in society.[15] Effective and quality legal aid is no longer only a facet of law but rather a movement to provide justice to the underprivileged through constant co-operation at the individual, governmental and non-governmental level.[16]

Legal Aid and the Role of Technology

The revolution brought about in our lives by technology has been unprecedented and undisputed. The advancement in technology has also altered the way the legal fraternity functions. Today, all information and communication technology enabled devices have become an important part of the legal research, legal education, legal profession and law per se.[17] In present times, a computer, access to the internet, mobile applications for legal research are all minimum tools present in every advocate's office. However, this adaptation of technology has not been witnessed much in the non-profit legal services sector.



15 The Legal Services Authorities Act, 1987, No. 39, Acts of Parliament, 1987 (India).
16 *Vision Statement,* NATIONAL LEGAL SERVICES AUTHORITY (Oct. 20, 2017, 5:13 P.M), http://nalsa.gov.in/content/vision-statement.
17 *Supra* note 10.

Lawyer-Client Interaction

With the proper use of technological aids, the lawyer-client interaction can be conducted without the need for actual physical presence. This means that not only will the client benefit by not having to take time off work, the lawyer also stands benefited in terms of both time and money.[18] The need to travel distances can be reduced, and this can prove to be an invaluable asset especially where the travel is to and fro urban and rural areas. Where a lawyer providing pro bono services has to travel for maybe two hours to reach a community centre for providing services, his/her enthusiasm is bound to be affected by the negative. This can be achieved not only through video conferencing with the aid of the internet, but telephonic conversations can also serve the purpose to a certain extent. If not in totality, the idea can at least substantially:

1. Help the client/aggrieved person in being directed to the right person, place and remedy, and
2. Enable the lawyer to have basic knowledge about the client's problem which s/he can use to conduct a preliminary study.

Cost Reduction and Time Management

The inculcation of a technologically spearheaded approach in matters of legal aid can alter substantially both monetary as well as non-monetary matters related to legal aid.

If we talk specifically of the availability of legal aid services to the needy and economically disadvantaged, technology has the probability of playing the most vital role in ensuring the availability of the same at a mass level. Technology can act as the bridge to cover the gap of justice between the haves and the haves not of society. The use of technology in matters of legal aid can not only help in addressing time constraints, communication gaps and lack of awareness about laws and legal aid services but can also help to bridge the gap between the financial needs of corporate and lawyers on one hand and the financial inability of those seeking legal aid services.[19] The first roadblock to equal justice arises with the non-availability of legal aid to one and all. Apart from the methodical pitfalls present within the system, the difficulty in access to legal aid services is the major deterrent to equality of justice.

Technology can be utilized for the performance of low-value but time-consuming chores.[20] For

18 T Du Plessis, *Competitive Legal Professionals' Use of Technology In Legal Practice and Legal Research* 4 PER (2008).

19 *Ibid.*

20 Margaret, *The Use Of Technology To Expand Access To Justice, By The Legal Services Corporation,* LEGAL DESIGN LAB (Nov. 1, 2017, 10:15 A.M), http://www.legaltechdesign.com/blog/2014/01/13/the-use-of-technology-to-expand-access-to-justice-by-the-legal-services-corporation/.

instance, tasks like scheduling of appointments, managing documents, documenting bills and other forms can be relegated to the hands of technology to save time and thereby increase the value-for-money out of the funds for legal aid services.

Technology can also come to our aid in the training of para-legal and legal staff. One training session can be relayed simultaneously at several centres.[21] This practice can not only help us save time and money but can also become a source of instantaneous reference, if need be.

Remote Assistance

Legal aid has increasingly turned to websites which are specifically designed for to be user-friendly and informative. They are a marked improvement from the earlier interface which was simply a virtual representation of the already physically available literature. However, now the websites which are being put to use are categorical, informative, user-friendly and accessible. The websites purported to aid in matters of legal aid are now incorporating various tools which are easy to operate and use for both the operators as well as the users.[22] Operators who are not trained in technical matters can also easily operate and update the websites as can the users. Thus, legal aid websites are shifting from being purely static to dynamic.

Moreover, multimedia content is also being adapted for use by smartphones, which is the demand of the day. Every other person as of the present is more likely to access the internet from his or her internet enabled smartphone rather than a computer system.[23] Keeping this in mind, websites have to be moulded in accordance with the needs of the mobile phones. In addition, specific applications can also be developed in order to make the availability of information and legal aid services a matter of utmost convenience. The sole catch here is to ensure that the information is constantly and regularly updated.

Another method through which legal aid can tap and utilize technological advancements is through the introduction of remote access services.[24] For instance, the use of instant messaging applications can be made to assist users to find required sources. This will not only ensure that

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21 Thomas Spraggs, *Enabling Access to Justice Through Technology,* SPRAGGS & CO. (Nov. 4, 2017, 4:55 P.M.), https://www.ourcommons.ca/Content/HOC/Committee/.../SpraggsThomasL-e.pdf.

22 *Julia Gordon, Equal Justice and the Digital Revolution,* CENTRE FOR LAW AND SOCIAL POLICY, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION (Nov. 2, 2017, 3:30 P.M), https://www.clasp.org/sites/default/files/public/resources-and-publications/archive/0110.pdf.

23 Robert Bourns, *Capturing Technological Innovation in Legal Services,* THE LAW SOCIETY OF ENGLAND AND WALES, (Nov. 3, 2017, 2:30 A.M), file:///E:/Documents/Tanmeet/PhD/Publications/RGNUL%20Legal%20Aid/capturing-technological-innovation-report.pdf.

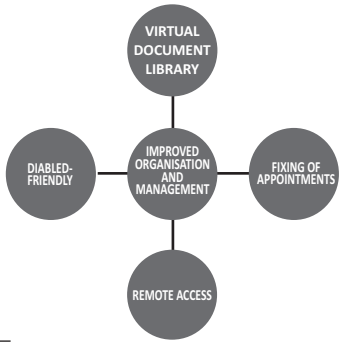
24 *Ibid.*

the users have ease of access but will also generate a sense of kinship with an informed operator at the other end. The trained operator can then easily communicate with clients who might not otherwise be so forthcoming with information. Such communication need not be restricted only to information about lawyers and how and when to contact them, but can also include dissemination of information about basic legal procedures like filing, forms and available remedies.

The remote services need not always have to be instant either. In case of non-availability of a trained specialist or in case of the non-availability of a ready solution, the user could also leave a message at a dedicated portal and receive a reply later on.[25] Enabling such remote assistance would contribute to saving time and energy at both ends. Further, it can bridge the rural-urban divide and ensure the availability of pro bone legal assistance even in far-flung areas which usually remain excluded from beneficiary schemes.

Furthermore, appropriate and in – detail legal information, advice and representation can be made available through the medium of internet.[26] This can include- Acts, legal literature, techniques for self-drafting by litigants in minor matters. In the age where almost every person possesses a smartphone, it is not inconceivable to think of the generation of a single point, unitary 'Smart' platform for the providing of legal aid services

If successful and efficient, the system of virtual and remote assistance can further be expanded to materialize the idea of a 'virtual legal aid clinic'. The virtual clinics can lend flexibility and ensure continuity of legal aid services beyond physical and temporal barriers. Such clinics, if unable to provide complete necessary information can then step into schedule appointments for clients to visit legal aid clinics.



25 James E. Cabral, et. al., *Using Technology To Enhance Access To Justice,* 26 HARVARD JOURNAL OF LAW & TECHNOLOGY 1 (2012), (Nov. 5, 2017, 12:15 P.M.), jolt.law.harvard.edu/articles/pdf/v26/26HarvJLTech241.pdf.

26 *Supra* note 21.

Improved Organization and Management

The vast scope that technology provides for positively enhancing the quality of legal services has till date not been tapped to its full measure. Of all the facets of justice which are focused upon, the role of technology in the access and securing of justice has been the point least focused upon.[27]

Technological aids present us with the scope of facilitating greater access for clients seeking to connect with lawyers, better case management, enhanced communication, and new opportunities for outreach, a better medium of training for advocates and volunteers, and greater connectivity, amongst a plethora of other benefits.[28] Technology enables us to overcome the barriers which block the availability of justice for one and all.

Virtual Document Library

Technology can speed up legal aid mechanisms not only in matters of advice and appointments but can also help in certain other incidental matters. For instance, a virtual document library can be created which can be accessed by the client as well as the lawyers who work on the case.[29] Further, provisions like e-filing can also be made a reality and utilized in addition to the above mentioned services. Technology has the potential of providing and serving as a potential platform for all legal aid services which might be required by clients.

Social Media and Generation of Awareness

Last but not the least, social media also has the potential to further legal aid services in a manner unprecedented till now. Akin to how social media is being captured by private individuals and organizations for their promotion and spread of popularity, similarly legal aid societies and clinics can generate awareness about their presence and the services they offer through the platform of social media. Facebook, YouTube and Twitter ensure accessibility to a majority of the masses and have the ability to cut through societal divisions and reach out to all strata's of society. If such social media platforms are utilized by legal aid clinics for generating awareness

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27 *Technology Initiative Grant Program,* LEGAL SERVICES CORPORATION (July 20, 2017, 3:35 P.M.), http://www.lsc.gov/grants-grantee-resources/our-grant-programs/tig.

28 *Report of The Summit on the Use of Technology to Expand Access to Justice,* LEGAL SERVICES CORPORATION, (Nov. 2, 2017, 3:45 P.M), https://www.lsc.gov/sites/default/files/LSC_Tech%20Summit%20Report_2013.pdf.

29 Roger Smith, *Law, Technology and Legal Aid Administration,* LAW, TECHNOLOGY AND ACCESS TO JUSTICE (Nov. 5, 2017, 11:46 A.M), https://law-tech-a2j.org/legal-aid-administrations/law-technology-and-legal-aid-administration/.

and providing services it will ultimately lead to the building of support, trust and confidence amongst the masses.

Equal Justice for the Disabled

The availability of legal aid services in a remote manner will prove to be a boon for the disabled.[30] It is a fact which cannot be denied that the disabled are often at the receiving end of lack of empathy. If legal aid services can be provided remotely, then they can be assured of the equality of opportunity for justice, at the ease of their comfort zones. However, it must be ensured that the same technologically aided processes don't become a bane for the disabled. For instance, a person with a certain hearing disability must be not be rendered incapable of availing technologically provided legal aid services. In the discussed instance, the website or application should ensure that it incorporates a text-to-speech function or a read out loud function. Similarly, other disabilities should also be taken into consideration while designing such tools and necessary modifications made for suitable use by all classes and categories of persons.

Apart from the measures discussed above, several other measures for the enhancement of effective delivery of legal aid services via technology can be adopted. It is not far-fetched to envision the availability of information, apply for legal aid services, and consult a lawyer – all through technology.[31] The end result of any of such measures shall always be one- a further step towards equality in access to justice.

Conclusion

Although a multi-faceted approach is required to make equal access to justice available to everyone, the significant and vital function that technology can perform for imparting efficacy to legal aid services needs to recognized, evaluated and developed so that the potential of technology in becoming an indispensable part of the legal justice mechanism can be utilized. As stated by the Hon'ble Apex Court in ***Hussainara Khatoon v. State of Bihar*****,** the availability of legal services to the needy is essential for any 'reasonable, fair and just procedure'. Keeping this end in mind, it is critical to wake up to the idea that technology can significantly complement the role of legal aid advocates and volunteers. Justice and efficiency in imparting justice can be made a real availability not only by having more money at our disposal but rather also by incorporating a different outlook. Not only can technology aid in making the access to justice a reality for the masses, it can also serve as a climbing step towards ensuring equal justice for one

30 *Supra* note 18.
31 *Supra* note 20.

and all. Half of the justice is denied upon non-availability of legal aid services or inefficient legal aid services. Technology has the prospective of bridging that gap bringing us closer to our goal of equal justice for all.

Technology provides us with a base for inculcating a culture of information sharing with ease and accuracy. Though technology has pervaded all spheres of our lives and with lightning speed, unfortunately, this pace of advancement of technology has not been utilized for our benefit especially in the non-profit and benefit schemes sector. The glaring absence of the use of technology is more than visible in legal aid clinics and legal aid services. Given that there is a vast pool of young lawyers and paralegal volunteers, it would be a travesty to not utilize technology in generating the maximum out of their services.

The legal fraternity can only begin to imagine the positive impact the inclusion of technology can have on legal aid services. However, along with the shift to technologically aided legal aid services, a few precautions have to be kept in mind. The precautions can be enumerated as under-

1. with the introduction of technologically aided legal aid services, traditional access to such services cannot be completely done away with;[32]
2. the application of legal aid services through various tools of technology can only be successfully implemented with concurrent awareness, education and support;[33]
3. a very important safeguard which needs to be kept in mind while making use of technology to further legal aid is the fact of illiteracy and limited adeptness at English of the masses; accordingly translations and conversions should be

32 *Supra* note 10.
33 *Ibid.*

made available lest the entire exercise turns to futility.

4. a major precaution which needs to be kept in mind is the safeguarding of the privacy of the client;[34]

It is not without the guarantee of authenticity and integrity that technologically aided legal aid services can be made a viable option and a reality in the country.

The negation of the uses of technology in advancing the cause of justice is in itself a travesty of the cause of equal justice. The non-utilization of technology and the digital revolution is a loss for not only clients but also for the organizations involved. The facilitation provided by technology has the capability of not only making access easier and convenient for users and clients but also offers a host of benefits for those running the legal aid clinics themselves. For instance, interaction within the staff of the clinic, recruitment of new volunteers and staff, document storage and hosting etc can all be streamlined and save fiscal and temporal energy of all parties involved. There is thus an urgent need to realise and become aware of the potential that technology provides for catapulting effective and equal justice into the mainstream for the masses.

34 AIR 1979 SC 1369 (India).
35 *Supra* note 4.
36 *Ibid.*
37 *Ibid.*

ROLE OF ICT's AND THE INTERNET IN RURAL ECONOMIC DEVELOPMENT ADMINISTRATION IN INDIA: A LEGAL STUDY

Dr. Jyoti Rattan*

Introduction

Secrecy was the hallmark of Government functioning earlier where people were hardly aware of the intricacies of Government functioning and hence accountability on the part of the Government as such, was difficult. However, Globalization and e-revolution have empowered citizens to know about Government functioning, participate in decision making and demand accountability from their Governments.

As was also admitted by the World Bank, that "Globalization of information- satellite, TV, Internet, phone, and fax enhances citizens' awareness of their rights, obligations, options, and alternatives and strengthens demands for greater accountability from the public sector."[1]

With the adequate legal support of relevant laws and without any sort of discrimination and with many governance advantages inherent in the new technology-based administrative systems for all the citizens, especially the common man, under this new system, Government acts in a responsive manner and provides public services more efficiently. Earlier, many developing countries suffered from not up to the mark and often dysfunctional governance systems including rent-seeking and malfeasance, inappropriate allocation of resources, inefficient revenue systems, and weak delivery of vital public services.[2] Accordingly came, the technology-driven systems, such as Alternative Service Delivery Arrangements (ASDA) that started in the early 1990s which involved changes in the form of existing public sector organizations into a new form of organization. These arrangements are defined as "the provision of public services through arrangements other than the traditional departmental structure; a wide variety of approaches are being used both within and outside the public sector."[3] Significantly,

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1 ANWAR SHAH, PUBLIC SERVICES DELIVERY: PUBLIC SECTOR GOVERNANCE AND ACCOUNTABILITY, Washington DC: World Bank. © World Bank, (2005), (Oct. 1, 2017, 10:51 PM), https://openknowledge.worldbankOrg/handle/10986/7424 License: CC BY 3.0 IGO.

2 Ibid.

3 GERRIT VAN DER WALDT, MANAGING PERFORMANCE IN THE PUBLIC SECTOR: CONCEPTS, CONSIDERATIONS AND CHALLENGES, 103, (SEPT. 18, 2018, 09:40 AM), https://books.google.co.in/books?id=vlXx-6GSNXQC&pg=PA103&lpg=PA103&dq=the+provision+of+public+services+through+arrangements+other+than+the+traditional+departmental+structure;+a+wide+variety+of+approaches+are+being+used+both+within

these arrangements have changed the methods of delivery of services by the Government to people. Some of these alternatives are frequently used in the past and are known to the public, for example, public corporations, mixed enterprises, contracting out, and privatization. However, other alternatives, such as service agencies, partnerships, employee takeovers, and single window delivery mechanisms, were not used frequently in the past.

Significantly, this was also suggested by the United Nations Department of Economic and Social Affairs in a Report [4] that "Evidence-based approaches to capacity-building along with the adequate use of technology, particularly the Information and Communication Technologies (ICTs) in public service delivery, can be used to make social accountability stronger and sustainable, and vice-versa."It is rightly observed by a jurist that "...use of ICTs by theGovernment integrates people, processes, information and technology in the service of achieving the governance objectives."[5]

ICTs, Internet and Law

To create order in cyberspace and to enable netizens to use ICTs and Internet safely, about two decades ago, a branch of jurisprudence i.e., Cyber Law emerged when Model Law on E-commerce was adopted in 1996 by United Nations Commission on International Trade and Law (UNCITRAL). It was further adopted by General Assembly of United Nations by passing a resolution on 31st January 1997. India being a signatory to this Model Lawenacted the Information Technology Act (IT), 2000 and also revised its national laws as per the said model law.This new branch of jurisprudence has given a boost to e-commerce and e-governance all over the globe as well as in India. In India, Sections 4-11 of the IInformation Technology Act, 2000, have enabled the Government to use ICTs in development of administration. However, Section 9 of the Act appears to be a hurdle in this regard as it provides that no one has a right

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+and+outside+the+public+sector.&source=bl&ots=aDq0hPhRlN&sig=zgNr8QJrhQnCEvVf2KBAAfok0no&hl=en&sa=X&ved=0ahUKEwiFhvDHucXaAhXGwI8KHXemDqEQ6AEINDAB#v=onepage&q=the%20provision%20of%20public%20services%20through%20arrangements%20other%20than%20the%20traditional%20departmental%20structure%3B%20a%20wide%20variety%20of%20approaches%20are%20being%20used%20both%20within%20and%20outside%20the%20public%20sector.&f=false.

4 Report of the Expert Group Meeting on *Engaging Citizens to Enhance Public Sector Accountability and Prevent* Corruption in the Delivery of Public Services, held at the United Nations Headquarters in Vienna, Austria on 7-8 July 2011, (Sept. 13, 2017, 03:01PM), http://www.slideshare.net/undesapublicadmin/engaging-citizens-to-enhance-public-sector-accountability-and-prevent-corruption-in-the-delivery-of-public-services-report-of-theexpert-group-meeting accessed on 23.05.2015.

5 Heeks, Richard as quoted inVAKUL SHARMA, INFORMATION TECHNOLOGY, LAW AND PRACTICE, 39 (2 e.d., 2010).

toinsist that any Ministry or Department of the Central Government or the StateGovernment or any authority or body established by or under any law or controlled orfunded by the Central or State Government should accept, issue, create, retain andpreserve any document in the form of electronic records or effect any monetarytransaction in the electronic form.[6]

ICTs, Internet: Alternative Service Delivery Arrangements for Rural Development Administration in India

It is heartening to note that ICTs and the Internet have played a commendable role in ASDA in every country including India. At the grassroots level in India, ICTs and the internet nowadays are used frequently for rural development administration. A wide variety of technologies are used by the Union Ministry for Rural Development. Clearly indicating a shift in the rural development strategy in India, the Union Government has accepted that the ICTs applications that are implemented in various parts of rural India and best projects such as e-Chopals, e-Seva, Bhoomi, Telemedicine projects, and e-procurement etc. that evolved overthe years have become role models in ICTs initiatives.[7]

Significantly, in 2013 Centre On Integrated Rural Development For Asia And The Pacific[8] conducted International Training Programme where main objectives were: to examine the linkages between policy and practice in development, particularly in rural development; review the current use of the ICTs in rural development; and to identify the potential areas, where ICTs related applications can play an effective role.

Practically speaking, for getting the benefit of ICTs in ASDAs in rural India three things are of utmost importance: ICTs connectivity, the capacity of the villagers and delivery of content. Regarding connectivity, it is heartening to note that rural India is well connected through telephones though not to such an extent by the internet. For example, at the beginning of 2011, there were 282.29 million rural connections (most of which were wireless), as compared to a mere 4.84 million (only landline) phones in the year 2000.[9] Further, in small towns and

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6 Jyoti Rattan, *E-Govrernance: International and national Prespective with Special reference to India,* 52$53, Punjab University Law Review, 52-53 (2011).

7 http://rural.nic.in/sites/downloads/latest/Training_prg_4_13march_indonesia.pdf (Sept.19, 2017, 03:09 PM).

8 CIRDAP-NIRD Collaborative International Training Programme on "Results Based Management: Performance Indicators Monitoring and Evaluation" 4-13 March 2013, Indonesiahttp://rural.nic.in/sites/downloads/latest/Training_prg_4_13march_indonesia.pdf (Sept. 19, 2017, 04:01 PM).

9 Archana G. Gulati, *Empowering India: Opportunities in rural telecommunications,* (Sept. 14, 2017, 10: 13 AM) http://www.tele.net.in/index.php?option=com_k2&view=item&format=pdf&id=9392: empowering-indiaopportunities-in-rural-telecommunications-archana-g-gulati-joint-administrator-finance-uso-fund-&-Itemid=43.

villages, some villagers access the internet regularly in shared spaces (public kiosks, offices, educational institutions etc.). However, nowadays the smartphone is an important tool for individual internet access hence; mobile telephony has brought about improved connectivity in Rural India. Thus every information is in their pocket all the time which can be easily accessible to them.

Significantly, efforts are made both by the Central Government as well as the State Governments to use ICTs in ASDA in rural development administration. Let usanalyze these efforts:

Efforts of the Central Government to Use ICTs in ASDA in Rural Development Administration

Digital India andRural Development Administration: Digital India is the latest initiative of Government of India to integrate the Government departments and the people of India. Its aims is to provideGovernment services to citizens electronically by reducing paperwork. The initiative also includes aplantoconnectruralareaswithhigh-speedinternetnetworks. Digital India has three core components. These include the creation of digital infrastructure, delivering services digitally and digital literacy. The Digital India Bharat Net has Covered 2,50,000 Gram Panchayats. Further, basic services which are covered are birth, death, marriage, caste certificates educational services, healthcare services, telemedicine, financial, insurance and pension services. It is commendable to note that it has the plan to cover uncovered 55,649 villages out of over 6,00,000 villages in India. Detailed Project Report (DPR) for 4,752 uncovered villages in the Himalayan States (Jammu & Kashmir, Himachal Pradesh, and Uttarakhand) and 2,138 uncovered villages in the Western States (Rajasthan, Gujarat, Punjab and Haryana) is being finalized.[10]

Even before the initiation of Digital India, the various ministries and departments of the Central Government were implementing initiatives under ICTs and E-governance but on a smaller scale. However, for the last almost two years, the Government has given an increased impetus to various initiatives under the Digital India mission. Let us review various initiatives by the Ministry of Rural Development and Ministry of Agriculture and Farmer Welfare in this regard.

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10 *India in e-Governance Development Index,* NATIONAL E-GOVERNANCE DIVISION, (Sept. 14, 2017, 11:45 AM), http://www.digitalindia.gov.in/writereaddata/files/whats_new_doc/Presentation-UNDP-26.08.2015.v5.pdf.

a) ICTs and Ministry of Rural Development

In India, Ministry of Rural Development has used ICTs in rural development administrationas a multipronged strategy. Let us analyze mainly two initiatives:

The Digital India Land Records Modernization Programme (DILRMP): It was launched by the Government of India in August 2008, with main objectives of proper management of land records, enhancing transparency in the land records maintenance system, minimizing scope of land/property disputes, and facilitating moving eventually towards guaranteed conclusive titles to immovable properties in the country. This programme mainly involves computerization of all land records including mutations, digitization of maps and integration of textual and spatial data, survey/re-survey and updating of all survey and settlement records including creation of original cadastral records wherever necessary, computerization of registration and its integration with the land records maintenance system, development of core Geospatial Information System (GIS) and capacity building. Significantly, now there is a single window to handle land records (including the maintenance and updating of textual records, maps, survey and settlement operations and registration of immovable property).

Further it is based on the two important principles i.e., "mirror principle, which refers to the fact that cadastral records mirror the ground reality, and the curtain principle which indicates that the record of title is a true depiction of the ownership status, mutation is automated and automatic following registration and the reference to past records is not necessary."[11]

b) Various Policies and Programmesof Ministry of Rural Development:

A number of policies and programs were started by the Ministry of Rural Development for rural development administration. The Ministry uses ICTs either for implementation of such policy or programs or for its monitoring. Important of these programs are: Mahatma Gandhi National Rural Employment Guarantee Act (MANREGA), Aajeevika - National Rural Livelihoods Mission (NRLM), Deen Dayal Upadhyaya Antyodaya Yojana - DAY for uplift of urban, rural poor, Swarnjayanti Gram Swarojgar Yojana (SGSY), Indira Awaas Yojana (IAY), National Social Assistance Programme (NSAP), Indira Gandhi National Widow Pension Scheme (IGNWPS) and Indira Gandhi National Disability Pension Scheme (IGNDPS).[12]

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11 Digital India Land Records Modernization Programme- MIS 2.0, DEPARTMENT OF LAND RESOURCES, MINISTRY OF RURAL DEVELOPMENT, GOVERNMENT OF INDIA, (Oct. 3, 2017, 06:30 PM).

12 Indira Gandhi National Disability Pension Scheme2009 was launched under NSAP where the GOI has approved a pension of ₹ 200 per month, per beneficiary to be provided to disabled persons with severe or multiple

• Mahatma Gandhi National Rural Employment Guarantee Act, 2006: It was enacted to ensure a minimum level of livelihood security in the rural areas by providing one hundred and eighty days guaranteed wages employment to every rural household whose adult member volunteers to do unskilled work. As per the Government report in the financial year 2014-15, roughly 3.60 Crore households were given employment and for 121.25 Crore persons,days of employment were generated. [13]

• Aajeevika - National Rural Livelihoods Mission (NRLM):It was launched by the Ministry of Rural Development (MoRD), Government of India in June 2011. This mission having investment support of the World Bankwas started with the aim of creating efficient and effective institutional platforms of the rural poor enabling them to increase household income through sustainable livelihood enhancements and improved access to financial services. Its main objective is to cover 7 Crore rural poor households, across 600 districts, 6,000 blocks, 2.5 lakh Gram Panchayats and 6 lakh villages in the country through self-managed Self Help Groups (SHGs) and federated institutions and support them for livelihood collectives in a period of 8-10 years.[14]

• Deen Dayal Upadhyaya Antyodaya Yojana- DAY for the uplift of urban, rural poor:It was announced by the Government in Sep 2014 for urban and rural poverty alleviation during 2014-15. Significantly,for this Yojna Rs.1,000 cr was sanctioned out of whichRs.500 cr will be spent on skill development of over 5,00,000 urban poor. It was realized by the Government that "If India is to emerge as the manufacturing base to meet global needs, the only certain way is to empower every youth of the country with the necessary skills. Skill development has multiple outcomes including enhancing employment opportunities, stimulating economic growth and promoting self-worth of beneficiaries."

• Swarnjayanti Gram Swarojgar Yojana: It is an integrated schemeintroduced on April 1, 1999,forproviding opportunities for self-employment to therural poor. The objective of SGSY is

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disabilities between the age group of 18-64 years belonging to BPL families http://rural.nic.in/netrural/rural/sites/downloads/annual-report/Annual_Report_2014_15_English.pdf (Sept. 30, 2017, 10:44AM).

13 Shankar Chatterjee, *Development through MGNREGS: Cases from Nadia district of West Bengal,* 72, IRA-INTERNATIONAL JOURNAL OF MANAGEMENT & SOCIAL SCIENCES, 72, 76 (2016) (Sept 24, 2017, 10:50 PM), http://www.panchayatgyan.gov.in/documents/30336/0/case+4-+Nadia+panchyat.pdf/3c24 5edf-1250-4b52-9c785e9c515f05af .

14 Welcome to DEENDAYAL ANTYODAYA YOJANA – NRLM, (Oct. 3, 2017, 01:12 PM), http://aajeevika.gov.in/content/welcome-deendayal-antyodaya-yojana-nrlm.

to ensure that the assisted poor families have a monthly income of at least ₹ 2000 so as to bring those families above the poverty line in three years.The assisted families Swarojgaris maybe individuals or Groups (Self Help Groups). Emphasis will be on the group approach. Under this Yojna the Block and Panchayats should give more attention towards the formation of self-help groups. SGSY will particularly focus on the most deprived groups among the rural poor. Accordingly, the SC/STs will account for at least 50% of the Swarozgaris, women for 40% and the disabled for 30%.At the Block level, at least half of the groups will be exclusively women groups. [15]

- Indira Awaas Yojana(IAY): It was a comprehensive scheme started to meet the shortage of housing in rural areas. Since its adoption, it is providing assistance to BPL families who are either homeless or have inadequate housing facilities for the construction of the safe and durable shelter. [16]

ICTs in Implementation of These Programmes

To ensure efficiency and transparency in the implementation of these schemes and to provide easy access to all the citizens in rural India, several initiatives at various levels (National, State, District and Block levels) have been taken by way of strengthening the ICT infrastructure in the Ministry. The Ministry has its internet portal for outside users which is a single web access point for around 150 websites of the rural domain. The two Departments of the Ministry have separate websites for Department of Rural Development and Department of Land Resources. The portal provides details of all programmes of the Ministry, their physical and financial performance, the release of funds from the Ministry of Rural Development. The details of rural household survey BPL Census 2002 up to individual level are hosted on the website.

Apart from this, the Ministry has an Intranet Portal to strengthen e-governance. It provides access to all day to day activities. The portal works on authorization matrix after the person is logged in. Further, the File Tracking System and Biometric attendance monitoring system are being implemented in the Department of Rural Development successfully. As part of National e-Governance Programme (NeGP), e-file system has been introduced during the year 2011-2012 to improve efficiency, consistency, and effectiveness.

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15 Salient Features of Swarnajayanti Gram Swarozgar Yojana (SGSY), (Oct. 4, 2017, 02:17 PM), http://coochbehar.nic.in/HTMfiles/SGSY.html.

16 *Indira Awaas Yojana,* MINISTRY OF RURAL DEVELOPMENT, DEPARTMENT OF RURAL DEVELOPMENT KRISHI BHAVAN, GOVERNMENT OF INDIA, (Sept. 21, 2017, 07:11 PM), http://iay.nic.in/netiay/IAY%20revised%20guidelines%20july%202013.pdf.

Softwares involving local language were developed for MGNREGA, IAY, PMGSY and, NSAP. MGNREGAsoft (a mobile-based software) has introduced the concept of ICTs for masses, transparent system, exchange of data among various other applications etc. The System has changed the way of monitoring from numbers to names, local to National, English to local languages and consolidated figures to transactions. The system provides G2G, G2B,G2C, C2G services through the portal. The system has around 12 crore job cards having names of around 26 crore workers with the details such as time for job demand made, allocation of the worksite and the payment made. All job cards, muster rolls, labour budgets and social audit proceedings are available on the first page of the portal. The MGNREGAsoft has also received many awards in the past.

Significantly, under the National Rural Livelihoods Mission (NRLM), i.e., Ajeevika, ICTs have played a key tool for implementation and monitoring of the Programme. The Department is in consultation with Unique Identification Authority of India (UIDAI) and Controller General of Accounts (CGA) alongwith other experts in this field for convergence. Under Ajeevika (NRLM), an ICT structure of e-NRLM is being designed including a comprehensive MIS for the programme. A web-enabled transaction platform for financial management would also be developed.

Similarly, AWAASsoft is the Management Information System designed for Rural Housing Scheme of the Ministry. The system is hosted on the site. All information about different components of Rural Housing is available on the portal and the stakeholders can access the portal and can view/enter the information according to their role. Recent important steps in this regard are: an Electronic Fund Monitoring System (eFMS) which has been set up to speed up payment of wages to workers employed on schemes under the Mahatma Gandhi National Rural Employment Guarantee Act. eMMS Electronic Muster Measurement System (eMMS) has been introduced using mnregasoft wherein every day the attendance is taken in the mobiles and put in the public domain. Ministry has also introduced Direct Benefit Transfer (DBT) in various districts from 1st June 2013 onwards.

Further, a significanteffort has been made by the Ministry to overcome the problem of fake muster rolls and ghost workers, by introducing Electronic Muster Roll (e-MR). E-MRs are pre-printed muster rolls digitally populated with the names of the workers who demand works under MGNREGA.

ICTs and Monitoring System of Ministry of Rural Development: In order to ensure effective implementation of various programmes at the District, Block, Gram Panchayat and Village levels, Ministry of Rural Development and the State Governments have started reporting the progress so that action can be taken well in advance for mid-course corrections. The Monitoring Division of the ministry has streamlined the data processing system and the online Monthly Progress Report is received by 10th of every month. These reports provide the State-wise and Programme-wise performance of the schemes. District-Level information on the performance of various schemes is also generated and disseminated to all concerned. About 600 District RuralDevelopment Agencies (DRDAs) are submitting their progress reports of rural development programmes namely SGSY, NRLM, IAY, MGNREGA.Further, the State Governments/ Union Territories and DRDAs were requested to take action to ensure that reportsprepared by the DRDAs and implementing agencies are sent through the electronic medium.[18]

A significant suggestion to avoid corruption and to ensure proper utilization of fund by these programmes is that Governments should furnish Utilization Certificates to the effect that the funds have been utilized for the purpose for which these were sanctioned and no diversion has taken place. The auditing of accounts and reports thereon are a pre-condition for the release of the second and the subsequent installments. State Governments have been advised to ensure the authenticity of Utilization Certificates.[19]

Performance Review Committee: The Ministry has constituted the Performance Review Committee (PRC) under the chairmanship of the Secretary. The PRC has the representation of State Secretaries,in-charge of rural development, Panchayati Raj,Public Works Department and Social WelfareDepartment. During the year 2011-12, the first meeting of PRC of all the States/UTs was held in New Delhi under the chairmanship of Secretary (RD) where the Committee reviewed the performance of various programmes being implemented in States/UTs, and appropriate recommendations were made for corrective action, wherever found

17 Annual Report 2013-2014 of Ministry of Rural Development(Oct. 1, 2017, 11:57 AM), http://rural.nic.in/netrural/rural/sites/downloads/annualreport/Annual_Report_2013_14_English.pdf.
18 *Ibid.*
19 *Id.*

necessary.[20] However, a study conducted by the Centre for Research and Innovative Science Policy, Hyderabad showed that though many initiatives have benefited rural women by way of access to new information and new employment opportunities, they still face a number of constraints as they are not well sensitized to ICTs.

Initiatives of Ministry of Agriculture and Farmers Welfare

AGMARKNET: This project is approved by the Department of Marketing & Inspection (DMI), Ministry of Agriculture, and Government of India. The main objective of this project was to protect the interest of the farmers and to enable them to know the actual price and stock level of their products in the market or mandi before they come to sell.Now, various State agricultural marketing boards (apmcs) have taken the initiative to keep the farmer informed through a website. Agmarknet currently covers 73 markets across India, which will be extended to 670 mandis and 40 agricultural boards.

The website links to various apmcs and mandis across the country, allowing the user to check out the delivery position and prices of various commodities and vegetables. Significantly, commodities are divided into seven groups - cereals, pulses, fibers, spices, fruits, vegetables, and oilseeds. Surfers can make a search by market or by commodity. The main benefit of this project is it's the potential to reduce prices paid to intermediaries and bring benefits to a wide cross-section of farmers and consumers.[21]

Efforts of the State Governments to use ICTs in ASDA in Rural Development Administration

Apart from efforts of the Central Government, the State Governments have also started various e-projects for rural administration development. Significantly, most of the e-governance projects started in India are rural-centric rather than urban-centric which are to be used by specific community residing in a municipal area, town, tehsil or district. It is commendable to note that in such E-governance projects user-friendly technology having local language is used for interaction. Further, most of these projects are financed by the local Government. A few such projects are:

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20 *For Internet Savvy Farmers,* DOWN TO EARTH, (Sept. 26, 2017, 08:42 PM), http://www.downtoearth.org.in/news /httpwwwagmarknetnicin-14841.

21 Gayatri, *How to get land records in Karnataka* (Pahani/RTC), BHARAT ESTATES , (SEPT. 19, 2017, 11:59 AM), http://www.bharatestates.com/blog/bhoomi-karnataka-land-records-in-karnataka/.

Gyandoot (M.P): Gyandoot is an intranet in Dhar district of Madhya Pradesh, connecting rural cybercafés catering to the everyday needs of the masses. The website is an extension of the Gyandoot intranet, for giving global access. The site offers following services: Commodity/Mandi Marketing Information System, Copies of khasra, B1/khatauni and maps, On-line registration of applications, Income certificate, Domicile Certificate (mool niwasi), Caste Certificate; andHolder's passbook of land rights and loans (Bhoo adhikar evam rin pustika).

Gramdoot (Rajasthan): This project was developed in Dabri Rampura (near Jaipur), State of Rajasthan and it provides various online facilities to the villagers, like Jamabandii.e. copies of land records, Shikayat online, Gramdak i.e. rural e-mail account, Mandibhao i.e. online rates, Gramhuti.e. village Bazar, Vaivahiki i.e.Matrimonial service,Avedanpatrai.e. application for driving licence, bank loans and ration cards and Praman Patrai.e. issuance of domicile for caste, income certificate etc.

Bhoomi (Karnataka): This project was started by the State of Karnataka which involves computerization of more than 200 treasuries all over the State and it was mainly for computerization of Land Record System.Significantly, the 'Bhoomi' project has successfully digitized 20 million land records of ownership of 6.7 million farmers of the state. Now a farmer can easily obtain a copy of land records (RTC/Pahani) by providing owner's name/plot number at Government authorized kiosks in 177 taluk offices. A person only has to pay ₹15 for the procedure. Also at the kiosks, provision to see the land transactions is also available. It is known as mutation details.

Warana (Maharashtra): It was recently launched and the primary objective of this project is to demonstrate the effective use of IT infrastructure in the accelerated socio-economic development of 70 villages around Warana Nagar in the Kolhapur and Sangli districts of the State of Maharashtra. The existing cooperative structure has been used in concert with high-speed VSATs to allow internet access to existing cooperative societies. The project aims to provide agricultural, medical, and education information to villagers by establishing networked 'facilitation booths' in the villages.

Raj Nidhi: Information kiosks (Rajasthan): Raj Nidhi is a web-enabled information kiosk system developed jointly by Rajasthan State's Department of Information Technology and Rajasthan State Agency for Computer Services (RajComp). Earlier on March 23, 2000, Nayla

became the first village of Rajasthan to have a "Raj Nidhi Information Kiosk" when the US President, Mr. Bill Clinton visited this village to observe the functioning of a Gram Panchayat.[22]

Package for Effective Administration of Registration Laws Project (PEARL)(Kerala): The Government of Kerala has launched a project titled PEARL (Package for Effective Administration of Registration Laws) for computerization of the Registration Department in the State. Under this programme, anyone can apply online for certificates, certified copies of documents and registration of marriages besides online submission of applications for registration of societies and firms.

E-Chaupal: It was started by ITC's International Business Division as a cost-effective alternative supply chain system to deal directly with the farmer to buy products for exports and had become very important for rural India. The tobacco giant has already set up over 700 chaupals covering 3,800 villages in four states i.e., Madhya Pradesh, Uttar Pradesh, Karnataka and Andhra Pradesh which deal with products ranging from soya bean, coffee, aquaculture, and wheat. It is a unique web-based initiative in Central India and caters to Soya growers regarding all information, products, and services required in Soya farming. The Soya kiosks facilitate the supply of high-quality farm inputs and purchase of Soya at the doorsteps of the villagers. The project has started 23 tele-centers in Hoshangabad district of Madhya Pradesh. The end users/beneficiaries of the projects are Villagers.

Computer-based Functional Literacy Programme: It was launched in February 2000 in Beeramguda village in Medak district of Andhra Pradesh (AP) to decrease illiteracy with a new approach to learning, using multimedia and flashcards to fortify learning experience. The lessons focus on reading which could be used in different languages. The programme is currently operational in 1,000 centers in several states of India and helped more than 20,000 people to read. Tata is of opinion that if implemented properly, the project can make 90% of India literate in 3 to 5 years.

Raj-SWIFT: Rajasthan Government's Intranet: The Rajasthan State's Department of Information Technology (DoIT) has developed Government's own Intranet called as Statewide Intranet on Fast Track i.e., "Raj-SWIFT." This system which has been built using Internet technology and tools would facilitate online data, text, and e-mail communication between the

22 *Applications in India,* 7TH INTERNATIONAL CONFERENCE ON E-GOVERNANCE, (Oct. 3, 2017, 08:11 AM), http://www.iceg.net/2011/iimb-resources.html.

office of the Chief Minister and all the 32 District Collectors on a one-to-one basis. Therefore, this project brought the Chief Executive of the State and the District Administration close enough to be just a mouse click away.

Independent Efforts Made By Some Non-State Actors for Rural Development Administration:

Leaving aside the efforts made by the Government in India, some civil society organizations have also worked for using ICTs in rural development administration. For example:

Hole-In-The-Wall Training System: It was set up by the National Institute of Information Technology (NIIT), New Delhi in collaboration with International Finance Corporationwas initiated in 1999. In this system a freely accessible computer was put up for use to the slum dwellers, especially the children. With no prior experience, the children learned to use the computer on their own. Significantly, Sugata Mitra, Chief Scientist at NIIT, is credited with the discovery of Hole-in-the-Wall. As early as 1982, he had been toying with the idea of unsupervised learning and computers. Finally, in 1999, he decided to test his ideas in the field. On 26th January, Dr. Mitra's team carved a "hole in the wall" that separated the NIIT premises from the adjoining slum in Kalkaji, New Delhi.The continuous monitoring of the use of computer through video capture showed that young boys and girls from the settlement became highly proficient at using graphic interface and in surfing parts of the Web, regardless of their lack of proficiency in English, or the absence of any direct instruction. Thus, the experiment showed that children, irrespective of their social, ethnic or educational identity, learn to use computers by themselves. Encouraged by the success of the Kalkaji experiment, freely accessible computers were set up in Shivpuri (a town in Madhya Pradesh) and in Madantusi (a village in Uttar Pradesh).About 40,000 in-school and out-of-school children have been directly impacted. This technique is being made available to the world through Hole In the Wall Education Limited by NIIT. As a result of this, more than 30 such clusters of computers or Learning Stations have been set up in India and outside India. The results, which have been uniformly encouraging, shows that children learn to operate as well as play with the computer with minimum intervention. They picked up skills and tasks by constructing their own learning environment.

Information Village Research: It was initiated in January 1998 and connected 10 villages near Pondicherry in Southern India. It empowered villagers to access necessary information to

improve their lives, with the involvement of local volunteers who gather information, put the information on an Intranet and provide access through nodes in the villages. The project uses local Tamil language. Most of the operators and volunteers are women, empowering them with both status and influence. Information provided in the village knowledge centers is local specific and relates to prices of agricultural goods, market, community information, health care, cattle diseases, transport, weather, etc. The project is an inspiring example of how breaking the information barrier can change rural lives.

Suggestions

However, a careful examination of the situation brings up the following important suggestions for further enhancement of rural economic and social development of India:

1. There is a need to increase the ICTs and internet technology sensitization programmes in rural India for enhancing the skills of all potential users, particularly rural women, so as to increase the beneficiary base and bring about a speedier rural social and economic change.
2. In order to accelerate rural economic and social development and reach remote areas, multi-pronged efforts must be made by the Union Government for further ICTs and Internet penetration along with other technologies like Mobile Telephony, etc.
3. To help avoid corruption, online reporting of utilization of funds for the purpose for which it was allocated at grass roots level must be made compulsory under possibly all relevant rural economic and social development administration programmes and schemes, before releasing the next installment.
4. For effective use of ICTs and the Internet in rural economic and social development administration Section 9 of the Information Technology Act, 2000 must be abolished so that Government- people integrations become enforceable by law. Accordingly, under any e-project, if a person wants to interact with Government in electronic form then it cannot be denied.

Conclusion

After a critical review of the above situation, it is concluded that the system of Alternative Service Delivery Arrangements has become very common in the knowledge society of 21st

century all over the Globe including India. Today ICTs and internet have played a commendable role in this system of ASDA. To make use of ICTs in ASDA a reality, cyber law, a new branch of jurisprudence has played a significant role. Model law on E-Commerce adopted by the General Assembly and the Information Technology Act 2000 (amended in 2008) deserve a special mention here.

However, Section 9 of the Information Technology Act, 2000 is hampering the effective use of ICTs in various e-projects and ultimately rural economic and social development,as nobody can force any Government institution to interact in electronic form.

In India, ICTs and internet are used in rural economic and social development administration. ICT's penetration is increasing every day in India as shown by the reports. However, ICTs and Internet penetration is not 100% in rural India and women users are less than men. People are using telephones but internet usage is comparatively less. However, Digital India, a new initiative by the Government of India to make best use of ICTs for development and delivery of services will definitely prove an asset for rural economic and social development administration as under this the Government has agreed to cover 250,000 uncovered villages by e-infrastructure.

Further, the role regarding ICTs in ruraleconomic and social development, both Central and State Governments is worth noting. Ministry of Rural Development has started internet and intranet portal. Various portals (using local language) such as MNREGAsoft, AWAASsoft have been developed. E-muster roll, online monitoring report system, performance review committee etc., are other efforts to improve rural development in India.

State Governments have also used ICTs in rural economic and social development administration by starting various e-projects where local language and user-friendly technologies are used. These efforts have enabled the villagers in rural areas to have every important and relevant information at their door step. Undoubtedly, these endless efforts have made a lot of improvement but still we have to go along way.

SCOPING THE DEFINITION OF MENTAL ILLNESS FOR THE PURPOSE OF THE MENTAL HEALTHCARE LAW

Mrs. Kirandeep Kaur*

"Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."

-Constitution of the World Health Organization

Introduction

Mental health is an integral part of a human's wellbeing. The same may be disturbed by illnesses which range for a span of time, for a crisis in life or for lifetime itself. Mental health of humans is a discussion which finds very sparse space in discussions and deliberations pertaining to well-being and happiness.

Mental healthcare in India was initially governed by the Mental Health Act of 1987 until very recently. The Mental Healthcare Act was passed in 2017 which repealed the Mental Health Act of 1987. The journey from 1987 to 2017 has witnessed changes in the society and advancement in mental health care research and practices. People over time have become more vocal about mental health and well-being. Celebrities have come out and spoken about their experiences with depression, bipolar disorders, obsessive compulsive disorders, etc. Rehabilitation of the mentally ill persons into the society and protection of their human rights both during and after mental healthcare has also acquired significance.

The Mental Health Act, 1987functioned with the purpose to *"consolidate and amend the law relating to the treatment and care of mentally ill persons, to make better provision with respect to their property and affairs and for matters connected therewith or incidental thereto."*[1] The Mental Healthcare Act, 2017 aims to be an Act to not only provide for the services pertaining to mental healthcare but also to protect and promote the rights of persons suffering from mental illness during delivery of mental healthcare services.

The definition of the term 'mental illness' has evolved and widened over time. The causes and implications of mental illness can be better understood by gaining knowledge about the concept of mental illness. The common understanding of the terminology is sometimes faltered and mislead by the beliefs of the society and culture that one lives in. This paper therefore holds

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1 The Mental Health Act, 1987, No. 14, Acts of Parliament, 1987 (India). Preamble.

significance because it throws light on the concept of mental illness and attempts at clearing the cobwebs of misconceptions and doubts pertaining to the mental illness.

Mental Retardation/Intellectual Disability

Mental illness and mental retardation are often confused and inter-changed terminologies. The difference between the two concepts is less known and discussed. The definitions of mental illness across most nations exclude mental retardation; therefore, making it important to understand the meaning of the term. To get a considerable understanding of the concept of mental illness it is important to understand what mental retardation is.

Mental retardation affects a person's intelligence and cognitive abilities,[2] and is often referred to as intellectual disability. Mental retardation is a neurodevelopment disorder characterized by theperson having a below average intelligence which limits his/her normal life with an IQ[3] of less than 70-75 as compared to the normal average of 100,[4] thereby resulting in sub-average intellectual functioning.[5] Mental retardation is present at birth but becomes evident with the onset of development and entails lack of skills necessary for normal and independent existence of the person;for example disability pertaining to judgement, thinking planning, learning, solving and action which is generally lifelong and cannot be completely treated. It develops and becomes evident during the growing years of the person. Fanconi anemia, down syndrome, hydrocephalus and cerebral palsy are some of the examples of mental retardation.

Mental illness is different from mental retardation, so are the causes, symptoms and implications. A person with mental illness may be completely socially sound; and unlike mental retardation, mental illnesses can affect persons of any age and from any background;[6] and mental illness if diagnosed is treatable and curable.

Understanding What Constitutes Mental Illness

The Mental Healthcare Act, 2017 defines mental illness in the following words:[6]

"Mental illness means a substantial disorder of thinking, mood, perception,

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2 *What is the difference between Mental Retardation and Mental Illness,* WISE GEEK (Nov. 1, 2017), http://www.wisegeekhealth.com/what-is-the-difference-between-mental-retardation-and-mental-illness. html.

3 Intelligence Quotient.

4 Mental Retardation, HUMAN DISEASES AND CONDITIONS (Nov. 1, 2017), http://www.humanillnesses.com/original/Men-Os/Mental-Retardation.html.

5 *Mental Retardation and Mental Illness,* PUBLIC IMAGES NETWORK (Nov. 1, 2017), http://lucasdd.info/wp/wp-content/uploads/2015/12/Mental-Retardation-andMentalIllness201405161349276399.pdf.

6 *Ibid.*

orientation or memory that grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterized by sub-normality of intelligence."

Mental healthcare includes not only the diagnosis and treatment of mental illness but also the care and rehabilitation of the person back into the society.[7] It is therefore very important to understand the various elements that constitute mental illness to gauge this phenomenon. The definition of "mental illness" in the Mental Healthcare Act, 2017, can be broken down into two stages of eventualities, namely: 'cause' and 'effect'.

Mental illness means (cause) **a substantial disorder of:**		**Mental illness results in (effect)** **gross impairment of:**
• Thinking, • Mood, • Perception, • Orientation, or • Memory.		• Judgement, • Behavior, • Capacity to recognize reality, or • Ability to meet the ordinary demands of life.

Section 2(l) of the Mental Health Act, 1987[8] stated that a mentally ill person means "a person who is in need of treatment by reason of any mental disorder other than mental retardation." The Mental Health Act, 1987 did not enumerate any of the above factors and effects of mental illness that find place in the definition of the Act of 2017.[9] The Act of 1987 faltered because of lack of clarity about what constituted mental disorder, other than exclusion of mental retardation. The definition given under the Mental Healthcare Act, 2017 fixed this anomaly and laid down a very detailed definition of mental illness. The various traits of mental illness coupled with the resultant effects, throw light towards better understanding of mental illness from the legal perspective.

A substantial disorder of thinking, mood, perception, orientation or memory; each of these terminologies are however, subject to various interpretations with respect to their content and

7 The Mental Healthcare Act, 2017, No. 10, Acts of Parliament, 2017 (India). Section 2(s).
8 *Supra* note 7, Section 2(o).
9 *Supra* note 1, Section 2(1).

extent. At the same time, this fact cannot be obviated that unlike physical illness where the degree of harm or effect on the body can be gauged or quantified (example recording the temperature of the body, blood sugar level, blood pressure); disorders in thinking, mood, perception, orientation and memory cannot be compartmentalized into normal and not normal. Psychiatry has laid down tests to examine the disorder and the pertinent ones relate to the actions and lifestyle of the person in question; that is when such a substantial disorder leads to gross impairment of judgement, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, the person is considered to have mental illness. According to the World Health Organization the various symptoms that could comprise mental disorder are a combination of traits like abnormal thoughts, emotions, behavior and relationships with others.[10] When do the thoughts, emotions, etc. become abnormal is based on facts and circumstances of each case.

These mental conditions could be caused because it runs in the family, or because of the circumstances or lifestyle of the person or simply because of alcohol or drug abuse. Determining factors leading to the disorders in thought, mood, perception, orientation or memory, are many, and the list is not exhaustive. Mental disorders comprise various symptoms evident in the form of combination/combinations of *"abnormal thoughts, emotions, behavior and relationships with others."*[11] They are detectable and treatable with a co-ordinate functioning of medication and counseling.

Categories of Mental Illness

There are a lot of mental illnesses recognized and existent in today's time. All the types comprise one or the other impairment in thinking, mood, perception and memory which affects the person's thoughts, behavior, personality or capacity to meet the daily needs of a normal life.

The World Health Organization in its document tilted *"The ICD-10 Classification of Mental and Behavioral Disorders –Clinical Descriptions and Diagnostic Guidelines"*[12] lays down various categories and sub-categories into which mental disorders can be classified. The document was compiled from Chapter V of the Tenth Revision of the International Statistical Classification of

10 Supra note 1, Section 2(i).

11 *Mental Health,* WORLD HEALTH ORGANIZATION (Nov. 5, 2017), http://www.who.int/mental_health/management/en/.

12 *Mental Disorders,* WORLD HEALTH ORGANIZATION (Nov. 5, 2017), http://www.who.int/mediacentre/factsheets/fs396/en/.

Diseases and Related Health Problems (ICD-10).[13] Herein below is a compiled version of the categories enumerated in the document: [14]

1. **Organic, including symptomatic, mental disorders,** which are further categorized into:
   - Dementia in Alzheimer's disease
   - Vascular dementia
   - Dementia in other diseases classified elsewhere like Pick's disease, Parkinson's disease, Huntington's disease, etc.
   - Unspecified dementia
   - Organic amnesic syndrome, not induced by alcohol and other substances
   - Other mental disorders due to brain damage and dysfunction and to physical disease
   - Personality and behavioral disorder due to brain disease, damage and dysfunction
   - Unspecified organic or symptomatic mental disorder.[15]

2. Mental disorder and behavioral disorders due to psychoactive substance use, which are further categorized into mental and behavioral disorders due to use of alcohol, opioids, cannabinoids, sedatives or hypnotics, cocaine and other stimulants, including caffeine. It also includes mental and behavioral disorders due to use of hallucinations, tobacco, volatile solvents and multiple drug use and use of other psychoactive substances.[16]

3. Schizophrenia, schizotypal and delusional disorders, which are further categorized into:
   - Schizophrenia- Types of Schizophrenia are: Paranoid schizophrenia, Hebephrenic schizophrenia, Catatonic schizophrenia, Undifferentiated schizophrenia, Post-schizophrenic depression, Residual schizophrenia, Simple schizophrenia, Other schizophrenia with varied symptoms

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13 *The ICD-10 Classification of Mental and Behavioural Disorders,* WORLD HEALTH ORGANIZATION (Nov. 1, 2017), http://www.who.int/classifications/icd/en/bluebook.pdf.

14 *The ICD-10 Classification of Mental and Behavioural Disorders:* Clinical Description and Diagnostic Guidelines, WORLD HEALTH ORGANIZATION (Nov. 1, 2017), http://apps.who.int/iris/handle/10665/37958.

15 *Supra* note 13.

16 *Ibid.*

- Schizotypal disorder
- Persistent delusional disorders
- Acute and transient psychotic disorders
- Induced delusional disorder
- Schizoaffective disorders: Types of Schizoaffective disorders are: Schizoaffective disorder manic type, depressive type, mixed type, etc.
- Other nonorganic psychotic disorders.[17]

4. Mood disorders, which are further categorized into manic episode, bipolar affective disorder, depressive episode, recurrent depressive disorder, persistent mood (affective) disorders and other mood (effective) disorders.[18]

5. Neurotic, stress-related and somatoform disorders, which are further categorized into phobic anxiety disorders; other anxiety disorders like panic and mixed anxiety disorders; obsessive - compulsive disorder; reaction to severe stress, and adjustment disorders; dissociative (conversion) disorders; somatoform disorders; other neurotic disorders like neurasthenia, depersonalization and other specified neurotic disorders.[19]

6. Behavioral syndromes associated with physiological disturbances and physical factors, further categorized into: eating disorders; nonorganic sleep disorders; sexual dysfunction, not caused by organic disorder or disease; psychological and behavioral factors associated with disorders or diseases classified elsewhere; abuse of non-dependence-producing substances like steroids, hormones, vitamins, anti-depressants, etc.; mental and behavioral disorders related to puerperium and behavioral syndromes associated with physiological disturbances and physical factors.[20]

7. Disorders of adult personality and behavior, for example: paranoid personality disorder, schizoid personality disorder, dissocial personality disorder, emotionally unstable personality disorder, habit and impulse disorders, etc.

8. Behavioral and emotional disorders with onset usually occurring in childhood and adolescence and disorders of psychological development.[21]

It is to be noted that these types of mental illnesses are varied and can co-exist in various

17 *Supra* note 13, at 10.
18 *Id.,* at 29.
19 *Id.,* at 25.
20 *Id.,* at 18.
21 *Supra* note 13, at 34.

combinations at the same time, thereby making the defining of mental illness a complex issue. The World Health Organization document on ICD-10 Classification of Mental and Behavioral Disorders –Clinical Descriptions and Diagnostic Guidelines, also includes mental retardation and its various types in the list of mental and behavioral disorders; however, since the definition of mental illness excludes mental retardation, the same does not form part of the classification of the various types of mental illnesses enumerated above.

Mental Illness As Defined By Other Countries

To get a better understanding of the concept of *"mental illness"* as interpreted worldwide, it is important to delve into the definition accorded to mental illness in various other jurisdictions of the world.[22] There is a trait of similarity among all the definitions with a hue of minor variations in the understanding of the concept. The definition of mental illness in United Kingdom, South Africa, Pakistan, Indonesia, United States and Australia finds place in the discussion hereinafter.[23]

The Mental Health Act[24] of the United Kingdom was introduced in 2007. It amended the Mental Health Act 1983, the Domestic Violence, Crime and Victims Act 2004 and the Mental Capacity Act 2005 with respect to mentally disordered persons. The 2007 Act defines mental disorder to mean any disorder or disability of the mind. This definition is very simple yet subjective leaving a wider scope of interpretation.

The South Africa Mental Health Care Act, 2002[25] defines mental illness[26] as a *"positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorized to make such diagnosis."* The Act also uses another terminology that is *"mental health care user"*[27] who is a person receiving care, treatment and rehabilitation services or using a health service at a health establishment; and includes a prospective user, the person's next of kin, a person authorized by any other law or court order to

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22 *Id.,* at 12.

23 WHO, MENTAL HEALTH CARE LAW: TEN BASIC PRINCIPLES (1996) (Nov. 1, 2017), http://www.who.int/mental_health/media/en/75.pdf

24 WHO-AIMS, *Report on Mental Health System in Bangladesh* (2007) (Nov. 1, 2017), http://www.who.int/mental_health/bangladesh_who_aims_report.pdf.

25 *The Mental Health Act, 2007 (United Kingdom),* LEGISLATION GOV UK (Nov. 1, 2017), http://www.legislation.gov.uk/ukpga/2007/12/pdfs/ukpga_20070012_en.pdf.

26 *South Africa Mental Healthcare Act,* 2002 (South Africa), GOV ZA (Oct. 30, 2017), https://www.gov.za/sites/default/files/a17-02.pdf.

27 *Ibid,* Section 1(xxi).

act on that persons behalf; an administrator appointed in terms of this Act; and an executor of that deceased person's estate. The definition of mental illness under the South Africa Mental health Care Act, 2002 is complemented by the definition of a mental health care user, thereby delivering a better understanding of the concept of mental illness.

The Pakistan Mental Health Ordinance[28] came into effect in 2001 before which, the law governing the issue was the Lunacy Act of 1912 which stood repealed by the Ordinance. The Ordinance omits terms used in the Ac of 1912 such as *'lunatic', 'asylum', "criminal lunatic"*, etc. The Ordinance of 2001 states that mental disorder means mental illness and includes mental impairment, severe personality disorder, mental impairment and any other disorder or disability of mind. This definition however, does not include disorders which arise because of reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs. The 18th amendment to the Constitution of Pakistan by making it the responsibility of the provincial governments to pass health legislations, and the lax on the part of the latter to pass such legislations,[29] has led to the mental health picture in the nation to be a fragmented and disoriented one.[30] It is noteworthy that till date only the provinces of Sindh and Punjab have a mental health law.[31]

According to the American Psychiatric Association, mental illnesses are *"health conditions involving changes in thinking, emotion or behavior (or a combination of these)"*and that mental illnesses leads to distress and difficulty in carrying on with social, work or family activities.[32]

Law #23 on Health enacted in 1992 incorporates provisions pertaining to mental health in Indonesia. There is no clear definition of mental disorders or illness in the Indonesian Law. However, there is coverage, though limited, of mental health issues in the health law discussions in Indonesia.[33]

The Mental Health Act, 2007[34] of New South Wales, Australia provides for treatment and care of

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28 *Ibid,* Section 1(xix).

29 *Mental Health Ordinance for Pakistan,* 2001, PIMH GOP PK (Oct. 30, 2017), http://www.pimh.gop.pk/docs/Mental%20Health%20Ordinance.pdf.

30 It is noteworthy that till date only the provinces of Sindh and Punjab have a mental health law. Amina Tareen & Khalida Ijaz Tareen, *Mental Health Law* in Pakistan, 13 BJPSYCH INTERNATIONAL (2016), (Nov. 5, 2017), https://www.rcpsych.ac.uk/pdf/PUBNS_IPv13n3_67.pdf.

31 *Ibid.*

32 *Supra* note 30.

33 *Supra* note 31.

34 I. Irmansyah, et. al., *Human Rights of Persons with Mental Illness in Indonesia: More than Legislation is Needed,* 3 INTERNATIONAL JOURNAL OF MENTAL HEALTH SYSTEM (2009), (Oct. 25, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2709890/.

persons with mental illness and mental disorders. Mental illness is very succinctly defined in this Act to mean *"a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterized by the presence in the person of any one or more of the following symptoms: (a) delusions, (b) hallucinations, (c) serious disorder of thought form, (d) a severe disturbance of mood, (e) sustained or repeated irrational behavior indicating the presence of any one or more of the symptoms referred to in paragraphs (a)–(d)."*This definition is a very detailed definition but suffers from the vice of being exhaustive. It is not inclusive enough to accommodate more possibilities of different conditions which could amount to mental illness in the medical terms.

It is pertinent to note that there is a stark similarity among the various definitions of *"mental illness"* in all the above countries. There is also a general understanding of the concept of *"mental illness".*

In order to understand the viability of any law it is important to weight the same vis-à-vis the corresponding laws in other countries of the world. Having discussed some of these definitions of mental illness, it becomes quite evident that the definition[35] of mental illness as stated in the Indian Mental Healthcare Act of 2017 stands apt and viable on the anvil of comparison. The definition given in 2017 lays down the list of substantial disorders and the gross impairment caused by the same. The terms used in the definition (like thinking, mood, perception, behavior, judgment, ordinary demands of life, etc.) are subjective thereby making the definition inclusive enough to accommodate possibilities beyond those listed in the definition.

Conclusion: The Importance of Defining Mental Illness for the Purposes of Healthcare

Mental illness is that type of illness which is discussed in the wraps of anonymity and pretexts of stigma. Mental healthcare is not accessed by many mentally ill persons in India for fear of branding by the society. Many have been unable to discern the fact that, just like physical illness, mental illness too needs treatment and care from a health professional. Resort is taken in superstitious pathways where dargahs, deras and babas claim to cure illnesses of the mind because mental illness is many a time associated with witchcraft, ghosts, evil spirits, sins and repentance.

"Folk mental health traditions, based in religious lifeways and etiologies of supernatural

35 *New South Wales Mental Health Act, 2007,* LEGISLATION NSW GOV AU (Oct. 25, 2017), https://www.legislation.nsw.gov.au/acts/2007-8.pdf.

affliction, are overwhelmingly sought by Indians in times of mental ill-health."[36]

The Supreme Court has time and again given directions to the Government to undertake comprehensive awareness campaigns to educate people about mental healthcare and to ensure that mentally ill persons are sent to doctors and not to religious places such as dargahs or temples.[37] Article 17 of the United Nations Convention of Rights of Persons with Disabilities, 2007[38] states that every person with disabilities, has a right to be respected and to get physical and mental integrity at par with others; and an important step towards that would be, giving them proper healthcare.

Insanity being a ground for inability to enter into a contract, and non-liability for commission of a crime, an understanding of it is vital in the eye of law. Defining mental illness and identifying the components that qualify a person to be considered mentally ill and therefore eligible for and in need of mental healthcare is very important too. One of the major steps in diminishing the treatment gap is by understanding the concept of mental illness and the importance of mental healthcare therein.

This paper appraised the definition of mental illness as laid down in the Mental Healthcare Act, 2017 of India and the fact that this Act of 2017 brings the Mental Healthcare legal framework in consonance with the mandates of the United Nations Conventions of Rights of Persons with Disabilities, 2007. Mental illness is different from mental retardation and therefore the necessity to explain and discuss the latter was felt and addressed. Mental illness being a broad concept, there are various classifications into which mental illness can be categorized, cue for which was taken from the World Health Organization document on ICD-10 Classification of Mental and Behavioral Disorders – Clinical Descriptions and Diagnostic Guidelines.[39] Having discussed the concept of mental illness at length, paper then drew light on the definitions of mental illness

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36 *Supra note 7. Section 2(s) of the Act defines mental illness as "a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence."*

37 Anubha Sood, *The Global Mental Health Movement and its Impact on Traditional Healing in India:* A Case Study of the Balaji Temple in Rajasthan, 53 MC GILL TRANSCULTURAL PSYCHIATRY (2016), (Nov. 3, 2017), http://journals.sagepub.com/doi/abs/10.1177/1363461516679352? journalCode=tpse; Julie Schoonover, et. al., Perceptions of Traditional Healing for Mental Illness in Rural Gujarat, 80 ANNALS OF GLOBAL HEALTH (2014), (Nov. 5, 2017), http://www.sciencedirect.com/science/article/pii/S2214999614000514.

38 Re Death of 25 Mental Asylum Patients v. Union Of India, 2002(3) SCC 36 (India); Sheela Barse v. Union of India and Another, AIR 1993 SCW 2908 (India).

39 *Convention on the Rights of Persons with Disability and Optional Protocol,* UNITED NATIONS (Nov. 1, 2017), http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf.

in some other countries, and tested the definition of mental illness in the Mental Healthcare Act, 2017 of India in the anvil of comparison.

Having indulged in the above discourse it can therefore be concluded that the Mental Healthcare Act, 2017 is a welcome change towards a better understanding of mental illness. If the 2017 Act is implemented and followed in letter and spirit it has the potential to mete out better treatment to mental healthcare in India than the Mental Health Act, 1987 was able to provide.

40 *Supra* note 13.

VIOLENCE AGAINST WOMEN WITH INTELLECTUAL DISABILITIES IN INDIA: A HUMAN RIGHTS APPROACH

Mrs. Nidhi Sharma*

"For too long human differences have counted as a ground for exclusion – whether direct or subtle. For too long the human difference of disability was looked on as something that ruins rather than complicates human existence. For too long our societies reacted either out of pity or revulsion to people with disabilities…. This has to stop."

-Donal Barrington[1]

Introduction

Disability is part of the human condition. It is the result of negative interactions that take place between a person with an impairment and his or her social behaviour.[2] In simple words, disability can be defined as the loss or limitation of opportunities to take part in the society on an equal level with the others due to the social and environmental barriers.[3] People with disability are often considered to be weak, worthless and in some cases sub-human by their societies and because of this attitude they face a heightened risk of violence whether it is physical, mental or sexual in nature. Even in the context of religion, one can find evidence of the low regard that the various religions have always had for the disabled.[4] For Example, Hindu Law discriminated against the disabled on two grounds:

1. According to *Baudhayana* they are not capable of transacting legal business.[5]

2. There was discrimination against the disabled because they were unable to perform the religious ceremonies. However, this discrimination was not on religious grounds as shudras who were not required to perform the Vedic rites were also excluded from inheritance on the grounds of disability.[6]

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1 Speech by Donal Barrington, Former President, Human Rights Commission at the Conference on *Towards a United Nations Convention on Human Rights of Persons with Disabilities, at the Royal Hospital Kilmainham on 26* February 2002, UNITED NATIONS ENABLE (Sep. 10, 2017, 12:30 PM), https://www.un.org/esa/socdev/enable/rights/contribhr41.htm.

2 *Id.*

3 Defining Impairment and Disability, CENTRE FOR DISABILITY STUDIES (Sep. 10, 2017, 12:34 PM), http://pf7d7vi404s1dxh27mla5569.wpengine.netdna-cdn.com/files/library/Northern-Officers-Group-defining-impairment-and-disability.pdf.

4 Id.

5 Michael Moore, *Religious Attitudes towards the Disabled,* THE SECULAR WEB (Sep. 17, 2017, 08:12 AM), https://infidels.org/library/modern/michael_moore/disabled.html.

6 2 P.V. KANE, HISTORY OF DHARAMSHASTRA 297-298 (Government Oriental Press, 1958).

Middle Eastern cultures also regard disability as a punishment from the heaven, emanating from the spirits and caused by an evil eye.[7] Although the full range of disabilities is recognised across cultures, its prevalence and definition is bound by socio-economic and political considerations, and the extent to which the people with disabilities are valued or devalued varies from one culture to another.[8] Disability is not just a health problem, rather it is a complex phenomenon which covers impairments, activity limitations and participation restrictions. For a better clarity of the term 'disability', it would be imperative that we tend to focus on the various international and national instruments which talk about the rights of the disabled persons.

Para 5 of the Preamble to the Convention on the Rights of Persons with Disabilities, 2006[9] not only acknowledges that disability is an "evolving concept", but also stresses that:

> *"Disability results from the interaction between the persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in the society on an equal basis with the others."*[10]

Therefore, to define disability as an interaction means that disability is not an attribute of the person.[11] Section 2(s) of the Persons with Disabilities Act, 2016[12] also provides that a person with disability means a person with a long term physical, mental, intellectual or sensory impairment which in interaction with barriers, hinders his full and effective participation in the society equally with the others. The United Nations Sustainable Development Goals (SDG's)[13] under Goal 3 strives to ensure healthy lives and also to promote the wellbeing for all at all ages. Goal 4 also strives to build and upgrade education facilities which are child, disability and gender sensitive and provide a safe, non-violent, inclusive and effective learning environments for all. However, the United Nations Report[14] of the Secretary General stated that in 2016 only

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7 RAMESH CHANDRA DUTT, A HISTORY OF CIVILIZATION IN ANCIENT INDIA 59 (Vistar Publishers, Delhi, 1972).

8 DINESH BHUGRA (ed.) & KAMALDEEP BHUI (ed.), TEXTBOOK OF CULTURAL PSYCHIATRY 462 (Cambridge University Press, 2007)

9 Id.

10 Convention on the Rights of Persons with Disabilities, 2006 (A/RES/61/106). The Convention was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007, UNITED NATIONS ORGANIZATION (Sep. 12, 2017, 11:21 AM), https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html.

11 *Id.*

12 World Report on Disability, *Understanding Disability,* WORLD HEALTH ORGANIZATION (Sep. 12, 2017, 11:34 AM), http://www.who.int/disabilities/world_report/2011/report.pdf.

13 The Rights of Persons with Disabilities Act, 2016, No. 49, Acts of Parliament, 2016 (India).

14 United Nations Sustainable Development Goals, officially known as Transforming our world: the 2030 Agenda for Sustainable Development, is a set of 17 Global Goals which were built on the Principles agreed upon under Resolution A/RES/66/288, popularly known as The Future We Want, in 2015. They came into force on January, 2016.

28% of the people with severe disabilities collected the disability benefits.

In the ninth session of the Conference[15] of State Parties to the Convention on the Rights of Persons with Disabilities, 2016 held in New York, the former President of General Assembly Mr. Mogens Lykketoft recognised that the rights and perspectives of persons with disabilities were increasingly being integrated into international development frameworks. In his closing remarks also, he mentioned that there is an imperative need to mainstream disability in the implementation of the 2030 agenda and in that regard, the need to strengthen co-ordination to break down silos and actively engage persons with disabilities in the decision making process.[16]

Thus, disability is a development issue and it will be hard to improve the lives of the most disadvantaged people in the world without addressing the specific needs of the persons with disabilities. There are a number of disabilities which have been recognised under the legal frameworks including blindness, low-vision, leprosy-cured persons, hearing impairment, speech and language disability, autism, etc. Intellectual Disability has also now been included under the list of disabilities. From attempts by the Eugenicists and the Nazi regime to eradicate the people suffering from intellectual disabilities alongside other groups deemed "undesirable", to taunts that use derogatory language associated with the intellectual impairment, to being shunned because their disabilities have been ostracized throughout the history and across cultures and are one of the most marginalized and excluded groups around the world.[17]

Despite the various legislations, there is a severe shortage of accessible and appropriate government services for women with intellectual disabilities. Women with Intellectual Disabilities are easy targets since they are often financially and emotionally dependent on care takers in a private space and thus, they are at a higher risk of violence. Lack of adaptive functioning skills such as reasoning, inter-personal competence and impaired understanding are some of the issues identified as contributing to the ongoing victimization, which may exacerbate a sense of entrapment. The purpose of this paper is to focus on the meaning of intellectual disability and the violence attributed towards the women who are suffering from the same. Apart from this, the international and the national legal frameworks shall also be discussed throwing

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15 United Nations Secretary General Report on Progress towards the Sustainable Development Goals (2017), UNITED NATIONS STATISTICS DIVISION (Sep. 13, 2017, 09:21 AM), https://unstats.un.org/sdgs/files/report/2017/TheSustainableDevelopmentGoalsReport2017.pdf.

16 Report of the Ninth Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, 2006, UNITED NATIONS (Sep. 13, 2017, 09:50 AM), http://www.un.org/disabilities/documents/COP/9/cosp9_report_e.pdf.

17 *Id.*

light on the violation of the human rights of such women.

Intellectual Disability-Meaning

The nature and definition of intellectual deficits have been debated since the beginnings of the classification of mental disorders.[18] Esquirol referred to intellectual deficits overall as conditions of incomplete mental development based on known or unknown biological or environmental issues.[19] The Convention on the Rights of the Persons with Disabilities does not define the term disability per se, but rather talks about it as an outcome of the interaction between an impairment and the environment. Such a definition highlights the heterogeneity of experiences, life chances, choices and preferences of adults and children with disabilities shaped by a range of socio-economic, cultural and other factors rather than focusing on a condition. Therefore, in line with the Convention, the World Report on Disability[20] defines the term intellectual impairment as:

> *"A state of arrested or incomplete development of mind which means that the person can have difficulties understanding, learning and remembering new things and in applying that learning to new conditions. Also known as intellectual disabilities, learning disabilities and formerly as mental retardation or mental handicap."*[21]

The American Psychiatric Association[22] also defines Intellectual Disability as something which involves general mental abilities that affect the functioning in two areas:

1. Intellectual Functioning (such as learning, problem solving, judgment),
2. Adaptive Functioning (activities of daily life such as communication and independent living).

The Diagnostic and Statistical Manual[23] defines Intellectual Disability as:

1. Significant impairment of intellectual (cognitive) functioning, indicated by a full scale IQ below 70.
2. Significant impairment of adaptive (social) functioning that affects how a person copes with the everyday tasks in the following three areas:

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18 Intellectual Disability: Raising Awareness and Combating Stigma-A Global Review, UNIVERSITY COLLEGE LONDON (UCL) (Sep. 13, 10:43 AM), https://www.ucl.ac.uk/ciddr/documents/ExecSummary.

19 James C. Harris & Stephen Greenspan, *Definition and Nature of Intellectual Disability,* SPRINGER (Sep. 15, 2016 21:45 PM), file:///C:/Users/jai%20mata%20di/Downloads/9783319265810-c1%20(1).pdf.

20 *Id.*

21 *Supra* note 12.

22 *Id.*

23 Defining Intellectual Disability, AMERICAN PSYCHIATRIC ASSOCIATION (Sep. 9, 2017, 22:13 PM), http://www.apa.org/pi/disability/resources/publications/newsletter/2016/09/intellectual-disability.aspx.

i. The conceptual domain, which includes the skills in language, reading, writing, maths, reasoning, knowledge and memory.

ii. The social domain, which included empathy, social judgment, interpersonal communication skills, the ability to make and retain friendships and similar capacities.

iii. The practical domain which centres on self-management in areas such as personal care, job responsibilities, money management, recreation and organizing school and work tasks.

Article 1 of the Convention on the Rights of Persons with Disabilities also says that the persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The Persons with the Disabilities Act, 2016 under Section 2 of its Schedule clearly mentions that intellectual disability, is a condition which is characterised by significant limitation both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behaviour which covers a range of every day, social and practical skills, including specific learning disabilities[24] and autism spectrum disorder.[25] Specific Learning Disability means the condition where there is a deficit in processing language, or difficulty to comprehend, speak, read, write, spell or do mathematical calculations and also includes perceptual disabilities, while Autism Spectrum Disorder is a nuero-developmental condition that appears in the first three years of the life of a person. It affects a person's ability to communicate, understand relationships and relate to others.

Therefore, in my opinion, intellectual disability may be defined as a significantly reduced ability to understand new or complex information, to learn new skills and a reduced ability to cope independently i.e. impaired social functioning. A person's mental capacity, the ability to make decisions can vary depending on the environmental or social factors; however, the legal capacity is "a universal attribute inherent in all person by virtue of their humanity" and can therefore not be stripped of it."[26]

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24 American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. Arlington: American Psychiatric Association, 2013).

25 Section 2(a) of the Schedule of the Persons with Disabilities Act, 2016.

26 Section 2(b) of the Schedule of the Persons with Disabilities Act, 2016.

Violence Against Women with Intellectual Disabilities-A Human Rights Perspective

Violence in all its facets remains a serious area of concern for women with disabilities, both as an individual experience and a structural reality that systematically oppresses them in all areas of life.[27] The violence occurs throughout the life cycle from pre-birth, infancy, childhood, adolescence to senescence.[28] While the most identified damages of violence against women are physical injuries, the unseen damages penetrate deeper.[29] The 1993 Declaration on the Elimination of Violence against Women[30] defined violence against women as any act of gender-based violence that results in or is likely to result in physical, sexual or psychological harm.[31] This definition shows that violence against women comprises of various forms of violence including physical, sexual and psychological violence. The European Institute of Gender Equality[32] distinguishes between two forms of violence i.e. Direct Violence which includes physical, psychological and economic violence perpetrated by the individuals and Indirect Violence which represents a type of structural violence characterized by the norms, attitudes and stereotypes around gender that operate within a larger societal context.[33]

Therefore, Gender-based violence against women is a crime and a Human Rights violation that occurs often repeatedly in the lives of a great number of women around the world. Human Rights are derived from the Natural Law and cannot be taken away and are the basis on which all the legitimate law is based. There is a very strong link between Human Rights and Disability, particularly in the context of the existing reporting structures within the United Nations. Many of the basic human rights are routinely violated for this vulnerable group and States are not often consciously aware because people with disabilities are usually invisible in their democracies.[34]

Adding to the greater vulnerability of becoming victims are a multiplicity of other factors, such as severity of disability, dependence on the abuser, communication limitations i.e. the women

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27 United Nations Committee on Rights of Persons with Disabilities, *General Comment on Article 12:Equal Recognition before the Law* (CRPD/C/4/2) (2014).

28 Women with Disabilities (WWD) India Network, Special Chapter 1a - Women with Disabilities, WOMEN ENABLED ORGANIZATION (Sep. 20, 2017, 10:09 AM), https://womenenabled.org/pdfs/mapping/Women%20with%20Disabilities%20in%20India.pdf.

29 Indira Sharma, *Violence against Women 57 Indian Jour. Of Psychiatry* 131, 132 (2015).

30 C. GARCIA-MORENO (ed) & A. RIECHER-ROSSLER (ed.), VIOLENCE AGAINST WOMEN AND MENTAL HEALTH 3 (Karger Medical and Scientific Publishers, 2013).

31 United Nations Declaration on the Elimination of Violence against Women, 1993 (A/RES/48/104).

32 Article 1 Declaration on the Elimination of Violence against Women, 1993.

33 European Institute of Gender Equality, *What is Gender-Based Violence- Forms of Gender-Based Violence* EIGE (Sep. 12, 2017, 16:12 PM), http://eige.europa.eu/gender-based-violence/what-gender-based-violence/forms-gender-based-violence.

34 *Id.*

suffering from speech and hearing disabilities or intellectual disabilities, easy access to inmates in institutional set ups, low or non-credibility to complaints of harassment and abuse towards the women with disabilities and the whole range of socio-economic and cultural factors that configure the lives of non-disabled women in the society.[35] Most women and girls with intellectual disabilities experience a range of abuses including institutionalization and neglect, physical or verbal abuse and involuntary treatment while in institutional care.[36]

The critical areas of concern on the issue of violence against women with intellectual disabilities are found both in the institutes and at home. The Human Rights Watch conducted a study[37] on the violence against women with intellectual disabilities, whereby they found out that at least one or more staff members said that it was a waste of time to speak to women and girls with intellectual disabilities because they cannot communicate, their testimonies cannot be believed, or simply because "they are mad and will say anything." When asked about the marital status of pregnant women in a mental hospital, a staff nurse told us, "Nobody is going to marry someone with 'mental retardation', these are mostly abuse cases."[38] Moreover, in a government home in Delhi, a staff member explained that women with psychosocial or intellectual disabilities are barred from cooking or even entering the kitchen. She told Human Rights Watch that the mental girls don't cook because the other girls refuse to eat food made by them. They say we won't eat food made by the hands of a 'mental' person. Also because they are not clean.[39]

It was also found that, in some cases where girls or women with psychosocial or intellectual disabilities had sexual relationships out of wedlock, eloped, or were raped, their families chose to institutionalize the girl or woman for fear of shame and dishonour. People with intellectual disabilities experience more violence in general when compared to those without disabilities.40 As is the case for people without disabilities who experience sexual violence, perpetrators are often those who are known by the victim, such as family members, acquaintances, residential

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35 Address by M. Claire O'Connor, Director, National Disability Authority at Seminar held on 16th April, 2015 in Irish Human Rights Commission National University of Ireland Galway & Trinity College Dublin, with regard to the *Draft United Nations Treaty on the Rights of Persons with Disabilities: Towards an Effective Monitoring Mechanism.*

36 *Supra* note 23, at 123.

37 Human Rights Watch Report, *Treated Worse than Animals: Abuses Against Women and Girls with Psychological and Intellectual Disabilities in Institutions in India,* HUMAN RIGHTS WATCH (Sep. 12, 2017, 17:20 PM), https://www.hrw.org/report/2014/12/03/treated-worse-animals/abuses-against-women-and-girls-psychosocial-or-intellectual.

38 *Id.*

39 *Id.*

40 *Id.*

care staff, transportation providers and personal care attendants.[41] A study conducted by the Mental Disability Rights Initiative- Serbia[42] uncovered multiple forms of violence, including forced medical treatment such as administration of contraceptives without informed consent and forced abortions and sterilisations.[43]

Women and girls with psychosocial or intellectual disabilities are typically placed in three types of institutions for mental healthcare, shelter, or protection:

a. Mental hospitals;

b. Government or NGO-run residential care facilities; and

c. Short-term rehabilitation facilities.

Within these places, violence can range from chaining, filthy living conditions, common bathing, and non-provision of clothes especially during mensuration, physical abuse and sexual violence which is often repetitive in nature.

Apart from the violence in the institutes, the women suffering with the Intellectual Disabilities also suffer violence and abuse in the domestic settings often at the hands of the relatives.[44] These include the deliberate acts of seclusion, denial of basic amenities, chaining, mental abuse, emotional deprivation and abandonment.[45] The main reasons of the violence against women due to:

1. Difficulty in reporting maltreatment due to the lack of accessible forms of communication.
2. Non-accessibility of information and counselling services due to barriers in the physical environment and due to the lack of accessible forms of communication.

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41 Leigh Ann Davis, People with *Intellectual Disabilities and Sexual Violence,* THE ARC (Sep. 13, 2017, 15:21 PM), https://depts.washington.edu/healthtr/documents/itellectualdis_sexviolence.pdf.

42 *Id.*

43 United Nations Trust Fund to End Violence Against Women, *Ending Violence against women with disabilities in Serbia's custodial Institutions,* UNITED NATIONS WOMEN ORGANIZATION (Sep. 13, 2017, 15:56 PM), http://www.unwomen.org/en/news/stories/2017/9/feature-serbia-ending-violence-against-women-with-disabilities.

44 *Id.*

45 Report of office of United Nations High Commissioner for Human Rights, *Thematic Study on the Issue of Violence Against Women and Girls and Disability* (2012) (A/HRC/20/5), UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (Sep. 25, 2017, 07:27 AM), http://women-disabilities-violence.humanrights.at/sites/default/files/otherpublications/2012_un_human_rights_council_study_on_violence_against_women_and_girls_with_disabilites.pdf.

3. A greater amount of dependence on other people for care.
4. Being more exposed to violence as a result of living in institutions, residences and hospitals.
5. Less risk of discovery as perceived by the perpetrator.
6. Less education about appropriate and inappropriate sexuality.
7. Long-lasting effects of electroshock and some psychiatric drugs that can impair women's ability to defend themselves against any form of violence and abuse.
8. Denial of human rights that results in experience of powerlessness.
9. Being physically and mentally less capable of defending themselves.
10. Girls, older women, and indigenous women with disabilities might face additional barriers and violence as a result of even more complex intersectional forms of discrimination.

In spite of the severity of the discrimination, the strength of the societal prejudice against women with disabilities, and the evidence of their own experiences, violence against women with disabilities is not recognized. It is hidden and ignored, and this fact increases their exposure to violence.[46] The paper shall now move to the Legal frameworks at the international and national level to safeguard the Human Rights of the women suffering from intellectual disabilities.

Legal Framework for the protection of Human Rights of women suffering from Intellectual Disability

Persons with disabilities often are excluded from the mainstream of the society and denied their human rights. Discrimination against persons with disabilities takes various forms, ranging from invidious discrimination, such as the denial of educational opportunities, to more subtle forms of discrimination, such as segregation and isolation because of the imposition of physical and social barriers.[47] Under the International and national law, India has an obligation to respect the rights of persons with disabilities.

International Legal Framework

All international human rights instruments protect the human rights of persons with disabilities, as they apply to all persons. This principle of universality is reinforced by the principles of

46 Report on Violence against Women with Disabilities (2013), WOMEN WITH DISABILITIES INDIA NETWORK (Sep. 24, 2017, 18:09 PM), http://www.wwdin.org/pdf/Report%20by%20WWDIN%20India%20Network%20for%20SRVAW_22nd%20April%202013.pdf.

47 *Id.*

equality and non-discrimination, which are included in human rights instruments.[48] United Nations Sustainable Development Goals in Para 19 specifically mentions that:

> *"We affirm the importance of the Universal Declaration of Human Rights as well as other international instruments relating to human rights and International Law. We emphasize the responsibilities of all states in conformity with the Charter of United Nations, to respect, protect and promote the human rights and fundamental freedoms for all, without distinction of any kind."*

The Convention on the Rights of Persons with Disabilities makes it explicit that the human rights enumerated in the major human rights documents apply with equal force to individuals with disabilities. Universal Declaration of Human Rights,[49] the International Covenant on Economic, Social and Cultural Rights,[50] the International Covenant on Civil and Political Rights,[51] the Convention on the Elimination of Discrimination against Women, 1993 are some of the major international documents which incorporate that United Nations has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind.[52] However, the Convention on the Rights of Persons with Disabilities is the core document which expressly prohibits discrimination and requires the State parties to take measures to eradicate all forms of discrimination against individuals, including persons with disabilities.

Since the objective of this paper is focused on the Human Rights of the Women suffering from intellectual disabilities, it would be pertinent to mention the core provisions under the international documents which confer upon the women suffering from disabilities the right to an equal treatment and live a life of dignity. The provisions are:

1. The Preamble of the Convention on the Rights of the Persons with Disabilities clearly mentions that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.[53]

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48 Overview of International Legal Frameworks for Disability Legislation, UNITED NATIONS ENABLE (Sep. 24, 2017, 18:35 PM), http://www.un.org/esa/socdev/enable/disovlf.htm.
49 *Id.*
50 The Universal Declaration of Human Rights, 1948 adopted by Resolution A/RES/3/217A.
51 The International Covenant on Economic, Social and Cultural Rights, 1966 adopted by Resolution 2200A (XXI).
52 The International Covenant on Civil and Political Rights, 1996 adopted by Resolution 2200A (XXI).
53 Para (b) of the Preamble of United Nations Convention on Rights of Persons with Disabilities, 2006.

2. The general principles of the Convention shall apply equally to women.[54]
3. Article 6 of the Convention specifically speaks about the rights of the women suffering from disabilities. It provides that the women and girls with disabilities are subjected to multiple discriminations and it is necessary to take measures in order to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.[55]
4. The Convention also lays down that the member parties shall lay down an effective legislation and policies which focus on women so as to ensure that instances of exploitation, violence and abuse against women with disabilities are identified, investigated and, where appropriate, prosecuted.[56]
5. There is also a need to recognize the rights of women with disabilities with regard to social protection programmes and poverty reduction programmes.[57]
6. There should be a prohibition to subjecting any person to torture or to cruel, inhuman, or degrading treatment or punishment, including non-consensual medical or scientific experimentation. Article 15 of the Convention requires all States Parties to take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.
7. The highest attainable standard of physical and mental health is a fundamental human right enshrined in numerous international human rights instruments, including the Universal Declaration on Human Rights. The Convention specifically mentions that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.[58]

National Legal Framework

The Constitution of India guarantees fundamental rights to all its citizens including persons with disabilities. Dignity of the individual is an essential notion underpinning all the fundamental

54 *Id.,* at Para (q).
55 Article 3(g) of the United Nations Convention on the Rights of Persons with Disabilities, 2006.
56 Article 6(1) of the United Nations Convention on the Rights of Persons with Disabilities, 2006.
57 Article 16(5) of the United Nations Convention on the Rights of Persons with Disabilities, 2006.
58 Article 28(2)(b) of the United Nations Convention on the Rights of Persons with Disabilities, 2006.

rights guaranteed under Part III of the Constitution of India. Although disability is not defined in the constitution, certain clauses direct the state to make effective provision for securing the right to work, to education, and to public assistance in cases of disability, among others. The right to equality is enshrined in Article 14 of the Constitution and recognizes that all persons are equal before the law. Persons with disabilities are entitled to this guarantee to not be discriminated against in any manner and to be treated equally, which includes the requirement for special treatment where required. Article 21 of the Constitution guarantees the right to life to all persons, which has been interpreted by the Supreme Court to include the right to live with dignity,[59] the right to livelihood,[60] and the right to education. Article 41[61] of the Constitution, explicitly mentions 'disablement' as a condition for which the State is to strive, to provide assistance in certain matters including education, work, etc.

Before, India ratified to the Convention on the Rights of the Persons with the Disabilities in 2007, the main legislation on disability rights was the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.[62] However, after the ratification, the government began re-drafting India's mental health and disability laws so as to bring them into line with the new international treaty.

In 2016, the Rights of Persons with Disabilities Act was passed by both the Houses of the Parliament. The Act replaced the previous Act of 1995 in order to make it compliant with the United Nations Convention on the Rights of the Persons with Disabilities. The new legislation lays down 21 conditions that are recognised as specified disabilities. Section 2(zc) of the Act, mentions that the 'specific disability' means the disabilities as specified under the Schedule to the Act. These conditions have been categorised under physical disability, intellectual disability, mental behaviour and disability caused due to neurological condition or blood disorders.

With regard to the rights of the women suffering from intellectual disabilities the core provisions under this Act are:

1. The principles laid down under the Act shall apply without any discrimination equally to the women.[63]

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59 Article 25 of the United Nations Convention on the Rights of Persons with Disabilities, 2006.
60 Francis Coralie Mullin v. Union Territory of Delhi, (1981) 1 S.C.C 608 (India).
61 Olga Tellis and Others v. Bombay Municipal Corporation and Others, (1985) 3 SCC 545(India).
62 Unnikrishnan J.P. and Others v. State of Andhra Pradesh and Others, (1993) 1 SCC 645 9India).
63 The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, No. 1, Acts of Parliament, 1996.

2. The Government and other local authorities shall ensure that the women suffering from disabilities enjoy their rights equally with others.[64]
3. Requisite support needs to be provided to the women with disabilities for livelihood and for upbringing of their children.[65]
4. Adequate and proper sexual and reproductive healthcare for the women suffering from disabilities.[66]
5. There should be a formulation of schemes and programs in order to support the employment of women with disabilities, especially by laying down skill training programs.[67]
6. There shall be a reservation of 1% posts in the Government establishments for the persons who are suffering from intellectual disabilities.[68]

Apart from the Persons with the Disabilities Act, 2016, India welcomed a new legislation dealing with mental health i.e. the Mental Healthcare Act, 2017.[69] The Act aims to provide a right to access to the mental healthcare and treatment i.e. providing mental health services at an affordable cost, of good quality, available in sufficient quantity, accessible geographically, without discrimination on the basis of gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class, disability or any other basis and provided in a manner that is acceptable to persons with mental illness and their families and care-givers.[70] With regard to the women the Act mentions that every person suffering from mental illness shall be given proper healthcare and there shall be no discrimination[71] made on the basis of gender or disability.[72]

The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities[73] also provides multiple schemes and services, including health insurance, for persons with developmental or intellectual disabilities, but its scope and reach are limited. As a result, families lack awareness and support in their day-to-day lives. Unable to cope with caring for a relative with a psychosocial or intellectual disability, families often dump them in

64 Preamble to The Persons with Disabilities Act, 2016.
65 Article 4(1) of The Persons with Disabilities Act, 2016.
66 Article 24(2)(d) of The Persons with Disabilities Act, 2016.
67 Article 25(2)(k) of The Persons with Disabilities Act, 2016.
68 Article 19(2) (c) The Persons with Disabilities Act, 2016.
69 Article 34(1)(d) of The Persons with Disabilities Act, 2016.
70 The Mental Healthcare Act, 2017, No. 10, Acts of Parliament, 2017 (India).
71 Article 18(2) of Mental Healthcare Act, 2017.
72 Article 22 (1) of The Persons with Disabilities Act, 2016.
73 Article 22(1) (a) of The Persons with Disabilities Act, 2016.

state mental hospitals or residential care institutions. Once in there, people with disabilities experience a range of abuses and even death.[74]

There are a lot of women around the world who are suffering from disability. For women with disabilities, gender-based violence is often compounded by disability-based discrimination.[75] Unfortunately, too many existing programs meant to prevent gender-based violence do not take into account the unique dangers and challenges faced by women with disabilities. Without specific attention and solutions these women have been left behind and are at risk.

Challenges and Recommendations

From the detailed discussion above, it is clear that women with intellectual disabilities suffer from high rates of violence, be it physical, sexual or psychological in nature. Human Rights law defines this as a violence accomplished by physical force, legal compulsion, economic coercion, intimidation, psychological manipulation, deception and misinformation and in which the absence of free and informed consent is a key analytical component.[76] There are various international and national instruments which lay down the law for the protection of women suffering from disabilities. However, the state institutions are failing in performing these duties. There are many reasons for the same including:

1. The most important reason is the prejudice associated with the disability. Persons with disabilities are still regarded as recipients of charity or objects of others decisions, rather than people with the right and autonomy to make their decisions.[77]
2. Isolation and exclusion from the society poses another threat to the well-being of women suffering from intellectual disabilities.
3. Exploitation of the women and girls with mild intellectual disabilities by fellow residents or staff in the institutions is yet another challenge.
4. There is lack of access to justice. In other words the justice system can be very

74 The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities, 1999, No. 44, Acts of Parliament, 1999 (India).

75 *Id.*

76 ADD International Approach-A Learning Paper, Disability and Gender based Violence, ADD ORGANIZATION (Sep. 28, 2017, 17:12 PM), https://www.add.org.uk/sites/default/files/Gender_Based_Violence_Learning_Paper.pdf.

77 Remarks by United Nations Resident Coordinator Louisa Vinton at the Violence Against Women With Disabilities: Challenges and Perspectives Conference, UNITED NATIONS DEVELOPMENT PROGRAMME (Sep. 28, 2017, 17:32 PM)

challenging for people with disabilities, particularly people with psychological or intellectual disabilities.

5. Women with intellectual disabilities also face barriers while reporting and having criminal complaints registered and investigated in cases of sexual violence. The police often refuse to register a case because they are not convinced that the survivor is telling the truth or can identify or remember the perpetrator. [78]
6. Women labelled with intellectual disabilities are likely to be silenced and ignored when speaking out or attempting to defend themselves, particularly when the violence is authorized by law or committed in a context where the woman is deprived of her legal capacity or freedom.
7. Professionals who work with women who have experienced abuse often do not recognize that women with disabilities are in the same situations, either because they do not have the information or because they do not recognize acts they believe to be associated with disability, including forced institutionalization and forced interventions, as acts of violence.[79]

In order to meet these challenges, the author has made the following recommendations:

1. There should be requisite steps taken by the appropriate Government to improve the conditions of the institutions where the women suffering with disabilities are kept, so as to ensure that the Human Rights of such women are respected and protected. This can be done by issuing guidelines for sanitation, hygiene, and living conditions and prohibiting arbitrary detention without judicial review and involuntary electroconvulsive therapy.
2. An independent and confidential complaint mechanism must be created which can receive and investigate complaints on a confidential basis, about ill-treatment of women with intellectual disabilities in institutions.
3. There is a need to take measures to fight stigma, discrimination and all forms of violence against women and girls with disabilities, for example through

http://www.mk.undp.org/content/the_former_yugoslav_republic_of_macedonia/en/home/presscenter/speeches/2015/12/02/remarks-by-un-resident-coordinator-louisa-vinton-at-the-violence-against-women-with-disabilities-challenges-and-perspectives-conference-.html.

78 *Id.*

79 *Supra* note 37, at 74.

awareness campaigns and community discussions.

4. There should be an immediate action taken towards the prohibition of discriminatory practices against persons with disabilities such as spatial segregation and use of derogatory words.
5. Education must be imparted to women and girls with disabilities about their human rights. All the government and privately-run institutions need to provide accessible information to women with intellectual disabilities and inform them about their rights and complaint procedures.
6. The causes of all forms of violence against women with disabilities need to be investigated with regard to the isolation and victimization that can contribute to violence in such circumstances.
7. Training of the women with disabilities to organise and manage support services efficiently, to develop skills and abilities for economic self-sufficiency, and to use technological aids that that lead to greater independence.
8. There should be proper allocation of funds by the appropriate governments and specific budgets should be created for community support programs and independent and supportive living arrangements for women with intellectual disabilities. Moreover, a body composed primarily of experts with disabilities must also be created in order to monitor and assess the effectiveness of community-based support services.
9. Ensure that the staff in general hospitals and at institutions is trained to accommodate women with disabilities and are sensitive to their needs.
10. Lastly, The National and the State Human Rights Commission along with the National Commission for Women must also ensure regular and periodic monitoring of conditions in mental hospitals and institutions women with intellectual disabilities.

Conclusion

Many women with disabilities see themselves as victims of maltreatment and abuse, while society ignores the problem. However, some women with disabilities may not see themselves as victims of violence because they consider their situations habitual and associated with disability.

In some situations society refuses to recognize that certain acts constitute violence, and the women who experience them may or may not consider themselves as victims. This is particularly true with respect to acts authorized under domestic law, such as forced psychiatric interventions with mind-altering drugs, electroshock or psychosurgery, institutionalization, restraints and isolation, which are practiced primarily on women with psychosocial disabilities and women with intellectual disabilities. Gender is a major factor in mental health conditions. Depression, which is the leading cause of disability and is expected to be the second largest cause of the global disease burden by 2020, is reported to be twice as common in women when compared to men.[80]

Women and girls with intellectual disabilities in India experience widespread violations of their rights, including denial of legal capacity, the right to make one's own decisions and a lack of community-based support and services. They are particularly vulnerable to being admitted without their consent to institutions where they face a range of abuses, including neglect, verbal and physical violence, and involuntary treatment. With the coming of the Persons with Disabilities Act, 2016 and Mental Healthcare Act, 2017, a new ray of hope has emerged for the persons who are suffering from various disabilities. However, still there is a need to a undertake urgent reforms to guarantee the legal capacity of women with intellectual disabilities and take steps to shift from institutional to community-based care and services for people with disabilities.

There are no specific programs for women with disabilities, only some homes for destitute women. The security of women with disabilities is the biggest challenge. Women with disabilities don't get support from their families and are deprived from home. Moreover, the lack of adequate monitoring of both state-run and private mental hospitals and residential care institutions for women with intellectual disabilities. It is essential that State Mental Health Authorities as well as independent bodies such as the National Human Rights Commission regularly monitor residential care institutions as well as community-based services such as the District Mental Health Program to ensure quality of care and informed consent. Therefore, to

80 Women with Disabilities Australia (WWDA) Resource Manual on Violence against Women with Disabilities – Booklet 2: *Forgotten Sisters – A global review of violence against women with disabilities,* WOMEN WITH DISABILITIES AUSTRALIA (Sep. 30, 2017, 09:12 AM), http://wwda.org.au/wp-content/uploads/2013/12/Forgotten_Sisters.pdf.

81 Document on Violence against Women with Disabilities, International Network of Women with Disabilities (INWWD), WOMEN WITH DISABILITIES AUSTRALIA (Sep. 30, 2017, 09:41 AM), http://wwda.org.au/wp-

protect the Human Rights of women suffering from intellectual disabilities is the dire need of the hour. Till the human dignity is respected and upheld all the legislations and efforts are futile. As Ban-Ki Moon, the former Secretary General of United Nations states:

"Let us work together for a world of opportunity and dignity for all, a future of inclusion, one in which we all gain by leaving no one behind." [81]

content/uploads/2013/12/inwwdviol2010.pdf.

82 United Nations Expert Group Meeting on *Mental Well-being, Disability and Development: Conclusions and Recommendations for Inclusion of Mental Well-being and Disability into Key Goals and Outcomes of Upcoming International Conferences* (May 2013), UNITED NATIONS ORGANIZATION (Sep. 30, 2017, 19:42 PM), http://www.un.org/disabilities/documents/hlmdd/UNU_EGM_MWDD_2013.pdf.

83 Former Secretary General of United Nations, Ban-Ki Moon in a video message referring to the artists from the

CRITICAL EVALUATION OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

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Ms. Jasbir Kaur**

Introduction

Drugs have become a huge menace to mankind. We are in fact dealing with a security problem of global dimensions. It is not only a threat that affects affluent societies, but also developing countries. Those who produce drugs or deal with them unscrupulously launch an aggression against mankind, against human life and political environment. At the end of the twentieth century, there are many other dangers threatening mankind on this planet Earth.[1] Small dose of opium did much less harm than dose of heroin.[2] The problem is closely associated with the development process characterized by industrialization, urbanization and rural-urban drift and the resultant changes in the family structure, the community life and social values.[3] The more the body systems become tolerant, the more the person gets driven with the urge and more the amount of the substance is required and recurring expenditure get increased.[4] Therefore a very strict vigilance equipped with a fool proof law became necessary to control production and smuggling of these drugs in the country and also at international levels.[5]

Law and policy in India

Geographical India, by the very nature of its location on the global map is surrounded on at least three sides by illegal drug production areas namely, the Golden Crescent on the west and the Golden Triangle on the east and finally, the extensive border that India shares with Nepal, an area also used extensively for the cultivation of cannabis. Although, initially, the importance of India with respect to its geographical location was primarily to the extent of it being a transit point for the products generated by both the Golden Crescent and the Golden Triangle for the movement of the drugs, by the 1980's India had developed into a fairly big base for providing a

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1 D.C. JAYASURIYA, et.al. (eds.), GLOBAL DRUGS LAW 345 (Har-Anand Publication, New Delhi, 1997).

2 S.K. GHOSH, THE TRAFFIC IN NARCOTICS AND DRUG ADDICTION 93 (Ashish Publishing House, New Delhi, 1987).

3 Meeting of the Central Committee on Prohibition and Drug Abuse 25 SD 47 (1988).

4 Sukumar Bose, *Psycholosocial aspects of the victims of Drug Abuse,* 25 SD 49 (1988).

5 Suresh V. Nadagoudar, *Legal Strategy to Combat Drug Trafficking,* 23 COCHIN UNIVERSITY L. REV. 183 (1999).

domestic market for narcotics, specially heroin and morphine, which, by now, has assumed alarming proportions, not only crippling those who are dependent upon it, economy owing to the fact that immense profits are derived from this illicit drug trafficking which has a direct effect on making the economy dependent on the trade and thus eventually endangering the political stability of the nation itself.[6]

Current legal framework Narcotic Drugs and Psychotropic Substances Act, 1985

Narcotic Drugs and Psychotropic Substances Act, 1985 was enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provision for the control and regulation of operation relating to Narcotic Drugs and Psychotropic Substances and for matters connected therewith. Domestic legislation to give effect to these treaties was introduced only in the 1980s when the 'grace period' for abolishing the non-medical use of cannabis and opium under the 1961 Convention expired.[7] The oldest drug law in India related to the control of opium and the regulation of poppy cultivation. It was the Opium Act of 1857[8] which was followed by the Opium Act of 1878. India has always been responsive to the international concern for drug related problems. It participated in the second International Opium Conference held in Geneva in 1924 called by the League of Nations. India adopted the Convention and enacted the Dangerous Drugs Act, 1930. India was also a signatory to the Single Convention on Narcotic Drugs, 1961, the Protocol of 1972 amending the said Convention, as well as Convention on Psychotropic Substances, 1971. To give effect to these international conventions,[9] India enacted the Narcotic Drugs and Psychotropic Substances Act in 1985.[10] India became a signatory to the UN Convention against Narcotic Drugs and Psychotropic Substances, 1988. Various provisions of the 1988 UN Convention have been incorporated into the NDPS Act by amendments to the Act in 1989.[11] The need to amend the law to further strengthen it has been felt in the twenty first century.

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6 *Supra* note 2 at 9.

7 Molly Charles, et.al., *Drug Policy in India: Compounding Harm?,* THE BECKLEY FOUNDATION DRUG POLICY PROGRAMME (Nov. 5, 2017), http://reformdrugpolicy.com/wp-content/uploads/2011/10/Drug-Policy-in-India-Compounding-Harm.pdf.

8 H.K. BHARATI, A MANUAL OF DRUGS & PHARMACY LAWS IN INDIA 4 (Paramount Law Publishers, Indore, 1977).

9 INDIA CONST. art. 253.

10 Section 80 of The Narcotic Drugs and Psychotropic Substances Act, 1985, No. 61, Acts of Parliament, 1985 (India).

11 The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988, No. 46, Acts of Parliament, 1988 (India).

Then The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988 to bring certain controlled substances, which are used for manufacture of Narcotic Drugs and Psychotropic Substances, under the ambit of Narcotic Drugs and Psychotropic Substances Act and to provide deterrent punishment for violation, to provide that no sentence awarded under the Act shall be suspended, remitted or commuted and provide for pre-trial disposal of seized drugs. The death penalty on second conviction in respect of specified quantities of certain drugs to provide for forfeiture of property and detailed procedure relating to the same and provide that the offences shall be cognizable and non-bailable. Then again NDPS (Amendment) Act, 2001, which amended sections 41 and 36(1) and (2) and made provision for the special court.[12] NDPS (Amendment) Act, 2014 in which sections 9,10,15,17,18, etc. were amended is also a very significant amendment.

An Overview of the Narcotic Drugs and Psychotropic Substances Act, 1985

The alarming increase of incalculable and inexpressible evils of drug menace coupled with inadequacies in the erstwhile laws compelled the parliament to pass comprehensive legislation namely *The Narcotic Drugs and Psychotropic Substances Act, 1985 a special Act* enforceable by multi law enforcement agencies. In this Act, stringent provisions for the control and regulation of operations relating to narcotic drugs and also deterrent punishments including forfeiture of property and death sentence have been provided. Section 8 is considering the orbit of the Act. The Act provides for a mandatory minimum sentence of 10 years with a monetary fine of Rs. 1 lakh extendable up to 20 years and a fine of Rs. 2 lakhs. On a second conviction, the mandatory minimum punishment would be 15 years and a fine of Rs. 1.5 lakhs extendable upto 30 years with a fine of Rs. 3 lakhs and also exceptionally a death sentence.[13]

Obviously when such stringent provisions have been made, a fool proof procedure regarding issuance of warrants and authorization, power of entry, search, seizure and arrest :[14] power to stop and search conveyance and power to investigate including the obligations of officers to assist each other has been provided. All offences under the Act are required to be investigated with strict adherence to the letter and spirit of the provisions of the Act. The intention of the legislation is that when the NDPS Act provides for such stringent punishments, there must be strict compliance with the provisions for the Act so that innocent person are not harassed or

12 Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2011, No. 78, Acts of Parliament, 2011 (India).
13 Sections 17 to 32B of The Narcotic Drugs and Psychotropic Substances Act, 1985.
14 Id., at Sections 41 and 42.

unnecessarily roped in by any arbitrary or whimsical action of the enforcement agencies.[15] Non observance of procedure provided in Chapter V has been made punishable which is most unusual and has not been provided in the past in any other law.[16]

Search, seizure and arrest are the routine activities of investigation of any criminal case. But these constitute vital basis and components for drug cases because the success and failure of prosecution under this Act mainly depends upon the legality and illegality committed by the enforcement agencies in complying with the procedural aspects of the Act as enshrined in Sections 41 to 68 under Chapter V of the Act which casts statutory duty upon the investigating officers for strict compliance of its provisions. Court also helping in elaboration of the NDPS Act. Section 50 apply in case where things carried by person.[17] In case, the recovery of the narcotic is made from a container being carried by the individual[18] then provision of section 50 not attracted.[19] The Any slight deviation from the procedures, without reasonable and cogent grounds provides wide scope to the accused to get an acquittal. In this background, we may proceed to look into and consider the various provisions of the Act dealing with procedural requirements. [20]

Problems in Enforcement

There are several practical difficulties in affective enforcement of the NDPS Act, 1985. It would be appropriate to discuss some of these problems here.

(a) Lack of Coordination among different Enforcement Agencies

There is practically no coordination between the Central and State agencies responsible for implementation of NDPS Act, 1985. The Central agencies are functioning in isolation of the State police and there is no meaningful interaction between the agencies of the two Governments at the cutting edge level. Coordinated efforts can produce better results.

(b) Sharing of Intelligence

The central agencies are mainly after big smugglers who operate at the international or inter-state level. The state police generally catch distributors; occasionally small transporters are also

15 S.R. Majumdar, *Search and Seizure under Drug Law:* Some Viewpoint, CRIMINAL L.J. 12 (1995).
16 Section 59 of The Narcotic Drugs and Psychotropic Substances Act, 1985.
17 State of Rajasthan v. Tara singh, (2011) 11 SCC 559 (India).
18 Jarnail Singh v. State of Punjab, AIR 2011 SC 964 (India).
19 Ajmer Singh v State of Haryana, (2010) 3 SCC 746 (India).
20 Purva Chadha, Search and Seizure under The Narcotic Drugs and Psychotropic Substance Act, 1985, 12(1) Cri. L.J. 75 (2003).

apprehended. System for sharing intelligence between the state and central agencies has not been developed.[21]

(c) Priorities

The state police who are bogged down with day-to-day law and order and crime problems usually give low priority to enforcement of local and special laws, including the drug law.

(d) Ignorance

Police officers should realize that their subordinates are not well-informed and sensitized adequately about proper enforcement of NDPS Act. The Investigating Officers must be trained o investigation techniques to crack organized drug syndicates.

(e) Non-availability of Independent Witness and Impractical Mandatory Provisions of Law

The NDPS Act, 1985 lays down certain mandatory provisions, one such provision is relating to the search of suspected persons. As per section 50, the search would be affected before a Gazetted Officer listed in the Act. No Gazetted Officer other than that of police is ready to become a witness in such searches. Even Gazetted Police Officers are not always available. Under these circumstances, the investigating officers either adjust the time of search before a Gazetted Officer and expressed full faith for the search by the investigating officer, and thus they conduct search of the accused, effect recovery and produce the accused and recovered contrabands before the Gazetted Officer and maneuvered the record as if the search has been done in the presence of a Gazetted Officer. These mandatory provisions have become tools for the defense counsel to blast the prosecution case.

(f) Failure to Locate Source of Supply

It is unfortunate that the Investigating Officers often fail to locate the source of supply of the contrabands recovered by them. The link between the distributor, the transporter and the supplier is missing most of the time. There are many reasons behind this failure, i.e., lack of sustained interrogation, non-availability of adequate police remand for interrogation.

(g) Delay in Trial and Bail under Section 167(2), Cr.P.C.

An accused person has the right to be released on bail as per section 167(2), Cr.P.C. if the investigating agency fails to submit the challan (investigation report) in court for trial within 90

days of arrest. After seizure, samples of the contraband are sent for forensic analysis. The report of a forensic examiner is received usually after 90 days. For example, for the Haryana State Forensic Science Laboratory with about 6000 cases pending examination, it is almost impossible to prove a report in 90 days time in routine cases. Some courts accept challan within 90 days without the report of chemical examiner. Other refuses to accept the same. The accused gets the benefit and is released on bail. In view of practical difficulties, investigating officers may be issued chemical kits for identification of drug for the purpose of submitting the challan in the court. The detailed forensic report may be called by the court at a later date during the trial.[22]

(h) Quantum of Punishment

Punishment should be commensurate with the quantity of contraband recovered. The law should distinguish between trafficking of drugs dealing in large quantum from a street peddler. A judge may find it difficult to convict a person possessing 100 grams of opium for 10 years. There is urgent need to amend the punishments prescribed under the NDPS Act, 1985.

(i) Disposal of Case Properties

The Police Stations and judicial malkhanas do not have adequate space for storing narcotic contrabands, especially poppy husk. The Narcotics Control Bureau has laid down procedures for pre-trial and post-trail disposal of contrabands. These procedures need to be simplified and it should be made mandatory that the contrabands recovered should be destroyed under the supervision of the court within 30 days.

(j) Professional Offenders

The capital punishment provided in the NDPS Act for habitual offenders has not deterred anybody from making a living out of drug trafficking so far. With the low rate of conviction witnessed so far, it is very unlikely that the provision of capital punishment will be used any time. However, the law may be amended to refuse tail to habitual offenders.

(k) Forfeiture of Property and Preventive Detention

Law provides for forfeiture of the property acquired through illegal trafficking in narcotics. The reason behind in action on this account under NDPS Act could be:

i) Lack of knowledge on the part of the police officers.

ii) Apprehension in the mind of enforcement agencies about the likely success of such actions in the prevailing atmosphere.

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21 P. Singh, Drug Law Enforcement in India, 66 IPJ 75 (2000).

22 *Id.*, at 78.

The criminal justice system should rise collectively to take o the challenge. [23]

Criticism

Awarding of deterrent punishments to drug traffickers as provided in the Act and giving publicity to such punishments; details of properties confiscated/forfeited etc. would make the business of dealing illicit drugs more costly and risky, and would deter prospective individuals who are hitherto unemployed or who are greedier to earn money in an easier way.[24] Many an accused involved in NDPS and Abkari cases have walked away with acquittal due to lack of investigations.[25] The penalty for violating the same is a minimum of ten years imprisonment and a fine of Rs. 1 lakh which can be extended upto thirty years and a fine of Rs. 3 lakhs and even the death penalty. The major enactment or narcotics in India is the Narcotic Drugs & Psychotropic Substances Act, 1985. The scheme of the Act envisages long term prison sentences and heavy fines for the offenders. The jails are overcrowded with under trial offenders under the Act. The cultivator, the seller as well as the consumer of drugs are offenders and have to suffer minimum prison sentences which in most cases is ten years. Yet crime is on the rise. The present Act is widely criticized for treating the drug user and drug trafficker on par. Possession for personal use in small quantity is also an offence (where a user is in possession of a small quantity, the sentence may go upto six months or one year, depending upon the nature of the drug). But the small quantity fixed by the Government is so small that it may barely suffice for one single use. The basis for arriving at theses quantities is not known. Such provisions make it difficult for the drug addicts who have, wittingly or unwittingly, become victims of the drug trade, to come out in the opened and seek medical attention and rehabilitation. Another strong criticism is that the Act does not distinguish between soft drugs and hard drugs compared to soft ones. Much can be said about the policy of the Act prescribing the minimum sentence of ten years. Harsh minimum sentences result in a low conviction ratio. We may think of suitable amendments to the Act to produce the desired result.[26]

When the NDPS Act was enacted, perhaps the strength of the extant infrastructure was not sufficiently examined. Perhaps no proper study was made as to the required capacity of the police force and other investigating agencies, the criminal courts, the prosecuting agencies and

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23 *Id.*, at 79.
24 K. Senthila Thiban, *An Integrated Approach To Combat Drug Abuse in India,* 99 SD 30 (1990).
25 Justice M.R. Hariharan Nair, *Investigation and Charge Sheeting By Detecting Official,* 2 KL 29 (2004).
26 *Supra* note 6.

the jails, so that a larger number of offenders got arrested, the criminal courts became overloaded with cases and the ails were suddenly over-crowded. Limited capacity of forensic laboratories added to the prolonged litigations. (The minimum sentence of ten years prevents even the petty offenders from confessing their guilt. One in jail, the convicts and under trials has almost a permanent settlement. Keeping this situation in mind, we had to make a judicial order for grant of bail according to a scheme evolved therein. All such situations will have to be averted whenever we think afresh.[27]

Conclusion

Stray incidents indicate that the drugs trade operations have made deep inroads into the social fabric of our country. The same may be true about many other countries also. There is no doubt that a clearer picture would emerge only after the outcome of a detailed socio-legal study of the causes, factors and effects of the flourishing state of his menace is known. But, the lure of money, vulnerability of adolescents, poverty and other facts of socio-economic deprivations not only promote and aggravate this menace, but also provide sustenance to the flourishing trade. Developing countries have undoubtedly become a thriving market for this trade which has got the potential power to endanger the social, economic and political security of the state. It has already started human and social dimensions of the problems must also be addressed while combating this menace. Latest studies have shown that cultivation of drug crops leads to environmental degradation in the form of deforestation, soil degradation, water pollution and loss of biodiversity. These adverse impacts would be in the nature of long-term losses to the ecology and the humanity. Therefore, concerted global action from a holistic perspective alone can arrest this trend and save humanity from its deleterious impact.[28]

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27 *Supra* note 2, at 10.

28 G.S. Tiwari, *Drug Trade and Terrorism: An Assault on Human Rights,* 45 JILI 37 (2003).

PRINCIPLE OF PROTECTIVE JURISDICTION UNDER INTERNATIONAL LAW: AN ANALYSIS

Mrs. Pooja Devi Thakur*

Introduction

The Westphaian international legal order provides that sovereignty of State is supreme within its own territorial frontiers.[1] The concept of sovereignty is based on the maxim – sic uteretuoutalienum non leaedas (use your property such a way as not to cause damage to the others), used to express that the duty of States to exercise sovereignty in such a way not to cause harm to territory of other states. This traditional concept is negative in the sense of law of jurisdiction.[2] This means that the States are not allowed to assert jurisdiction over affairs which are in realm of other States - typically acts that take place extraterritorially - as would violate the principle of non-intervention and sovereign equality of States. For this reason the scope of traditional model of criminal jurisdiction is essentially limited to territory.[3] The big name literature of early American law is studded with evidence of this preoccupation with the "locus" of the crime.[4] The authority of legislature and courts in criminal matters is supposed to be bounded by territorial boundaries of state.[5] With increase in the development of the transportation and communication, criminal activities are not restricted within one territorial limit. Perhaps, a State can no longer afford to depend only upon application of territorial principle for prosecuting the criminals as with the time it has become ineffective. But nowadays

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1 LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUE 9 (1995) (Tracing the territoriality principle back to Peace of Westphalia in 1648); Shih Shun Liu, *Extraterritoriality: Its Rise and Its Decline,* PANARCHY (Mar. 24, 2017), http://www.panarchy.org/shihshunliu/ Extraterritoriality_Liu.pdf.

2 Cedric Rynaert, *The Concept of Jurisdiction in International Law,* UNIJURIS (Mar. 24, 2017), https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf.

3 John H. Jackson, *Sovereignity-Modern: A New Approach To An Outdated Concept, 97* AMERICAN JOURNAL OF INTERNATIONAL LAW 782-802 (2003); David Wolitz, *Criminal Jurisdiction and the Nation-State: Towards Bounded Pluralism,* 91 OREGON LAW REVIEW 726-783 (2013).

4 STORY, COMMENTARIES ON THE CONFLICTS OF LAW 17-18 (1883) (No State or nation can by its laws directly affect or bind property out of its own territory, or persons not resident therein, whether they are natural-born subjects or others….it would be equivalent to a declaration that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nation; that each could legislate for all, and non for itself; and that all might establish rules which none were bound to obey). American Banana Co. v. United Fruit Co., 213 U.S (1909) (Justice Holmes held that the general and almost universal rule is that the character of an act as lawful or unlawful general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly b the law of the country where the act is done).

5 Hannah L. Buxbam, Territory, *Territoriality, and the Resolution of Jurisdictional Conflict,* 57 AMERICAN JOURNAL OF COMPARATIVE LAW 631-675 (2009) (Territoriality functions within the jurisdictional context as the conceptual foundation of regulatory authority over transaction or conduct).

nation States are increasingly asserting jurisdiction over criminal offences that occur extraterritorially.

International law also recognizes different forms of criminal jurisdiction. In addition to the territoriality principle that connects jurisdiction to the place where a crime was committed, there are several other grounds of extraterritorial jurisdiction.[6] The expanding extraterritorial jurisdiction include offences committed abroad even by aliens, if the crime threatened the "security, integrity or independence" of the State to seeking to prosecute. The main forms of extraterritorial jurisdiction are the protective principle and the universality principle.[7]

Protective Principle and its Evolution

The protective principle is one of the bases recognized in international law for the exercise of criminal jurisdiction by a sovereign State.[8] According to this principle, a sovereign State has jurisdiction to prosecute those who commit acts outside of its territory which have a potentially adverse effect on its security or governmental functions.[9]

a. Genesis of Protective Principle

This principle in based on ancient doctrine of self-defence,[10] which permits a State to assert jurisdiction over person including any entity whose conduct outside a State's territory threatens its national interest.[11]

As discussed earlier, the primary justification for protective jurisdiction is self-defence of the State and its security interests.

In the UN Charter it is provided that:

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6 There are other five bases of jurisdiction and are as follows: (1) territorial Jurisdiction, is based on the absolute sovereignty of a State within its boundaries; hence prosecute all who commit a crime within its territory; (2) Nationality Principle, means jurisdiction over nationals rests on the allegiance due a State by its citizens and inherent authority which it has over them; (3) universal jurisdiction, it is premised on the belief that certain crimes, such genocide, war crimes, crimes against humanity so that every State has the right to punish those which commit them.

7 CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 7 (2008).

8 Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime,* 29 AMERICAN JOURNAL OF INTERANTIONAL LAW 437-445 (1935) (Hereinafter cited as Draft Convention). United States v. Pizzarusso, 388 F. 2d 8, 10 (2d Cir. 1968).

9 Danwood Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights,* 5 MELBOURNE JOURNAL OF INTERNATIONAL LAW (2004).

10 Noah Bilalostozky, *Extraterritoriality and National Security: Protective Jurisdiction as a Circumstances Precluding Wrongfulness,* 52 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 618-684 (2014). (Napoleon's France, European States, acting in defence of the nation-State, asserted jurisdiction over acts allegedly injurious to the security of the State committed by aliens in the foreign territory).

11 Linda M. Paul, *Using the Protective to Unilaterally Enforce Transnational Marine Pollution Standards,* SWFSC (Sept. 21, 2017), https://swfsc.noaa.gov/publications/TM/SWFSC/NOAA-TM-NMFS-SWFSC-154_P1045.PDF.

> *"Nothing in the present Charter shall impair the inherent right of the individual or collective self defence if an armed attack occurs against a Member of the United Nation, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take any time such action as it deems necessary in order to maintain or restore international peace and security."*[12]

The protective principle jurisdiction's genesis can be traced back to the statutes of Italian city-states, through its first articulation in a national legal system came in the Napoleonic Code.[13] The French Code of Criminal Procedure of 1808 authorized the exercise of jurisdiction over alien acts that constituted "a crime against the security of State, of counterfeiting the seal of the State, the national currency, national documents or banknotes authorized by law."[14]

The protective principle has been used very infrequently in the US, the territorial and nationality principles generally being relied upon to establish jurisdiction over criminal offenses. The United States Supreme Court first recognized the protective principle in ***Strasshein v. Daily***[15] Justice Holmes defined principle as "acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it." The protective principle has, however, been used to establish jurisdiction over the offence of making false statements on visa at United States consulates. In addition, the America Law Institute has recognized that, should congress decide to proscribe the counterfeiting of United States currency outside of the United States, jurisdiction over that offense could be based on the principle.

Eleven years later, in ***United States v. Bowman (1922, p. 98),***[16] the Supreme Court applied the

12 Article 51 of The UN Charter, UNITED NATIONS (Sept. 23, 2017), http://www.un.org/en/sections/un-charter/chapter-vii/index.html.
13 ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 859 (2003).
14 Arthur Lenhoff, *International Law and Rules on International Jurisdiction,* 50 CORNELL LAW REVIEW 5-23 (1964).
15 221 U.S. 280 (1911).
16 260 US 94 (1922).

principle to a case involving a conspiracy to defraud the U.S. Government by American citizens on American ships on the high seas. The lower court had dismissed the case since the controlling criminal statute did not expressly confer jurisdiction on U.S. courts for fraudulent acts committed on the high seas. The Supreme Court reversed, holding that jurisdiction could be inferred since certain criminal statutes are "not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself. . . "

b. Current conception

Now, it is well established concept, although there are uncertainties as to how far it extends in practice and particularly which acts are included within the net of the claimed jurisdiction. [17] It is universally accepted that due to the eminence of some specific interests at stake, States have the authority to prescribe and apply policy with regard to crimes manifestly detrimental to their community even though these crimes are initiated and consummated by aliens in a foreign country.[18]

The Draft Convention by the League of Nations is considered as the reflection of the acceptance of reasons behind the extraterritorial jurisdiction.[19] Article 7 of the Draft Convention, titled "Protection-Security of State," provides that:

> *"A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed."* [20]

It has been already discussed earlier that the primary justification for protective jurisdiction is self-defence of the State and its security interests.

In the UN Charter it is provided that:

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17 MALCOLM N. SHAW, INTERNATIONAL LAW 591 (2003); ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 44 (2010); IAN BROWNILE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 304 (2008) (Nearly all States assume jurisdiction over aliens for acts done abroad which affect the security of the State….However, it is obvious that the interpretation of the concept of protection may vary widely).

18 Robert Thee, *State Criminal Jurisdiction,* 9 MALAYA LAW REVIEW 38-95 (1967).

19 Draft Convention, Supra note 8 (The Draft Convention was a product of the League of Nations Assembly's call for a "Conference for the Codification of International Law." The faculty of the Harvard Law School, responding to the Assembly's call, organized the "Research in International Law" for the purpose of preparing drafts of international conventions on subjects selected by the League of Nations).

20 *Ibid.*

21 *Supra* note 12.

> *"Nothing in the present Charter shall impair the inherent right of the individual or collective self defence if an armed attack occurs against a Member of the United Nation, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take any time such action as it deems necessary in order to maintain or restore international peace and security."*[21]

The Restatement (Third) of Foreign Relations Law of the United States outlines the scope of this principle:[22]

"A State has jurisdiction to prescribe law with respect to ... (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the State or against a limited class of other State interests."

The Restatement and the Draft Convention gives ample capacity to a State to exercise protective principle against the conduct legislate that threatens national security. Now the various States throughout the World have incorporated the protective principle in their codified laws like Ethiopia, France and Venezuela etc. by taking a cue from Restatement and the Draft convention.

In 2006, US courts exercised protective principle jurisdiction to convict a Canadian national of attempting to blow up the Trans-Alaska oil pipeline, a crime 'clearly implicating the fuel security and financial security of the United States.[23] The court held that the protective principle applies where the defendant's conduct may have "potentially adverse effect on the sovereign's security or its governmental functions."[24]

Rationale behind Assertion of Protective Principle

There is a need for the States to develop methods for catching criminals beyond their borders and this led to rise in extraterritorial jurisdiction. The extraterritorial criminal jurisdiction to include

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22 Section 402 (3). HAROLD G. MAIER, Jurisdictional Rules in Customary International Law, EXTRATERRITORAL JURISDICTION IN THEORY AND PRACTICE 6 (Karl M. Meesen ed.) (1996) (The draft convention along with its accompanying commentary, was the intellectual, if not the institutional, forerunner of the American Law Institute's Restatement on the "Bases of Jurisdiction to Prescribe"); Noah, *Supra* note 10 (the draft convention gave rise to the Restatement's formulation of protective jurisdiction more than fifty years later).

23 United States v. Reumayr, 530 F Supp 2d 1210 (DNM 2008).

24 *Ibid.*

offences committed abroad, if the crime threatened the "security, integrity or independence" of the State seeking to prosecute.[25] This principle provides that States may exercise jurisdiction over aliens who have committed an act abroad which is deemed prejudicial to the security of the particular State concerned. Without any centralized or global authority capable of protecting States from extraterritorial harm, States require the competence to punish foreign conduct that frustrates their sovereign right to internal peace[26] and protective principle serves a useful purpose in that as it permits a State to combat extra-territorial acts done by non-subject who have an adverse effect on its welfare or security.[27]

If such a protective jurisdiction is not given to a sovereign State, its stability and existence itself can be shaken by acts or things done by foreigners outside its territory and the State will be powerless to do anything against them. Therefore it should be taken to be the basic right of any State to protect itself from such prejudicial acts done by foreigners outside the State by dealing with them in any manner they like.[28]

Relationship between Protective Principle and Passive Personality

The passive personality principle deals with crimes committed against the national of State. In contrast, the protective principle addresses itself to criminal activity directed towards the State itself as a sovereign political entity. But the similarity is limited to the fact that both involve actions initiated and completed outside the State seeking to assert judicial jurisdiction.

The difference between protective principle and passive personality principle of jurisdiction is that whereas the former is vague and uncertain as to the requirement to the actual harm or injury to the State or interest but in the later an actual harm to the State subject is mandatory.

Identification of Problems in Assertion of Protective Principle

1. For the protective principle, it is the nature of the interest injured rather than the place of act or the nationality of the offender that serves as the basis of

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25 Draft Convention, Supra note 8, at 546 (the States assuming penal competence upon the protective principle include practically all States other than the United States and Great Britain).

26 Manuel R. Garcia-Mora, *Criminal Jurisdiction Over Foreigners for Treason and Offences Against the Safety of the State Committed Upon Foreign Territory,* 19 UNIVERSITY OF PITTSBURGH LAW REVIEW 567-568 (1958).

27 BRUNO SIMMA & ANDREAS TH. MILLER, Exercise and Limits of Jurisdiction, CAMBRIDGE COMPANION TO INTERNATIONAL LAW (JAMES CRAWFORD & MARTTI KOSKENNIEMI eds.) (2012).

28 K.T.M.S. Abdul Cader and Others v. Union of India, AIR 1977 Madras 386 (India); G.B. Singh v. Union of India, AIR 1973 SC 2667 (India).

jurisdiction.[29] But the word "interest" is highly subjective and not easily categorized,[30] due to which a State may misuse it so as to get jurisdiction by relying on the protective principle. Therefore, it can be said that the word 'interest' should not be seen and construed as mere political, social or commercial/economic but it should be something more tangible and adversely affecting the sovereign rights and foundation of the nation.[31]

2. There are various acts, which even if adjudged objectively qualify easily as attacking the roots of the State. But there are no definite criteria to identify and group together these acts. Moreover, the criteria and yard stick to measure act as shaking the roots or core of a State differs from country to country. The problem is compounded by the fact that various States have different threshold before taking an affirmative action based upon the protective principle. For example, attack on the World Trade Centre in New York (9/11 attacks) were sufficient for the USA to jump into the so-called, war on terror and attack Iraq and Afghanistan. But various attacks by the ISI sponsored terrorist groups on the Indian soil for example attack on Parliament, attacks in Mumbai (26/11 attacks), Pathankot Air Base and Uri terrorist attack proved insufficient for India to take any major step against Pakistan. It is worth mentioning here that the cross border surgical strikes by the Indian Armed forces was nothing but a manifestation of relying upon the protective principle. So it can be said that relying and using the protective principle for safeguarding the interest of the State depends also upon the military power of the State.

3. Also the question here arises that to claim jurisdiction under protective principle whether or not an actual harm is necessary? Interestingly, the whole literature does not have addressed the issue in a satisfactory manner.[32] But on other hand, Ryngaert asserts that no actual harm is required, which would

29 Draft Convention, Supra note 8, at 543.

30 GILLIAN D TRIGGS, INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES 357 (2006) (Stated that there are uncertainties as to what constitutes a sufficient threat to national interest to justify reliance on the protective principle and also notes that the protective principle is open to abuse).

31 CAMERON, Infra note 32 (Stated that the category of offences under the protective principle is by no means closed and principle is uniquely flexible- i.e. the scope appears to be capable of almost infinite expansion).

32 IAN CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION (1996) (Cameron has not discussed the issue of mere threat to nationality security versus completed acts, and at what stage a State may be legally entitled to invoke the protective principle).

however, seem to open the door to preventive as well as putative assertions of legislative jurisdiction and increase the scope of the principle considerably.[33]

4. Pragmatically, this jurisdiction can be effectively exercised when the foreigner after committing the crime is found in the territory of regulating State. As long as the foreigner remains outside territory, the question of jurisdiction by such State over the foreigners does not arise[34] because such persons may not be arrested, summons may not be served or police investigation may not be mounted[35] except where a 'permissive rule' derived from international custom or from a Convention exists.[36]

5. Extraterritorial criminal jurisdiction is a controversial issue.[37] States are increasingly asserting the extraterritorial jurisdiction to curb and control transitional crime, but due to lack of consistency and uncertainly in the rules of jurisdiction, there is a rise of jurisdiction of conflicts.In a recent report from Harvard University, exercises of extraterritorial jurisdiction are frequently controversial and contribute to tensions among states.[38] Also, there are few criteria which limit the extraterritorial jurisdiction such as non-interference, comity of nations etc., while focusing on the rights of States. But States are generally disinclined to place significant limitations on the principle. The States often feel that they cannot rely on other States to protect their vital interest. Hence, a lack of trust has the potential to raise the conflicts among the States.[39]

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33 KATHARINE EMILIA & MAY BROOKSON-MORRIS, CHOOSING THE RIGHT FORUM: COMPETING JURISDICTIONAL COMPETENCES IN THE SPHERE OF INTERNATIONAL, TRANSNATIONAL AND NATIONAL CRIMES (2015).

34 MARKUS DIRK DUBBER & TATJANA HORMLE, THE OXFORD HANDBOOK OF CRIMINAL LAW 401 (2014) (The states are free to decide whether and when they will exercise the jurisdiction, but they must do so only within the constraints imposed by international legal system).

35 L. Finaly, *Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of Rome Statute,* 15 UC DAVIS JOURNAL OF INTERNATIONAL LAW & POLICY 221 (2009).

36 MAX SORENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW 355 (1968), quoted in H.O. AGARWAL, INTERNATIONAL LAW AND HUMAN RIGHTS 223 (2013).

37 Danielle Ireland Piper, *Extraterritoriality and Sexual Offences Outside Australia,* 22 BOND LAW REVIEW 16-31 (2010).

38 Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas,* CORPORATE SOCIAL RESPONSIBILITY INITIATIVE WORKING PAPER NO. 59, 9 (2010).

39 CAMERON, Supra note 32; Menno T. Kammminga, Extraterritoriality, THE MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (R. WOLFURM ed.) (2008). This problem arises often when

6. There is considerable controversy regarding Article 51 of UN Charter, as the scope of self-defence and circumstances under which the right to self defence may be exercised are unclear. This also applies to the nature of what is meant by "armed attack." The most contentious issue pertains to whether the use of right of self-defence is confined to the circumstances whereby an armed attack has already occurred or whether this right can be invoked in anticipation of such attack.[40]

Concluding Remarks

It can be safely said that as far as extraterritorial jurisdiction is concerned the international fraternity should devise or formulate some standard rules so as to provide uniformity, certainty and stability in regard to the circumstances in which it can be exercised. This would go a long way to prevent the abuse of jurisdiction as per the selfish interests and whims of a State. This is also necessary to maintain a rule of law in the international matters and to safeguard the sovereign equality of the nations as well as the rights of the State subject. Specifically, Protective jurisdiction should be strictly limited to the circumstances in which there is clear cut, direct and imminent threat of harm and in cases of necessity only. Keeping in view the growing conflicts of jurisdiction between the nations, there is an urgent need to either establish some uniform rule or adopt a multilateral convention dealing with jurisdiction. Though the adoption of a convention or formulation of standard rules in relation to extraterritorial jurisdiction seems farfetched dream but one can only hope that negotiations in this behalf might help to regulate the use of protective jurisdiction which is sync with the well established norm of the international law. In the absence of the above arrangement it would be very difficult to regulate or stop the misuse of protective jurisdiction.

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the two countries are not at good terms with each other. For example, in Pathankot terror attack case, in spite of clinching evidence to relate the perpetrators with Pakistan and a consequential visit by the Pakistani agencies to the Panthankot Airbase, India failed to secure a prosecution for, what to say of conviction the perpetrators.

40 *Ibid.*

NEW DIMENSIONS OF CLINICAL LEGAL EDUCATION IN INDIA

Ms. Puja Banshtu*

Introduction

When India became a free country, legal education acquired importance, as rule of law became a fundamental doctrine for the governance of the country. Since the Constitution of India adopted a democratic form of Government, it became necessary that the legal system of the county should be brought in tune with socio-economic and political needs of the society. Due to this change in law and focus on social needs, legal education was required to change and reform its structure and pattern. The direction of such a change was required to be in tune with the constitutional philosophy of ushering in the socio-economic transformation of the Indian society in to a just society.[1] Clinical Legal Education, as a conceptual framework in which the knowledge of law is imparted to students, is relatively recent. It is the methodology to build "attitudes, perceptions, skills and aims of the law students."[2] Technically, it means that students are taught through a variety of processes about the practical incidence of law on society. The word 'clinical' is derived from the medical-school clinics which were the favored medium for medical students to learn the nuances of practical application of medical knowledge. The idea of lawyers in the present form came from the legal professional traditions of west and so did the idea of legal education. Since then legal education has continuously evolved based on the understanding of and demands from the legal profession, locally and globally. While initially apprenticeship was the predominant method of legal training, gradually the law school education became virtually the exclusive avenue for entrance into the legal profession.[3] The path-breaking moment in legal education came when Langdell introduced "the Case Method" in Harvard Law School in addition to the pre-existing lecture method.[4] In the later part of last century, the argument that teaching theory under Case-lecture method alone is sufficient, has not been able to hold up. Students schooled in "theory" alone were not deemed ready upon

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1 Anand A.S., *Legal Education in India-Past, Present and Future,* 3 SCC (JOUR.) 1(1998).

2 MENON N.R. MADHAVA, A HANDBOOK ON CLINICAL LEGAL EDUCATION 12 (Eastern Book Company, New Delhi, 1998).

3 Grossman George S., *Clinical Legal Education: History and Diagnosis,* 26 J. LEGAL EDUCATION 162 (1973-1974).

4 Moliterno James, *On The Future of Integration Between Skills and Ethics Teaching: Clinical Legal Education in the Year 2010,* 46 J. LEGAL EDUCATION 67 (1996).

graduation for the independent practice of law as a reason of which "law schools were placed under increasing pressure to make changes in the traditional curriculum."[5] It is here that the Clinical movement started taking roots. Like all the earlier important changes in legal education, the recent shift towards clinical education movement has been met with significant misgivings. Many hurdles have been overcome, but many remain. None of this transformation has come easily, and it remains far from total.[6] Since doubts may be raised over the adaptability of those practices in India, the local situation will be assessed and the already prevalent clinical measures will be analyzed. The challenges that are faced by a law student and a law teacher, and how clinical legal education can help overcome the same will be discussed next. It would be indispensable to discuss the "skills and social justice" approach which is thought to be the hallmark of Clinical legal education in developing countries like India.

Evolution and Concept of Clinical Legal Education

The concept of practical problem solving, whether by working in a laboratory or in the field, as an important means of developing skills has been in acknowledged since time immemorial. However, the concept of Clinical legal education, albeit one of the most outstanding developments, came to be incorporate in the teaching methodology only from the early twentieth century. It was in 1901, that a Russian professor, Alexander Lyublinsky, first proposed Clinical education in law on similar lines as in medicine.[7] The legal profession started initially without formal education of any kind and later grew into a form of apprenticeship. It is only a couple of centuries back that legal education with a fixed format was introduced in order to serve as qualification for being a lawyer. Since then, it has underwent continuous changes in order to be in alignment with the changing understanding about the socio-legal philosophy and the nature of the legal institutions. From the time the case method of instruction was adopted in Harvard Law School by Dean Langdell, the design and curriculum of legal education has varied from place to place, college to college, teacher to teacher and subject to subject.[8]

Earlier, the orientation of legal education was value free which meant that the law student must

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5 Maher Stephen T., *The Praise of Folly: A Defense of Practical Supervision in Clinical Legal Education,* HEINONLINE (July 19, 2017 11:04 P.M.), http://www.heinonline.com.

6 *Supra* note 4.

7 Wilson Richard J., *Training for Justice: The Global Reach of Clinical Legal Education,* 22 PENN ST. INT'L. L. REV. 421 (2004).

8 Grossman George S., *Clinical Legal Education: History and Diagnosis,* 26 J. LEGAL EDUCATION 162 (1973-1974).

be taught in a manner which doesn't hint toward the right and wrong of concepts; he must just be given a comprehensive understanding of conflicting positions on different issues. However, the same resulted in neglect of the "human relations skills which are crucial to the legal practitioner."[9]

Actual Clinical Legal Education in India has emerged only in 1960s with its roots in both the Legal Aid and Legal Education Reform Movements. For the first time in 1949, the Bombay Legal Education Committee recommended that practical courses should be made compulsory only for students who choose to enter the profession of law and the teaching method should include seminars or group discussions, moot court competitions etc.[10] Later, in 1958, the 14th Report of the Law Commission of India[11] recognized the importance of professional training and for a balance of both academic and vocational training. It recommended that University training must be followed by a professional course concentrating on practical knowledge to those who chose to practice law in the courts. The Commission's Report concentrated on institutionalizing and improving the overall standards of legal education. In that regard, the Report also discussed teaching methods and suggested that seminars, discussions, mock trials, and simulation exercises should be introduced. There were demands for improved training in skills and ethics in law school. Concerns arose about maintaining the quality of law practice when apprenticeship requirements were eliminated in the early 1960s (The Bar Council of India reintroduced a one-year training requirement after graduation from law school in 1994, based on recommendations of the Ahmadi Committee).[12] As a result, in 1977, the Bar Council of India recommended practical training in the curriculum. Reports of University Grants Commission (UGC) also played important roles in the history of Clinical Legal Education by outlining the objectives of reformed teaching as making students more responsive to learning and making them demonstrate their understanding of law. Report made by UGC, emphasized need of teaching a variety of skills and sensibilities to develop legal education as a hermeneutical profession and also took some initiatives by constituting committee for development of

9 Stone Alan A., *Legal Education on the Couch,* 85 HARVARD LAW REVIEW 392 (1971-1972).

10 K. Archana., *Practicability of Clinical Legal Education in India*- An Overview 26 JOURNAL OF EDUCATION AND PRACTICE 157 (2013).

11 LAW COMMISSION OF INDIA, Fourteenth Report on Reform of Judicial Administration (September 1958).

12 LAW COMMISSION OF INDIA, 184th Report on The Legal Education & Professional Training and Proposals for Amendments to the Advocates Act, 1961 and the University Grants Commission Act, 1956 (December, 2002); Also, in 1994, the Chief Justice of India, Justice M.N. Venkatachaliah constituted the Ahmadi Committee on Legal Education. The Committee consisted of Justice A.M. Ahmadi, Justice B.N. Kirpal and one of us (Justice M. Jagannadha Rao).

curriculum in law.[13] Legal education in India is predominantly regulated by the Bar Council of India in furtherance of powers vested in it under the Advocates Act, 1961. [14]

National Knowledge Commission 2005

There is a changed thinking on the idea of legal education with the changing dynamics of modern legal profession. In India, this thinking is reflected by the National Knowledge Commission (NKC), which was constituted in 2005 as a high-level advisory body to the Prime Minister of India. The commission envisages a system of legal education which "prepares professionals equipped to meet the new challenges and dimensions of internationalization, where the nature and organization of law and legal practice are undergoing a paradigm shift."[15] At the same time, the Commission cautioned that only emphasizing on the skills pertaining to global character of law might lead to a neglect of the peculiarities of our developing country. Therefore, in the same vein it stressed on the need for "original and path breaking legal research to create new legal knowledge and ideas that will help meet these challenges in a manner responsive to the needs of the country and the ideals and goals of our Constitution."[16]

The National Knowledge Commission Report, 2005 thus stresses on two aspects of legal education in which it is currently deficient. The first is that legal education should contribute to making the lawyer "globally ready", which aspect is forecast as an integral part of skills-oriented legal practice of the future. Secondly, "….path-breaking legal research to create new legal knowledge and ideas' must also be understood to include representation of India's poor people, to improve their access to justice."[17]

Various Dimensions of Clinical Legal Education in India

The significance of Clinical Legal Education in order to impart professional and world-class

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13 *Supra* note 10.

14 The Advocates Act, 1961, No. 25, Acts of Parliament, 1961 (India). Section 7 (1) states that the functions of the Bar Council of India shall be- (h) to promote legal education and to lay down standards of such education in consultation with the Universities in India imparting such education and the State Bar Councils; Section 49 (1) The Bar Council of India may make rules for discharging its functions under this Act and particular, such rules may prescribe. (af) The minimum qualifications required for admission to a course of degree in law in any recognized University; (ag) The class or category of persons entitled to be enrolled as advocates; (ah) The conditions subject to which an advocate shall have the right to practice and the circumstances under which a person shall be deemed to practice as an advocate in a court; (d) The standards of legal education to be observed by University in India and the inspection of Universities for that purpose.

15 NATIONAL KNOWLEDGE COMMISSION REPORT 2005, quoted in Schukoske Jane E., *Legal Education Reform in India: Dialogue among Indian Law Teachers* 1(1) JGLR 249 (2009). The National Knowledge Commission constituted a Working Group on legal education in the country, submitted report in 2007.

16 *Ibid.*

17 *Ibid.*

legal education has been realized in India too. It incorporates newand various dimensions which are analyzed as under:

Clinical Legal Education: Inclusion in Law-Schools Curricula

Clinical Legal Education is about engagement of law students with the community and learning the same precepts which are given in the books by interfacing with the people. This philosophy is beautifully summed up in the following words:

> *"They (law students) need to go to court, defend lawsuits, get people out of jail and all of that… but before that, they have to leave the technical lawyer stuff aside and focus on the human and social aspects of the situation. They'll encounter all sorts of problems, not just legal ones.... First they've got to see that there is a problem. Then they've got to take time to dissect it and really get to know what the problem is, where it came from, and who it affects.... Before they go to court, they have to figure out whether (the people) can solve the problem themselves. Then they have to ask 'What's my job? How can I help this community solve its problems?' They have to listen. A person or community with a problem needs to have the person listening to help them solve that problem."*[18]

The Clinical Legal Education movement is carried out by law schools the world over in a variety of ways. It is dynamic in the sense that it is not restricted or standardized by any textual dogma and the modes of Clinical Legal Education are adopted after taking into consideration disparate local factors and needs. Therefore, the clinical programs at one law schools may be quite different in orientation, structure, scope, resources etc. from another law school. It does not mean that the clinical programs are working in isolation from their other counterparts. Law schools across the world are sharing their "approaches to legal education in light of the swift change in law practice resulting from the current wave of globalization. They are undertaking access to justice work and a broad array of domestic and international legal issues in a variety of clinical projects."[19]

To avoid the difficult issues surrounding the expense and politics of in-school clinics, some

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18 Annie Bonaparte, quoted in SeielstadAndrea *M., Community Building as a Means of Teaching Creative, Co-operative and Complex Problem Solving in Clinical Legal Education,* 8 CLINICAL LEGAL REVIEW 445 (2001-2002).

19 Schukoske Jane E. *Legal Education Reform in India: Dialogue among Indian Law Teachers,* 1(1) JGLR 249 (2009).

schools have turned to "externship" programs.[20] The in-house clinical movement has "matured and become more sophisticated. Externships have improved and become pedagogically more sound because of the use of classroom components, learning contracts, site visits, evaluation processes, and grading criteria."[21]

Clinical Legal Education and Case -Lecture Method

The Case Method, the American legal pedagogical device, was the creation of Christopher Columbus Langdell, Dean of Harvard Law School in the late nineteenth century. For Langdell, law was a science consisting of a body of clearly discernible principles or doctrines, and the teacher student dialogue the best way to help the students elicit these principles. Langdell's method being value-free, necessitated that "the student judge all material for himself, scrutinize instances closely, accept no other man's judgment until he had judged its logic for himself ..."[22]

For what it is, the case method remains almost universally admired till today. The intellectual challenge of the case method is immeasurably greater than that of rote learning; and the mental skills exercised are those most required of law practitioners - a "sense of relevance, an analytic technique, and a sense of historical growth and movement."[23]

The case method, though a path-breaking legal education pedagogical device at the time of its conception, is increasingly being questioned by legal thinkers. It has been attacked as "infantilizing, demeaning, dehumanizing, sadistic, a tactic for promoting hostility and competition among students, self-serving, and destructive of positive ideological values."[24]

The first major attack on case method came from the 'Realist' school of jurisprudence which asked that "assumptions about the nature of law…be considered in the light of scientific knowledge of the actual workings of legal institutions, and assumptions about social policy…be seen in the light of scientific knowledge about society." The influence of Legal Realism meant

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20 There are three different modes of clinical education in the United States: in-house live-client clinics, externship programs, and simulation courses. In-house clinics are built around an actual law office located within the law school, providing students with a faculty supervised setting within which to practice law and learn from the experience. Externship programs are professional settings external to the law school, including law offices within governmental agencies and nongovernmental organizations. Law schools use the students' experience in those offices as the basis for teaching and learning. *Simulation* is a teaching method in which students are put into simulated lawyer roles to perform some aspect of the lawyering process in a controlled setting.

21 Tarr Nina, *Current Issues in Clinical Legal Education,* 37 HOWARD L. J. 31 (1993-1994) HEINONLINE (July 25, 2017 10.34 A.M.), http://www.heinonline.com.

22 Stone Alan A., *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971-1972).

23 George S. Grossman, *Clinical Legal Education: History and Diagnosis,* 26 J. LEGAL EDU. 162 (1973-1974).

24 *Supra* note 22.

that the social sciences were brought into the curriculum of law school.[25] The case method focuses too much on 'law' for its own sake, it fails to consider other factors which make up or influence the law or are affected by the law, including "legislative and administrative materials; the trial-level proceedings; legal institutions (even the appellate court is not studied as an institution); the legal profession; social and psychological forces" (which may be most profitably studied by the methods of other disciplines).[26]

Clinical Legal Education vis-à-vis Changing Legal Professional Role Requirement

Apart from correcting the deficiencies of the case method, as discussed above, Clinical Legal Education is also significant in addressing another issue which institutions of law are forever struggling against. That is the changing nature of society, changing legal and social role of the lawyer and the changing nature of the legal needs of the clients.[27] A lawyer is situated in a larger landscape of culture, politics, and narrative. Changes in those areas will change the legal terrain, and vice versa. Lawyers and other legal professionals must, accordingly, be prepared to make the leap in educational narratives of law.[28]

The current international discussions about legal education reform emphasize lawyering skills other than litigation for law students. It remains a fact that an increasingly lesser number of graduating law students opt for litigation as career after passing out of law school. While need of litigators is expected to be ever present in society, the heavy emphasis on litigation in the traditional law school curriculum "warrants fresh thinking in a globalized world in which transnational matters are best managed through advance planning and agreement. Development of problem-solving skills, involving invention of creative options for reaching solutions, through various Clinical Legal Education initiatives, also enhances the ability of lawyers to grasp the policy aspects of law and to contribute to policy-making."[29]

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25 *Supra* note 23. Realists were also remarkable in emphasizing for the first time that lawyers be trained as "policy makers".

26 *Ibid.*

27 SULLIVAN WILLIAM M., WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA (Jossey Bass, 2nd ed., 2005).

28 Margulies Peter, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education,* 88 NORTHWESTERN UNIVERSITY LAW REVIEW 695 (1993-1994).

29 Schukoske Jane *E., Legal Education Reform in India: Dialogue among Indian Law Teachers,* 1(1) JGLR 249 (2009).

The law school clinics, where law students supervised bylaw teachers offer legal services to people living in poverty, merge the personal and the political. Students learn something about their clients' lives, even if that understanding is merely partial. At the same time, students can extrapolate from their clients' lives to learn important political lessons, like lessons about the "scapegoating of the poor, the insensitivity of the bureaucracy, and the persistence of the human spirit in the face of such abuse. Indeed, progressives who subscribe to postmodernist views, as well as feminists and sociologists, increasingly recognize that the personal and political spheres are porous, not hermetically sealed."[30]

It is further said that in law clinics, "the student sees the case in action rather than as a dead thing lying in the case books" which helps him put into perspective the "fundamental structure of the law and its scientific development". The student comes to appreciate the fact that "the lawyer not only mechanically applies the law but deals with human aspects of litigation."[31] It is doubtful if any amount of book teaching can teach the law student that.

The central belief of Clinical Legal Education, taken for granted in medical education, is that professional education involves "the constant interaction of theoretical and practical, not just in classroom and library, but also in those settings where the profession is actually practiced."[32] Law students participating in clinical programs learn the fact-finding and dispute-resolution processes. Through these programs, students are able to "examine the relationships between legal doctrine as described, applied and argued in regular law school courses, and the actual work of practicing lawyers, trial courts and administrative agencies."[33]

It has also been stressed that Law students, for part of their academic sessions "need to get their noses out of books, and their heads out of the clouds" and learn those aspects of the legal processes which can only be learnt by direct interaction with the subjects of law. A student's work with clients on real cases under faculty supervision is an educational experience which should occur during law school and be part of and resonant with the general law school curriculum. The experience should include interdisciplinary work with "consultants" and "expert witnesses" from other specialized fields and the study of public policy as it impinges

30 Margulies Peter, Re-Framing Empathy in Clinical Legal Education, 5 CLINICAL LAW REVIEW 605 (1998-1999).

31 Stephen Wizner and Dennis Curtis, Here's What We Do: Some NotesAbout Clinical Legal Education, 29 CLEV. ST. L. REV. 673 (1980), ELSEVIER (Jan. 16, 2016, 11.45 A.M.), http://www.ssrn.com.

32 *Ibid.*

33 *Id.* at 677.

upon and is generated by the legal process. Law students should be impressed upon "issues of legal ethics and professional responsibility as they are confronted in actual practice, not as artificial rules to be snickered at in the classroom."[34]

An early exposure of law students to the workings of the legal system in the abovesaid manner will help them to understand better the concepts developed in traditional classroom courses and they will be able to contribute with some degree of sophistication to classroom discussions. Such exposure to the practical side of law also helps the student to "develop a profound understanding of the legal theory, economic implications and social dynamics of a given segment of the legal system."[35] By witnessing the interface of clients with their problems, students quickly develop a "perception of core issues, including many which, for a variety of reasons, rarely find their way into court decisions and thus, ultimately, into law school casebooks and classrooms."[36]

The time available to a law student is limited and therefore a balance between theory and practice must be struck. Limited resources may also force the faculty to choose between providing equal amounts of substantive instruction and advocacy skills training. While "focused practice for a real situation" is preferred over a generic "skills" training, they both may be employed for different. The emphasis of clinical methods of legal education and role sensitive education is shifting to teaching fundamental legal principles and philosophies, perspectives on the law's place in society, and, significantly, the thought processes and judgments inherent to lawyering. However, introduction of Clinical Legal Education mechanisms should not feed the "notion that law schools could somehow teach in three years all the law a lawyer would need to know."[37] The intent is to graduate lawyers who will be capable, conscientious and flexible learners and practitioners in a remarkably wide variety of settings.[38]

In Clinical Legal Education, the student's experience with human problems in the legal clinic always has the potential of being emotionally real. The student is directly involved in a case and can explore its social and psychological implications in as great a depth as his motivation allows. Clinical legal education, moreover, has important psychological benefits in addition to

34 *Id.* at 678.
35 *Id.* at 679.
36 *Ibid.*
37 *Id.* at 683.
38 Moliterno James, *On The Future of Integration Between Skills and Ethics Teaching: Clinical Legal Education in the Year 2010,* 46 J. LEGAL EDU. 67 (1996).

providing a setting in which human relations skills can be learned. A well run clinical program can offer an arena for the realistic implementation of some of a law student's activist values and for the exercise of altruistic and egalitarian motivations.[39]

Clinical Legal Education: Mechanism to Creative Problem-Solving

The traditional role of lawyer as adversary, no doubt his staple role even now, is being steadily complemented by his role as problem-solver through application of his socio-legal creativity. In such a situation, it becomes imperative for the academia to figure out what can be done "to create a problem-solving capacity in the lawyers."[40] It is a truth in the modern times that "the chasm between law in books and law as it is practiced in society and courtrooms," is growing.[41] In real life, "most clients don't present themselves or their problems the way these are framed in a court of appeals decision. Most heads of government agencies, or even their general counsels don't present the case as it appears in a casebook." Unlike an appellate decision, which gives all parties a relatively clear view of the determinative facts, "real-life problems require lawyers to assist people in dynamically changing situations."[42] In some clinics there is a political agenda grounded in liberalism that remains committed to using the legal system as a vehicle for change. Time and energy are spent evaluating the "legal system's treatment of poor people, and strategies are developed using constitutional and statutory law to effect change." These strategies "reflect a faith in the system that can be contrasted with those theoreticians, such as scholars in critical legal studies, who call for a re-examination of the whole legal system."[43]

This creativity is important in later travails of the legal profession too. It is in problem-solving, that this creative, humanistic process comes into play. Creative problem solving is not as constricting as a model of problem solving based solely on individual law practice. It offers a more useful approach, not only by the individual law practitioner but also by the legal profession.[44] Scholars have identified ways that differentiate creative problem-solving from

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39 *Supra* note 22.
40 *Ibid.*
41 MENON N.R. MADHAVA, HANDBOOK ON CLINICAL LEGAL EDUCATION (Eastern Book Company, Delhi, 1998).
42 Seielstad Andrea M., *Community Building as a Means of Teaching Creative, Co-operative and Complex Problem Solving in Clinical Legal Education,* 8 CLINICAL LAW REVIEW 445 (2001-2002).
43 Tarr Nina, *Current Issues in Clinical Legal Education,* 37 HOWARD LAW JOURNAL 31 (1993-1994) HEINONLINE (September 23, 2017 10.05 A.M), http://www.heinonline.com.
44 *Id.* at 449.

more traditional individual-based definitions of legal problem solving. Clinical legal programs give a grounding of these facets through "technical expertise, creative artistry, and empathy."[45]

Clinical Legal Education Orientation: Social Justice or Skills

It is a hotly debated issue between the clinical teachers whether the very essence of clinical education is empowering the disempowered or teaching students skills. However, in recent times, these two aims are increasingly being seen as complementary rather than conflicting.[46]

Skills oriented education has come to be regarded as the hallmark of Clinical Legal Education in the west. This is because the challenges before legal system are different from developing nations there and poverty is a relatively smaller issue. Also, the social missions in the Clinical Legal Education programs are designed in such a way as to augment the skills of law students; other outcomes being merely incidental to the process. It is also understood by some that "the political underpinnings of clinical education can be dissipated by attempts to legitimize and/or to sanitize clinical education as simply 'skills training'. By focusing on 'skills' instead of on poverty law and justice, the programs seem less objectionable."[47] Some clinical legal educators advocate greater emphasis on outcome-focused education, in which there is "a shift from focus on assessment of content mastery to focus on the learning of professional skills for lifelong learning required to adapt to future changes in the law and practice."[48]

There are an equal number of voices which support social justice as the primary mission of clinical legal education. This clinical instruction may include "community empowerment through economic development strategies and other means of improving the quality of residential life in underserved urban and rural communities. As the widening gulf emerges between rich and poor in the society and access to legal services becomes further removed from subordinated communities, the importance of clinical legal education's historic commitment to social justice becomes manifest."[49] The connections between skills teaching and ethics teaching have improved the teaching of both professional skills and professional responsibility.[50]

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45 *Ibid.*
46 *Supra* note 43.
47 *Ibid.*
48 Schukoske Jane E., *Legal Education Reform in India: Dialogue among Indian Law Teachers,* 1(1) JGLR 454 (2009), quoting STUCKEY ROY, "et. al.", BEST PRACTICES FOR LEGAL EDUCATION3 (Clinical Legal Education Association, 2007).
49 Seielstad Andrea M., *Community Building as a Means of Teaching Creative, Co-operative and Complex Problem Solving in Clinical Legal Education,* 8 CLINICAL L. REV. 445 (2001-2002).
50 *Supra* note 38.

A distinguished law teacher posits three premises in order to bring about empathetic engagement of law students with communities. First, clinical education should represent a commitment to enhancing the access of people living in poverty to both the justice system and the goods enjoyed throughout our society. Second, to help enhance this access, clinical education must concern itself with connections between people and law students and teaching ways to make those connections more rewarding. Third, clinical education has at least three distinct groups of stakeholders: clients, clinical teachers, and students. These values – "access, connection, and voice - inform clinical legal education's best work today and offer guidance for the future."[51]

Conclusion and Suggestions

As an academician, the author believes that Clinical Legal Education is an indispensable technique of legal education which needs more experimentation and adaptation only then legal education will produce better lawyers, judges, administrators and will succeed in providing effective legal services to the needy. The situation was summed up by The Hon'ble Dean of Connecticut Law School who cautioned on the need for meaningful supervision of students engaged in clinical work saying that "…it is not enough to let students 'see' the practical side of real-life things. Mere exposure may breed cynicism, despair, or disgust. It is essential to give students perspective on what they see: the causes of the problem; what is being done about it; the special responsibilities of the legal profession, if any, in the area."[52] It is possible that with innovation, improvisation, creativity and a little ingenuity, the extra monetary assistance required to run the clinics can be minimized.[53]

Therefore, the need to make effective clinical legal education mandatory in all law schools across the nation is greatly felt especially when fresh graduates have to face the competitive real world immediately after graduating from the law schools. Clinical Legal Education has hence become a significant and indispensable tool to prepare the students with the necessary theoretical and practical skills to deal with the expanding and diverse world of legal practice.

The introduction of robust clinical legal education programs in Indian law schools is critical to

51 Margulies Peter, *Re-Framing Empathy in Clinical Legal Education,* 5 CLINICAL L. REV. 605 (1998-1999).
52 *Supra* note 22 at 429.
53 *Supra* note 38.

teaching essential skills to law students and instilling in them the importance of social justice. Furthermore, effective clinics provide legal services to poor and marginalized groups that would not otherwise receive them. In India, however, clinical legal education has not realized its potential. Some of the major reasons for this are that students do not receive academic credit for their work, faculty members do not receive appropriate workload reductions for supervising these activities, and a Bar Council rule prevents students and faculty from practicing before courts in India. For promoting clinical legal education in India, some suggestions are proferred below:

1. The Bar Council should amend its rules to allow law Professors to practice in the course of teaching a clinical class and encourage law schools to dedicate faculty to teaching clinics and offer students credits for participating in clinics.
2. The Vice Chancellors, Chairpersons and other Law School Administrators should devote resources to hire clinical faculty and offer clinical courses with low student-teacher ratios.
3. The Non-Governmental Organizations should enter into partnership with Law Schools to further their work with rural and urban communities and advance the social justice mission of education.
4. The Legal Services Authorities must broaden the scope of legal aid by supporting law schools to make legal aid and legal advice easily accessible to rural and urban communities within the premises of law schools.
5. The grant making or funding agencies must fund Law School based legal aid clinics to engage with rural and urban communities in strengthening democracy and improving governance for the advancement of justice and the rule of law.

JUVENILE JUSTICE AND RIGHTS OF CHILDREN: CHANGING TRENDS IN INDIA

Dr. Puja Jaiswal*

Mr. Vaibhav Latiyan**

"There can be no keener revelation of a society's soul than the way in which it treats its children."

-Nelson Mandela[1]

Introduction

The gruesome murder of the seven-year-old boy in school premises which is believed to be the safest place for a child besidehome, shock the entire nation. After approximately two months, CBI says that it believes that the Class XI student is apprehended to have committed the murder in a bid to postpone exams and a parent-teachers meeting, and he had carried a knife to the school on September 8, 2017- the fateful day.[2] By any stretch of imagination, it is too difficult, if not simply impossible, for a prudent person to believe that a senior student of the school would go to the extent of murdering a young school-boy within the school's premises (toilet) just for the sake of postponement of PTM and scheduled forthcoming class term-examination. Although in current scenario nothing can be ruled out and everything is possible but still one wonders.

Yes, in the current times, we are witnessing rise both in the crime against and by the children. It's not only in India but across the globe that children are exposed to violence either directly or indirectly. Children's exposure to violence, whether as victims or witnesses, is often associated with long-term physical, psychological, and emotional harm. A large number of children in conflict with the law are socio-economic victims, denied their rights to education, health, shelter, care and protection. Many of them have had little or no access to education, many are working children. Some children have left their homes and taken to the streets to escape violence and abuse at the hand of their families. Some are forced to make their living on the streets, in order to survive. Others have been abandoned by their families and left to fend for themselves

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1 Extract from the speech by President Nelson Mandela at the launch of the Nelson Mandela Children's Fund - May 08, 1995.

2 Bindu Shajan Perappadan, *Gurugram School Senior Suspected of Killing Junior Sent to 3-day CBI Custody,* THE HINDU (Nov. 8, 2017, 11:00 AM), http://www.thehindu.com/news/national/ryan-schoolboy-murder-cbi-probe-details/article20002719.ece.

and sometimes for younger siblings as well.

Children exposed to violence are also at a higher risk of engaging in criminal behavior later in life and thus becoming part of a never ending cycle of violence. Today, crime by juveniles is a harsh reality not only in India but across the world. In India, in recent times juveniles have been found involved in many crimes such as stealing, abuse drugs and alcohol, trafficking, and also in most heinous kinds of crimes such as rape, gang rape, murder, etc.[3] It's a disturbing trend and the entire society gets affected by it. But before analyzing the recent trends in juvenile justice in the country and treaties for the protection of children, it is important to understand the concept of juvenile justice system.[4]

Juvenile Justice System and the Juveniles

Juvenile Justice is about not only the treatment of children in conflict with the law, but also about the root causes of felonious behavior and measures to prevent such behavior.[5] Its aim is to establish a fair and humane system of justice for children. The juvenile justice system applies the principles of restorative justice, puts the best interest of children first and intervenes in delinquent behavior through police, court, and correctional involvement, with the goal of rehabilitation. Thus, the juvenile justice system is based on principles of promoting, protecting and safeguarding the rights of children.

Juveniles are generally defined as persons under the age of 18. The United Nations Convention on the Rights of the Child (UNCRC) in Article 1 has defined child as

> *"For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."*

In the year 1992, India signed the United Nations Convention on the Rights of the Child, 1989 ('CRC'). Being a signatory, India sought to fulfill its international obligation by enacting the Juvenile Justice (Care and Protection of Children) Act, 2000. Importantly, this led to the age of juvenile irrespective of gender, being fixed at eighteen years.

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3 *Facts about Children and Violence,* US DEPARTMENT OF JUSTICE, https://www.justice.gov/archives/defendingchildhood/facts-about-children-and-violence, last accessed (Oct 19 2017).

4 R.N.CHOUDHRY, LAW RELATING TO JUVENILE JUSTICE IN INDIA 2 (2010).

5 *Ibid.*

The Juvenile Justice (Care and Protection of Children) Act, 2000, defines a child under section 2 (k) as

"Juvenile" or "child" means a person who has not completed eighteenth year of age."

And the same view was held in the Juvenile Justice (Care and Protection of Children) Act, 2015, which in section 2 (12) defines child:

"Child" means a person who has not completed eighteen years of age;" and

Juvenile under Section 2(35)[6] as

"Juvenile means a child below the age of eighteen years."

Juvenile delinquents are minors, usually defined as being between the ages of 10 and 18, who have committed some act that violates the law. For children in conflict with the law, the processes of access, trial and custody ruin their childhood as a result of being denied their rights to education, care, protection, opportunities, and family life. Many of them have little chance of rehabilitation and reintegration into society; limit their opportunities for developing into active and contributing adult citizens. Children and youth are the potentials that create human capital, and therefore, juvenile justice system focuses on fostering positive youth outcomes that are fair & equitable, reducing juvenile delinquency by developing individual responsibility and accountability, and thus securing public safety.

Framework for the Protection of Child Rights under International Instruments

For the protection of child rights and prevention of child abuse, various international instruments, treaties and conventions have contributed considerably. A brief description of the various conventions is given below in chronological order.

Pre- UNCRC: International Instruments

1. Geneva Declaration of the Rights of Child, 1924.[7]

Adopted on 26 September, 1924 by League of Nations, this was the first internationally recognized document that affirmed the existence of specific rights to children and the responsibility of adults towards children. It declares that "the mankind owes to the child, the best it has to give". This first-ever document laid down the foundation for the future child welfare legislations by giving the following five principles-

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6 The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016 (India).

7 *Geneva Declaration of the Rights of the Child, 1924,* UN DOCUMENTS (Oct. 30, 2017), http://www.un-documents.net/gdrc1924.htm.

a. The child must be given the means requisite for its normal development, both materially and spiritually;

b. The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succored;

c. The child must be the first to receive relief in times of distress;

d. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation;

e. The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

2. Universal Declaration of Human Rights, 1948.[8]

Adopted by General Assembly of the United Nations on December 10, 1948, it talks about specific rights of 'everyone' which is inclusive of children. It talks about thedignity of a being, and the importance of education while mentioning other rights. Special care to childhood is provided under Article 25(2) and Article 26 focuses on the education stating

"Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages."

Also, the preamble states that the General Assembly proclaims this declaration as a common standard of achievement for all peoples and the nations.

3. Geneva Convention, 1949.[9]

The Fourth Geneva Convention contains many provisions for the protection of children. It talks about the armed conflicts and the rights of children, their protection as the impact of consequences of war can be of too heavy on a young mind. Art. 14 provides for the establishment of safety zones for children below 15, Art. 50 provides for the facilitation of institutions devoted to care and education of children, Art. 82, 89 and 132 provide the rights of interned children covering food, lodging, security and their release. Art. 68 sets the rule that a child below 18 years of age cannot be given death penalty even if all the conditions which make that penalty

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8 The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly at its 3rd session on 10th December 1948 as Resolution 217 at the Palais de Chaillot in Paris, France.

9 *Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 1949,* INTERNATIONAL COMMITTEE OF THE RED CROSS (Nov. 3, 2017), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380.

applicable are present. The same view has reiterated in the Protocols.

Its Additional Protocol I also lays emphasis on the aid and care they require irrespective of their age while Protocol II provides that children shall be provided with the care and aid they require in case of non-international armed conflict.

4. U.N. Declaration of the Rights of the Child, 1959.[10]

On 20 Nov. 1959, the 78 Member States of United Nations General Assembly unanimously adopted the Declaration of the Rights of the Child. The preamble reiterates the pledge of the Rights of child, 1924 and highlights the children's need for special care and protection in its 10 principles. Various issues like equality, theright to special protection, adequate nutrition, housing, special education, protection against all forms of neglect, cruelty and exploitation and the spirit of love and understanding have been underlined in the declaration.

Also, the landmark judgment by Supreme Court in the case of ***Lakshmikant Pandey v. Union of India,***[11] has relied on the principles of this declaration for the welfare of the children.

5. International Covenant on Civil and Political Rights, 1966[12] **and International Covenant on Economic, Social and Cultural Rights, 1966.**[13]

The reinforcements for the previous declaration came in the form of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by United Nations General Assembly on Dec 16, 1966. Article 24 of International Covenant on Civil and Political Rights is dedicated to child welfare as it lays the provision for the protection of the child without any discrimination as to race, color, and sex. It also provides for the registration after birth along with the right to acquire a nationality.

International Covenant on Economic, Social and Cultural Rights also contains provisions for the protection of children from economic and social exploitation. Art. 10 also prohibits child labour. Art. 13 further emphasizes on education, stating

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10 *Declaration of the Rights of the Child, 1959,* UNICEF (Nov. 5, 2017), https://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf.

11 AIR 1984 SC 469 (India).

12 *International Covenant on Civil and Political Rights,* 1969, UNITED NATIONS HUMAN RIGHTS – OFFICE OF THE HIGH COMMISSIONER (Nov. 3, 2017), http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

13 *International Covenant on Economic, Social and Cultural Rights,* 1966, UNITED NATIONS HUMAN RIGHTS – OFFICE OF THE HIGH COMMISSIONER (Nov. 3, 2017), http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

"The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms."

6. United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, "The Beijing Rules." [14]

Adopted by General Assembly resolution 40/33 of 29 November 1985, this was the first approach to cover the whole process of juvenile justice. These rules are divided into six parts as (i) General Principles, (ii) Procedure of Investigation and Prosecution, (iii) Adjudication and Disposition, (iv) Non-Institutional Treatment, (v) Institutional Treatment, Research and Planning, and (vi) Policy Formulation and Evaluation. The process is governed by the principles, considering the gravity of the crime, personal liberty and the parental supervision. It also provides for the disposition measures like supervision orders, financial punishment and community service.

7. United Nations Convention on the Rights of the Child, 1989.[15]

United Nations Convention on the Rights of the Child (UNCRC), commonly known as Convention on the Rights of Child (CRC) is an international treaty under which the State Parties must ensure the civil, political, economic, social and cultural rights of every child, regardless of their race, religion or abilities. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, it came into force on 2 September 1990, in accordance with article 49 of the convention. India ratified UNCRC on 11 December 1992, agreeing in principles all articles except with certain reservations on issues relating to child labour. The convention consists of 54 Articles covering all four major categories of child rights: Right to life, Right to development, Right to protection, and Right to participation. Article 4 deals with the protection of rights of the children and for it, governments have a responsibility to take all available measures to make sure children's rights are respected, protected and fulfilled. Article 40 of the UNCRC primarily deals with the juvenile justice. It

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14 United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, UNITED NATIONS HUMAN RIGHTS – OFFICE OF THE HIGH COMMISSIONER (Nov. 3, 2017), http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf.

15 *Convention on the Rights of the Child,* 1989, UNITED NATIONS HUMAN RIGHTS – OFFICE OF THE HIGH COMMISSIONER (Nov. 5, 2017), http://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

states that children who are accused of breaking the law have the right to legal help and fair treatment in a justice system that respects their rights. Governments are required to set a minimum age below which children cannot be held criminally responsible and to provide minimum guarantees for the fairness and quick resolution of judicial or alternative proceedings.

All the past conventions and declarations resulted to a wide-ranging, ambitious manifesto, displaying an ideal world for children where they could enjoy the equal and inalienable rights of all the members of the human family, where they are promised full and harmonious development in an atmosphere brimming with love, happiness, and understanding. The rights of children are also recognized along with their health, education, protection and various freedoms. But as said, the ideal world is far away from reality; if only we could live in such a world.

Post- UNCRC: International Instruments

1. UN Convention for Prevention of Juvenile Delinquency: The Riyadh Guidelines, 1990.[16]

One year after the famous CRC was adopted, a new set of guidelines under the name of The Riyadh Guidelines were adopted. It focused on prevention of juvenile delinquency as stated in Art. 2

> *"Prevention of juvenile delinquency requires efforts by the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood."*

For the successful prevention, the prevention policies shall include in-depth analysis of problems, continuous monitoring, comprehensive plans, distributing roles between state and society and the participation of children themselves, and lastly, reducing the opportunities for committing offences. Apart from these prevention policies, the guidelines emphasized the role of society in the development of a child; family, school and community which is the ground of socialization process.

2. UN Rules for the Protection of Juveniles Deprived Of their Liberty: Havana Convention, 1990. [17]

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16 *UN Convention for Prevention of Juvenile Delinquency,* 1990, CRIN (Nov. 2, 2017), https://www.crin.org/en/docs/resources/publications/hrbap/IHCRC/UnitedNationsGuidelinesforthePreventionofJuvenileDelinquency.pdf.

17 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990, UNITED NATIONS GENERAL ASSEMBLY (Oct. 21, 2017), http://www.un.org/documents/ga/res/45/a45r113.htm.

In the same year, Riyadh Guidelines were adopted, these rules were adopted by the United Nations. These rules focus on the well-being of a juvenile while undergoing trials. Art. 1 of the said convention reads as:

> *"The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort."*

It sets out international standards applicable when the child is confined, the proper conditions to maintain general hygiene and qualification of personnel dealing with achild. Regarding the rights and liberty of detainee, they can be deprived of them only in accordance with principles and procedures of international law.

3. Guidelines for Action on Children in the Criminal Justice System. Vienna Guidelines, 1997.[18]

Recommended by Economic and Social Council Resolution, 1997/30 of 21 July 1997, these guidelines mainly focuses on to provide a framework to achieve the goals set forth in CRC and other child-related instruments in the context of administration of juvenile justice, in compliance with the United Nations standards and norms. These guidelines deal with children in the criminal justice system in the capacity both as perpetrators and as victims and witnesses. As given under aims, objectives and basics of the guidelines, these four principles are to be considered for any measures- non-discrimination, thebest interest of the child, the right to life, survival and development and respect for the views of the child. It also recommends that rehabilitation of the juvenile delinquents should be family based instead of institutional nature.

4. The UN Guidelines on Justice in Matters Involving Child Victim and Witnesses of Crime, 2005.[19]

The Economic and Social Council adopted the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime on 22 July 2005. The objective of the guidelines is explained in four principles which encircle the children and the administration of justice. It aims at the

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18 *Guidelines for Action on Children in the Criminal Justice System,* 1997, UNITED NATIONS HUMAN RIGHTS – OFFICE OF THE HIGH COMMISSIONER (Nov. 2, 2017), http://www.ohchr.org/EN/ProfessionalInterest/Pages/CriminalJusticeSystem.aspx.

19 *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime,* IBCR (Nov. 3, 2017), http://www.ibcr.org/wp-content/uploads/2016/10/resolution-2005-20.pdf.

20 *Children's Rights in Juvenile Justice,* 2007, UNITED NATIONS HUMAN RIGHTS – OFFICE OF THE HIGH COMMISSIONER (Oct. 30, 2017), http://www2.ohchr.org/english/ bodies/crc/docs/CRC.C.GC.10.pdf.

protection of child victims and witnesses of crime, with the help of state by providing legal assistance and to guide and assist those dealing sensitively with child victims and witnesses of crime.

5. Children's Rights in Juvenile Policy, 2007.[20]

Children's Rights in Juvenile Policy, [21] by Convention on the Rights of the Child lays down its objectives for achieving the international standards of child welfare. It calls for the integration of Beijing Rules, Havana Rules and the Riyadh Rules in a comprehensive juvenile justice policy. Also, to provide state parties adequate guidance for the content of the juvenile justice policy and for the interpretation and implementation of all other provisions contained in Articles 37 and 40 of CRC. It also provides a set of fundamental principles to be followed for the children in conflict with the law.

6. Execution of SAARC Convention.

The South Asian Association for Regional Cooperation (SAARC), which is the regional intergovernmental organization and geopolitical union of nations in South Asia, in its conventions, also recognizes the concept of child welfare. The Convention on Promotion of Welfare of Children[22] defines child as

> "Child shall mean a national of any Member State of the South Asian Association for Regional Cooperation (SAARC), below the age of eighteen years unless, under the national law, the majority is attained earlier."

And recognizes the rights of the children similar to as embodied in the CRC. In its various guiding principles, the State parties are directed to follow necessary rules for the welfare of a child. It directs the juvenile justice system in such a way as to promote child's sense of dignity and his reintegration with the family, as afamily is the best place for the development of a child. State parties are also expected to make further arrangement along with the implementation of such instruments.

7. Guidelines for Legislative Reforms on Juvenile Justice, 2011. [23]

For all those, who finally acknowledged the problem of juvenile justice and were looking forward to some further guidance for making a concrete juvenile justice law, this guideline is the

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21 General Comment No. 10 of 2007.

22 *SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, 2002, SAARC* (Oct. 21, 2017), http://www.saarclaw.org/uploads-saarc/saarc/59f4280915_FILE.pdf.

23 Carolyn Hamilton, *Guidance for Legislative Reform on Juvenile Justice,* UNICEF (Nov. 3, 2017), https://www.unicef.org/policyanalysis/files/Juvenile_justice_16052011_final.pdf.

end of their search. The governmental authorities, UN entities or any other organizations can look for the set of principles, standards mentioned in this guidelines, which are themselves derived from the various international conventions and declarations mentioned above. It covers the juvenile justice framework, general principles of CRC, minimum guarantees and rights of the juvenile during pre-trial stage, alternatives to judicial proceedings, trial, sentencing and the standards of detention. All these rules are enough to devise a detailed juvenile justice system.

So, from the above discussion on international treaties, it shall not be wrong to state that juvenile detention is not intended to be penalizing and correctional remedies should be adhered to keeping in mind thebest interest of the children. Juvenile detention is rather reformatory in nature. Juveniles held in custody usually receive consistent care under the doctrine of parens-patriae, i.e., the State as parent. The state is usually responsible for providing education, recreation, health, assessment, counseling and other intervention services with the intent of maintaining a youth's well-being during his or her stay in custody. Thus, the primary purpose of the juvenile courts, state and federal government juvenile justice systems is to rehabilitate, rather than punish juveniles and minors. Further, international standards laid down under the said conventions should be publicized through awareness generation and Information-Education campaigns. Also, training should be conducted for the stakeholders such as police, prosecutors, & judicial officers and also for social workers.

Juvenile Justice System in India

Implementation of International Instruments in India

Child-centric human rights jurisprudence has become pivotal in the framing of laws for children. This is the role that dominated by the features of social engineering. There are many international instruments which provide for the child welfare legislations and principles, many nations have the legislations based on the principles laid under these international instruments. India is one of them. Art. 51(c)[24] and Art. 37,[25] read jointly, imply that principles laid down in various international instruments are to be respected and applied while administering justice in the country. Even the judiciary has relied on the principles given in these conventions. In the

24 INDIA CONST. art. 51(c). Article 51(c) provides that the State shall endeavor to foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and encourage settlement of international disputes by arbitration.

25 INDIA CONST. art. 37. Article 37 provides that the provisions contained in this Part (Directive Principles of State Policy) shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

case of ***P.N. Krishanlal v. Govt. of Kerala,***[26] it was held by the Apex Court that wherever necessary, Indian courts can look into international conventions as an external aid for construction of a national legislation. The below said two landmark judgements also proves the same. In ***Vishaka v. State of Rajasthan,***[27] Justice Verma opined that

> "Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and enabling power of the Parliament to enact laws for implementing the International Conventions."

In ***People's Union for Democratic Rights v. Union of India,***[28] the Court followed the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant of Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR), to interpret and expand the ambit of Article 21 of the Constitution.

So, precisely we can say that the international treaties and conventions are enforceable by the Indian courts when they are incorporated by the act of parliament. There are number of legislations that have been constituted, after India became the signatory to such international treaties and conventions, such as the Convention on the Elimination of all Forms of Discrimination Against Women, Stockholm Convention, Diplomatic Relation (Vienna Conventions) Act 1972, SAARC Convention (separation of terrorism) Act 1993, Protection Of Human Rights Act 1993 and UN Child Rights Convention and many more. And also, Indian judiciary had relied upon international treaties and conventions if at all they are not in conflict with the Indian laws.

Law on Juvenile Justice, Care and Protection of Children

We have introduced not only legislative reforms, but some administrative reforms also in the juvenile justice system in India. The Juvenile Justice (Care and Protection of Children) Act, 2000 (popularly known as the JJ Act), amended in the year 2006 for providing proper care, protection and treatment focusing on the development needs of the children of both categories juveniles in conflict with law and children in need of care and protection, and recently amended in the year 2015. The last amended Act remains a highly debated issueamong the supporters of

26 (1995) Sup. (2) SCC 187 (India).
27 (1997) 6 SCC 241 at 249 (India).
28 AIR 1982 SC 1473 at 1487 (India).

child rights and others. The amendments were brought in to make the earlier Act more comprehensive and augment its implementation in the country.

If we analyse the law[29] on juveniles in India, it is a comprehensive legislation that aims to protect the rights of the children who come in conflict with law and children in need of care & protection, The JJ Act provides for opportunities for the growth and development to the children. The Act is based upon the provisions of the Indian Constitution and also on the major principle rights of the UN Convention on the Rights of the Child. That is that the Indian JJ Act conforms to the *UN Convention on the Rights of the Child, the UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 1985, the UN Rules for the Protection of Juvenile Deprived of their Liberty,* 1990 and all other relevant national and international instruments. It also prescribes a uniform age of 18 years below which both boys and girls are to be treated as children. The JJ Act is formed to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper & suitable care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation.

So, on analyzing the JJ Act, one significant feature of the Act is that it protects the rights of the children. A clear distinction has been made in this Act between the juvenile offender and neglected child and so it aims at providing better access to justice and opportunities to both classes of children by establishing Juvenile Justice Boards and Child Welfare Committees. It also provides for various categories of homes including observation homes[30] and special homes[31] for juvenile in conflict with the law and *children's home*[32] & *open shelter*[33] for children in need of care and protection. The Act also offers for family-based non-institutional care like

29 The Juvenile Justice (Care and Protection of Children) Act, 2000, No. 56, Acts of Parliament, 2000 (India). Amended in 2006 and last amended in 2015.

30 *Supra* note 6, Section 2(40). Sec 2(40) defines "Observation Home" as an observation home established and maintained in every district or group of districts by a State Government, either by itself, or through a voluntary or non-governmental organisation, and is registered.

31 *Id.,* Section 2(56). Sec 2(56) defines "Special Home" as an institution established by a State Government or by a voluntary or non-governmental organisation, registered under section 48, for housing and providing rehabilitative services to children in conflict with law, who are found, through inquiry, to have committed an offence and are sent to such institution by an order of the Board.

32 *Id.,* Section 2(19). Sec 2(19) defines "Children's Home" as a Children's Home, established or maintained, in every district or group of districts, by the State Government, either by itself, or through a voluntary or non-governmental organisation, and is registered as such for the purposes specified in Section 50.

33 *Id.,* Section 41. Sec 41 defines "Open Shelter" as a facility for children, established and maintained by the State Government, either by itself, or through a voluntary or non-governmental organization.

adoption, foster care, sponsorship, and aftercare. Thus, the Act has also created a legal, rehabilitation and social reintegration package for affected children.

Further, as the statutory mechanisms, the Act enjoins upon the State to establish a *Juvenile Justice Board* (JJB),[34] *Child Welfare Committee* (CWC),[35] and *Special Juvenile Police Unit* (SJPU),[36] in every district of the State. It emphasizes adoption of child-friendly procedures while dealing with cases of juveniles. The Act provides for non-disclosure of identity of the children; that no report in any newspaper, magazine, news-sheet or visual media of any inquiry regarding a juvenile in conflict with law or a child in need of care and protection under this Act shall disclose the name, address or school, photo or any other particulars calculated to lead to the identification of the juvenile or child.[37] The Ministry of Women and Child Development Department is the nodal ministry to implement the JJ Act. The said Ministry is implementing it through the *Integrated Child Protection Scheme* (ICPS). ICPS is a centrally sponsored scheme aimed at building a protective environment for children in difficult circumstances, as well as other vulnerable children, through Government-Civil Society Partnership.

Recent Amendment - India's Stance on Juvenile Justice

Till the last amended Act, the maximum punishment that could be pronounced to the juveniles was three years of detention in a remand home, irrespective of the gravity of the offence. It was only after the case, infamously known as the *Nirbhaya Case*, that the circumstances forced the legislatures to redefine the views on the definition of child. There was a tremendous public outcry demanding a change in the juvenile justice laws, lowering the age limit of juveniles, and firmer punishment for juveniles committing grave offences like rape and murder. The Committee on Amendments to Criminal Laws,[38] headed by Justice J.S. Verma was constituted, to examine the deficiencies in the existing criminal law regime governing sexual assault against women. The *Justice Verma Committee* rejected the demand for lowering the age of juveniles from eighteen to sixteen and found no merit in reducing the age of juveniles for certain offences.

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34 *Id.,* Chapter III - Juvenile Justice Board.

35 *Id.,* Chapter V - Child Welfare Committee.

36 *Id.,* Section 2(55). Sec 2(55) defines "Special Juvenile Police Unit" as a unit of the police force of a district or city or, as the case may be, any other police unit like railway police, dealing with children and designated as such for handling children.

37 *Id.,* Section 74.

38 Parliamentary Committee on Human Resource Development, Rajya Sabha, the Juvenile Justice (Care and Protection of Children) Bill, 2014, Two Hundred and Sixty Fourth Report, (Feb. 2015), PARLIAMENT OF INDIA – RAJYA SABHA (Nov. 1, 2017), http://www.prsindia.org/uploads/media/Juvenile%20Justice/SC%20report-%20Juvenile%20justice.pdf.

It instead pressed on the need for reforming and restructuring the existing juvenile justice and welfare system and called for stricter implementation of the 2000 Act. However, the government overlooked these recommendations and heeded to popular demand by introducing the *Juvenile Justice (Care and Protection of Children) Act, 2015,* with the two broad objectives of setting deterrence standards for juvenile offenders and protecting the rights of the victims. After many considerations, the *Juvenile Justice (Care and Protection of Children) Act, 2015*[39] was passed by the Parliament, received President Pranab Mukherjee's assent on December 31, 2015, and came into force from January 15, 2016. The newly amended Juvenile Justice Act allows children aged 16 to 18 years and in conflict with law to be tried as adults in cases of heinous offences.[40] A major change introduced by the Act is that where now the children aged between 16 and 18 are accused of serious crimes including murder, rape and acid attacks, authorities will conduct an assessment of factors including the "premeditated nature" of the offence and "the child's ability to understand the consequences of the offence". And on the basis of this assessment, children can be prosecuted in an ordinary criminal court, and further be punished as adults if convicted.

Thus, in response to the rise in violent crime by juveniles, the JJ Act of 2015, differentiates between petty, serious, and heinous offences, and lays down provisions to treat juvenile offenders who commit "heinous offences" between the ages of sixteen and eighteen as adults by putting them to trial under the criminal justice system. Also, juveniles between 16 and18 years of age, who are found guilty of committing heinous offences through a preliminary inquiry by the Juvenile Justice Board, will be sent to a *Children's Court*[41] that can pronounce the child guilty. Such juveniles can be detained in a 'place of safety'[42] until they reach the age of 21. At present, most states do not have the *'place of safety,'* also known as *'borstals,'* which also needs to be addressed.

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39 *Supra* note 6.

40 Shubhomoy Sikdar, Juveniles May be Tried as Adults for 'Heinous Crime,' THE HINDU (APRIL 9, 2016) (Nov. 2, 2017), http://www.thehindu.com/news/cities/Delhi/juveniles-may-be-tried-as-adults-for-heinous-crime/article8453562.ece.

41 *Supra* note 6, Section 2(20). Sec 2(20) defines "Children's Court'' as a court established under the Commissions for Protection of Child Rights Act, 2005 or a Special Court under the Protection of Children from Sexual Offences Act, 2012, wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act.

42 *Id.,* Section 46. Sec 46 defines "Place Of Safety" as any place or institution, not being a police lockup or jail, established separately or attached to an observation home or a special home, as the case may be, the person in-charge of which is willing to receive and take care of the children alleged or found to be in conflict with law, by an order of the Board or the Children's Court, both during inquiry and ongoing rehabilitation after having been found guilty for a period and purpose as specified in the order.

Conclusion and Suggestions

Children are the most vulnerable section of the society and when children come in conflict with the law, their human rights need to be protected as well. Therefore, from the above discussion on the *Juvenile Justice (Care and Protection of Children) Act, 2015,* it can be clearly deduced that rights of children have been respected and recognized, thus, adhering to correctional remedies instead of punitive measure. But, recently, in the background of the horrific rape of a young student in 2012, entirely a new regime with respect to juveniles above the age of sixteen, accused of committing heinous offences, has been set up. State's legal reforms in juvenile justice, particularly those that deal with serious offences, have stressed upon punitive measures, accountability, and also a concern for public safety, rejecting traditional concerns for diversion and rehabilitation in favor of a get-tough approach to juvenile crime and punishment. Although, we acknowledge that child committing a "heinous crime" requires more intensive scrutiny, and ought not to be treated similarly to children committing less serious crimes. But does this cater to the actual problem and nipping of the crime? Is it all about creating deterrence by the amending the law, or do we need to look at the issue of children in conflictwith thelaw by restructuring the existing juvenile justice and welfare system. Rather, the need here is to sensitize the young minds, educate them, and offer them opportunities to increase their employability on turning adult. There is a need for the parents to play a very important role in the proper development of their child. This is evident from the Preamble of the U.N. Convention on the Rights of the Child, 1989, which asserts that the family is "the fundamental group of society" and that children "should grow up in a family environment," whereas Art. 5 respect the "responsibilities, rights and duties of parents."[43] Thus, special efforts should be made to prevent juvenile delinquency through effective educational opportunities, stable family environment, and community-based programs. Appropriate guidance and counseling to the juveniles, victims and their families be provided that respond to the special concerns of the children.

Furthermore, a purely rehabilitation centric approach towards juvenile offenders committing

43 *Supra* note 15. Article 5 of the Convention provides that the States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

heinous offences may not be ideal. A restorative process, accompanied subsequently by rehabilitative measures, has several advantages both for the offender and the victim. Programs of restorative justice such as victim-offender mediation or dialogue, conferencing, victim assistance and involvement etc., promptly increase accountability among juvenile offenders, offer greater victim satisfaction and thus, assist in more effective societal reintegration. Community supervision and effective programming to reduce recidivism and produce other positive outcomes is need of the hour. Last, but not the least,

"The only effective way to reduce and prevent juvenile crime is to balance tough enforcement measures with targeted, effective and intervention initiatives."

-Janet Reno[44]

44 Janet Reno, *Janet Reno Quotes,* BRAINY QUOTE (Nov. 10, 2017), https://www.brainyquote.com/authors/janet_reno. Janet Reno was the First Woman Attorney General of the United States of America. Under her leadership, increased focus and support was offered to the Office of Juvenile Justice and Delinquency Prevention, which increased its capacity, offering a range of program initiatives relating to children exposed to violence, community assessment centers, intensive aftercare, nurse home visitation, truancy reduction, mentoring, after school activities and community-based comprehensive strategies to address serious, violent and chronic offenders. She urged the Department of Justice to look beyond the role of the prosecutor and understand the complex issues and childhood experiences that can cause and lead to delinquency.

PARALLEL IMPORTS UNDER THE TRADEMARK LAW IN INDIA

Mrs. Ramneek Kaur*

Introduction

Intellectual property refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce. Intellectual property rights are like any other property right. They allow creators, or owners, of patents, trademarks or copyrighted works to benefit from their own work or investment in a creation.[1] Intellectual Property Rights exist to incentivize innovation and trade and provide exclusivity of usage to authors / innovators/trademark holders.[2] With the increase in the knowledge and practice related to intellectual property rights, there is an increase in the issues surrounding them. In the present-day world today where intellectual property right holders are vigilant and aggressive in asserting their claim over their intellectual property, one of the issues that in gaining concern is the issue of Parallel Imports.

Meaning of "Parallel Imports"

The term "Parallel Import" in trade parlance is import of original/genuine products (not counterfeit or pirated) which are sold/ acquired legally abroad and imported into the country, by persons other than the intellectual property right holder without permission/authorization of the IPR holder. Hence, parallel import is essentially a trade practice. Parallel imports are genuine goods that are legitimately acquired from the rights holder and subsequently sold at lower prices through unauthorized trade channels in the same or a different market. [3] In other words, parallel imports are unauthorized imports of genuinely produced commodities under protection of an intellectual property right, i.e. a trademark, patent, or copyright.[4] Parallel trade is often referred to as grey-market trade that occurs in goods and through unofficial channels. Thus, while the goods are genuine, the channels of trade are not as were originally desired by the rights holders.

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1 WIPO Publication, *What is Intellectual Property,* WIPO (Oct. 1, 2017), http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf.

2 United IPR, *Legality of Parallel Imports in India viz a viz Kapil Wadhwa Judgment,* UNITED IPR (Oct. 5, 2017), http://www.unitedipr.com/legality-parallel-imports-india-viz-viz-kapil-wadhwa-judgment/.

3 Ashutosh Kane & Sakshi Pande, *Parallel Import Issues Under Indian Trademark Law,* WORLD TRADEMARK REVIEW (Oct. 8, 2017), http://www.worldtrademarkreview.com/Intelligence/IP-Lifecycle-India/2015/Articles/Parallel-import-issues-under-Indian-trademark-law?vl=1416669433.

4 Jung Hur & Yohanes E. Riyanto, *Tariff Policy and Exhaustion of Intellectual Property Rights in the Presence of Parallel Imports,* 58(3) OXFORD ECONOMIC PAPERS (NEW SERIES) 549-568 (2006).

The rights holders might have desired to sell the goods in a particular region or in another region through his authorized trade channel. Such trade occurs when products produced under the protection of a patent, trademark, or copyright in one market are subsequently exported to a second market and sold there without the authorization of the local owner of the intellectual property right.[5]

> *Basically, Parallel Import occurs when goods belonging to right-holders are legitimately acquired/bought by a third party in say, Country A and are then imported to and sold in say, Country B without the express consent of right holders. These goods are legitimately bought in Country A where the goods may be available at a lower price than Country B and the same goods are then sold in Country B at a price higher than the authorized sellers of the right-holder, thereby making the same goods available at a lower price to consumers (through parallel channels)*.[6]

Another example would be-imports of Levi's Jeans to the UK by Tesco, a British supermarket chain. Tesco deliberately buys Levi's jeans from outside the EU without getting permission from the manufacturer and sells them in the UK at lower prices than the prevailing prices.[7] This trade practice is carried out to take advantage of differentiation of price of goods between different countries which may be due to various factors including different taxation regime(s), subsidies, market trends, etc. However, in effect, parallel importation thus acts as a reasonable limitation to the rights holder's exclusive rights to use the intellectual property in relation to the goods and services for which it has been registered.

Legality of Parallel Imports

Whether parallel imports are legal or illegal depends on the Principle of Exhaustion followed in the country of import. Article 6 of TRIPS (Trade-Related Aspects of Intellectual Property Rights) read with foot note 6 of Article 28 and Article 5(d) of Doha Declaration makes it clear that it is open for countries to determine the principle of exhaustion they want to follow.[8] The Principle of Exhaustion followed by a country determines the country's stand on whether or not

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5 Matthews Duncan & Viviana Munoz Tellez, *Parallel Trade: A User's Guide,* IP HANDBOOK 2007 (Oct. 15, 2017), http://www.iphandbook.org/handbook/chPDFs/ch15/ipHandbook-Ch%2015%2004%20Matthews-MunozTellez%20Parallel%20Trade.pdf.

6 *Supra* note 2.

7 *Supra* note 4.

8 *Supra* note 2.

the right holder's exclusive right over a product is "exhausted" after its first genuine sale to a customer or whether the right holder can control further re-sale or distribution of the goods after first sale.

Principle of Exhaustion

Under the concept of 'principle of exhaustion', once a right holder has sold a product, it cannot prohibit the subsequent resale of the product. The intellectual property rights in that product have been exhausted on its 'first-sale'. This concept of principle of exhaustion deals with the extent to which the distribution intellectual property rights can be controlled by the rights holder. There are three major regimes of exhaustion after the Intellectual Property protected good is sold for the first time, i.e., the first sale doctrine. Under the 'national exhaustion' regime the exclusive right of the owner of the Intellectual Property ceases after the first sale within the national boundary. Under 'regional exhaustion', the exclusive rights cease after the first sale in a particular region, although imports into this region from outside countries may be banned. 'International exhaustion' refers to the rights of the Intellectual Property holder getting ceased once the IP-protected good is first sold anywhere in the world.[9] There are three kinds of exhaustion of rights:

1. National Exhaustion of Rights: National exhaustion of rights refers to one of the limits of intellectual property rights. Once a product protected by an IP right has been marketed either by manufacturer or by others with his consent, the IP rights of commercial exploitation over this given product can no longer be exercised by manufacture as they are exhausted. Any proper use of the goods after the first sale of the product would not amount to infringement. The concept of national exhaustion does not allow the IP owner to control the commercial exploitation of goods put on the domestic market by the IP owner or with his consent. However, the IP owner (or his authorized licensee) could still oppose the importation of original goods marketed abroad based on the right of importation.[10]

2. Regional Exhaustion of Rights: Regional exhaustion of rights refers to the first sale of the IP

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9 Rajesh Chadha, *The Impact of Parallel Imports of Books, Films / Music and Software on the Indian Economy with Special Reference to Students,* MINISTRY OF HUMAN RESOURCE DEVELOPMENT (COPYRIGHT DIVISION, DEPARTMENT OF HIGHER EDUCATION) GOVERNMENT OF INDIA, JANUARY 2014 (Oct. 22, 2017), http://copyright.gov.in/documents/parallel_imports_report.pdf.

10 Himanshu Sharma, *Transformation of Principle of Exhaustion of Rights,* MONDAQ – CONNECTING KNOWLEDGE AND PEOPLE (Oct. 25, 2017), http://www.mondaq.com/india/x/365208/Trademark/Transformation+Of+Principle+Of+Exhaustion+Of+Rights.

protected product by the IP owner or with his consent exhausts any IP rights over these given products not only domestically, but within the whole region, and parallel imports within the region can no longer be opposed based on the IP right.[11]

3. International Exhaustion of Rights: Once a product is exported in a market outside India and the further sale of the same product there would come under the purview of International exhaustion of rights but at the same time if the goods are purchased from the international market and sent back to India for the purpose of selling them here would not be allowed as per principle of parallel imports.[12]

Position Under The Indian Trademark Law

Under the current Indian law, legislations pertaining to each IPR provides for parallel imports differently such as Parallel imports are expressly prohibited under the Designs Act, 2000, the Geographical Indicators Act, 1999 does not cover the issue of parallel imports at all, principle of national exhaustion is followed with respect to Copyrighted material, Section 107A (b) of The Patents Act, 1970 expressly provides for parallel imports, Section 30(3)(b) of the Trade Marks Act, 1999 provides for the issue of parallel import.

Section 30(3)(b)[13] of the Trade Marks Act, 1999 provides that where the goods bearing a registered Trade Mark are lawfully acquired, further sale or other dealing in such goods by purchaser or by a person claiming to represent him is not considered an infringement by reason only of the goods having been put on the market under the registered Trade Mark by the proprietor or with his consent. However, such goods should not have been materially altered or impaired after they were put in the market.

Related Case Laws

In the case of ***Samsung Electronics Company Ltd. v. Kapil Wadhwa & Ors.,***[14] Delhi High Court delivered a judgment on parallel imports on 17th February 2012. In this case, the first

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11 *Ibid.*

12 *Id.*

13 The Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999 (India). Section 30: Limits on effect of Registered Trade Mark.

(1)…

(2)…

(3) Where the goods bearing a registered trade mark are lawfully acquired by a person, the sale of the goods in the market or otherwise dealing in those goods by that person or by a person claiming under or through him is not infringement of a trade mark by reason only of—

(a) … or

(b) the goods having been put on the market under the registered trade mark by the proprietor or with his consent.

14 C.S. (OS). No.1155/2011, Decided on 17.02.2012 (India).

plaintiff was Samsung Electronics Company Limited, Korea and the second plaintiff was its Indian subsidiary and exclusive licensee in India. The first plaintiff produced records to show 7 registrations for the mark "SAMSUNG" across classes 7, 9 and 11. The defendant was admittedly an erstwhile authorized dealer of Samsung products, more specifically printers. The cause of action arose due to the sales of imported Samsung printers by the defendant. These "grey market" goods, though genuine Samsung printers, were as per the plaintiff, not sold without due adherence to various statutory norms including affixing a MRP, not being given with a manufacturers guarantee, and most interestingly, "not earmarked to be sold in the Indian market". A further grievance was that the defendant was operating a website whereby the imported Samsung printers were offered at a price much lower than that of the plaintiffs and that the defendants used a technique of "deep hyperlinking" to establish that they were connected with the plaintiffs. The questions primarily arising were:

1. Does sale of imported, genuine products without consent of the right holder in India constitute infringement under section 29(1) read with 29(6)?
2. Does section 30(3) recognize national exhaustion or international exhaustion?
3. Does Meta tagging and deep hyperlinking of a registered trademark constitute infringement?

It was the first two questions which related to parallel imports. In answering the first question, the Court held that any importer, who is not a registered proprietor or permissive right holder, even if importing genuine products, is culpable of infringement. There is also an interesting observation that had the legislative intent been to facilitate free movement of goods, section 29(6) would have not existed at all. These fetters on the right of importation of genuine goods, is justified on the basis of section 29(1), which does not provide any distinction between genuine and non-genuine goods. In the absence of any legislative provision or exception for genuine imported goods, such importation is deemed to be an act of infringement. In answering the second question, the Court held that section 30(3) recognizes only national exhaustion in India. The section was interpreted to mean that once goods are acquired by a person from the registered proprietor within the same market, the registered proprietor cannot turn around and state that there in an infringement of his trademark on the count that there is change of ownership by way of an assignment between the registered proprietor and some other person and seek prohibition

on the dealings of the goods. This cannot subsume in favour of a person acquiring goods from a foreign market. The implication and effect of section 30(3) is stated to be limited to acquisitions within the domestic market. Section 30(3) permits an exception only on those goods which bear registered trademarks, and are acquired lawfully, and the word "lawfully" is to include the trademark law in force. The only "market" for the purpose of section 30(3) is deemed to be the Indian market. The Court unequivocally held that section 30(3) does not recognize any concept of international exhaustion, and the section operates only within the market where the registration of the mark extends.

Further, the issue of parallel import was discussed in great detail in the case of ***Kapil Wadhwa v. Samsung Electronics.***[15] In an appeal before the Division Bench against the order of the Single Judge in ***Samsung Electronics Company Ltd. v. Kapil Wadhwa,***[16] holding that India follows the principle of National Exhaustion and not of International Exhaustion of Rights, thereby restraining the defendants from importing, exporting and dealing in printers and their ink cartridges/toners bearing the trademark SAMSUNG; the Division Bench overruled the order of the Learned Single Judge after a careful reading of Section 29 and 30 of the Trade Marks Act, 1999, more importantly Section 30(3) & Section 30(4), Statement of Objects and Reasons of the Trade Mark Bill, 1999, Report of the Standing Committee in respect of Copyright Amendment Bill, 2010 and held that the term 'the market' contemplated by Section 30(3) of the Trade Marks Act, 1999 is the international market. Thus, legislation in India adopts the Principle of International Exhaustion of Rights. On the contention of the Plaintiffs/Respondents that an ordinary customer, who is provided with the warranties and after sales service by the Defendant/ Appellant may form a bad impression of product of plaintiffs/Respondents, which can lead to damage of reputation of Plaintiffs/ Respondents, the Division Bench directed the Appellants/Defendants to prominently display in their showrooms that the products sold by them have been imported from abroad and that the Respondents/ Plaintiffs do not give any warranty qua the goods nor provide any after service and that the warranty and after sales service is provided by the appellants personally.

The Division Bench therefore, re-considered the question of whether the Trade Marks Act, 1999 embodies the International Exhaustion Principle or the National Exhaustion Principle when the

15 2013 (53) PTC 112 (Del.) (India).
16 *Supra* note 4.

registered proprietor of a Trade Mark places the goods in the market under the registered trade mark. The court held that the earlier finding -that there was legislative intent to put barriers on importation-was premature and went on to interpret Section 30(3) as follows:

1. Where goods bearing a registered trade mark are lawfully acquired by a person, the sale of the goods in the market by that person is not infringement of the trade mark by reason only of the registered trade mark having been assigned by the registered proprietor by some other person after the acquisition of those goods.
2. Where goods bearing a registered trade mark are put on the market and are lawfully acquired by a person, the sale of the goods in the market by that person is not infringement of the trade mark by reason only of further sale in the market.

The two situations are distinct and operate in mutually exclusive areas and the question of any one being interpreted in a manner to render the other otiose does not arise."[17] While defining what "lawful acquisition" is, the court stated that there is no law which stipulates that goods sold under a trade mark can be lawfully acquired only in the country where the trade mark is registered. In fact, the legal position is to the contrary. Lawful acquisition of goods would mean the lawful acquisition thereof as per the laws of that country pertaining to sale and purchase of goods. Trade Mark Law is not to regulate the sale and purchase of goods. It is to control the use of registered trademarks. Thus the Division Bench held that the Trademarks Act embodies the principle of International Exhaustion and the term "market" Section 29 and 30 of the Act refers to international market and not the domestic market. The only condition imposed by the Court on parallel import, in relation to trademark, is that the imported goods should state they have been imported and that after sales service and warranty is not provided by the right holder but rather by the importer.

Besides these two important cases which discuss the issue of parallel imports in detail, following are the cases which either mention or discuss the said concept:

In the case ***Western Digital Technologies Inc. v Ashish Kumar,***[18] a suit was filed by the plaintiff (manufacturers and marketers of storage devices, media players, routers/switches/bridges, comprising of OEM/system manufacturer, desktop and enterprise, solid state drives(SSD) and

17 *Supra* note 4.
18 2016 Ind Law DEL 4027(India).

software and mobile) for permanent injunction restraining infringement of registered trade mark (Western Digital). It was contented by the plaintiff that on account of the registration, whenever any third party attempts to import products bearing the plaintiffs' registered trademarks and the Customs authorities either find that the said party is not included in the list of the plaintiff's authorized importers or the products appear to be counterfeit, a notice is generated seeking the plaintiffs' inputs on the said products and comment on whether they are infringing goods or are genuine products in order for them to be appropriately dealt with under the Customs Rules. The case was filed against the defendant who was an importer of computer peripherals and hardware such as hard disk drives, flash drives, tablets, USB dial drives, micro SDHC cards. The main contention of the plaintiff was that goods of the plaintiffs are being imported into India. However, the goods are not imported through legitimate channel or in a lawful manner. Another contention was that although the goods may be genuine, but the goods do not show that they are parallel imports from a particular country. The goods are not supported by the Western Digital warranty services or customer care and thus, the unwary customers may be misled that the goods being sold to have carried the same warranty and services as provided by the plaintiffs. The result of this would be that the disgruntled customer may affect the rights and reputation of the plaintiffs. Both the parties had relied on a decision rendered in the case of ***Kapil Wadhwa & Ors., v. Samsung Electronics Co. Ltd. & Anr.***[19] The matter was though amicably resolved, subject to the condition that the defendants would be willing to place permanently and affix a label to show that the goods have been imported and are not supported by an authorized Western Digital warranty. One of the main terms of the agreement between the parties was that a clear, un-removable and prominent label on both the packaging and product itself informing customers that the hard disk drives of the defendant are Parallel Imports of which particular country and also that they are not supported by Western Digital warranty services or customer care i.e. the plaintiff.

In ***Hindustan Lever Ltd. v. Briju Chhabra,***[20] the plaintiff HLL was the registered proprietor of the trade mark LUX and LUX label in respect of toilet soaps within India. Unilever, PLC is the principal company and registered proprietor of the trade mark LUX worldwide. The defendant in this case imported into India LUX soaps manufactured in Indonesia without any license,

19 2013(53) PTC 112(Del) (DB) (India).
20 CS (OS) 2345 of 2000 (India).

permission or authorization from HLL. The product so imported also expressly indicated that the product was for sale in Indonesia only. HLL argued that such parallel import by defendant of LUX soaps from Indonesia amounted to infringement of its statutory and common law rights on LUX in India. It was also argued that the fact of such imported product being genuine was of no relevance as any shortcomings in the grey goods would be attributed to HLL. The plaintiff argued misrepresentation on the part of the defendant. It was also argued that if the territorial demarcation is not respected, HLL in India would have to suffer huge losses by way of reduced sales of its goods. The High Court of Delhi agreed with the submissions of the plaintiff and defendant was restrained from indulging in any further acts of parallel importing.

In ***CISACO Technologies v. Shrikanth,***[21] plaintiff CISCO was selling its products used in computer hardware since the year 1984 under the trademark 'CISCO' and was using a 'Bridge Device'. It was submitted that the product of the plaintiff is used in critical networks such as railways, air-traffic control, hospitals, air defence, etc. and malfunctioning/failure of such products would result in huge losses due to failure of these networks. The defendant in this case copied the product and the trade name of the plaintiff in identical terms. Further, they were also using the word 'CISCO SYSTEMS' on its products with the 'Bridge Device.' The plaintiff invoked Section 29(6)(c) of the Trade Marks Act, 1999. Prima-facie case was made out for grant of ex-parte ad interim relief. The defendants or any person acting under their authority were restrained from marketing, selling, offering for sale, importing, manufacturing or dealing with in any manner, hardware components pertaining to computer or any electrical/electronic goods bearing the trademark 'CISCO' and/or using the 'Bridge Device' or any other trademark/mark deceptively similar thereto. It was observed that Section 140 of the Trade Mark Act, 1999 makes statutory provisions where under the Collector of Customs could prohibit the importation of goods if the import thereof would infringe Section 29(vi)(c) of the Trade Marks Act. Statutory authorities must prohibit import of such products, import whereof would result or abet in the violation of the proprietary interest of a person in a trademark/trade name. Therefore, directions were issued by the High Court of Delhi to the Collector of Customs to notify at all ports that no consignment, other than that of the plaintiff, be permitted to be imported in respect of routers, switches and cards which bears the trade mark 'CISCO' and/or the 'Bridge Device.'

21 2005 (31) PTC 538 (Del) (India).

In ***Samsung Electronics Company Ltd. v. G. Choudhary,***[22] Samsung initially brought suit in the district court in Delhi seeking an injunction based upon a claim of trademark infringement against the unauthorized distributors from importing and distributing Samsung's products. The district court denied the injunction. In appeal, the plaintiff prayed for an interlocutory injunction which, in essence, sought to combat and eradicate parallel importation by third parties into India of products manufactured by the plaintiff itself, but in China. The case set up was that although the products were genuine, they were not meant for Indian markets, inter alia because their sale does not strictly conform to Indian laws and regulations. Granting the injunction in favor of the plaintiff, the Court observed:

> "Indian law is quite liberal in permitting parallel imports of genuine goods bearing registered trademarks, provided such goods have not been materially altered after they have been put on the market. ...once genuine goods are released into commerce anywhere by or with the proprietor's consent, all associated Indian trademark rights are exhausted. Such consent may be express or implied, direct or indirect. The underlying rationale for liberal exhaustion is that trademarks are deemed to connote trade origin and not control. The trademark proprietor may, however, impose contractual restrictions on a third party, such as a foreign licensee, against importing genuine goods into India, provided, that such restrictions pass muster under the Trade Marks Act and the MRTP Act, Indian's competition statute. Subsequently, if such genuine goods are imported into India, the trade mark proprietor's remedy against the importer would be through a claim for breach of contract and not for trade mark infringement."

It was further observed that the issue of exhaustion was not expressly addressed in the 1958 Act, but the New Act statutorily introduces this concept. Section 30 of the New Act provides that where the goods bearing a registered trade mark are lawfully acquired, the further sale or other dealings in such goods by the purchaser or by a person claiming to represent him is not considered an infringement if the goods have been put on the market under such mark by the proprietor or with his consent....A cause of action for trademark infringement may be available to the proprietor against an importer where the genuine goods have been materially altered

22 2006 (33) PTC 425 (Del) (India).

without the proprietor's consent after they were put on the market. The burden of proving such consent is on the importer. A cause of action on the grounds of passing off is available if the trademark proprietor can show that the importer is passing off the goods in a misleading or improper way causing confusion in the minds of the public.

The Indian law follows the principle of international exhaustion which was recognized by the Delhi High Court in the case of ***Xerox Corporation v. Puneet Suri,***[23] wherein the plaintiff owned the trademark 'Xerox' and claimed that the defendant's act of importing and selling second hand Xerox machines constituted trademark infringement. The defendants argued that their acts were covered under Section 30(3), which recognized the principle of international exhaustion. The Court agreed with the defendants and held that 'import of [second hand] Xerox machines that had proper documentation is permissible under the Trademarks Act, provided that 'there is no change or impairment in the machine.'[24]

In ***M/s General Electric Company v. Altamas Khan and Ors.,***[25] the plaintiff, General Electric Co. filed a suit against the defendants to restrain them from misrepresenting themselves as authorized distributors of the plaintiff and from trading as GE Dehumidifiers or in any other deceptively similar trading style and also from importing, exporting, distributing, selling or dealing in Dehumidifiers or any other product of the plaintiff under the trademark GE or GENERAL ELECTRIC or the GE monogram or any other mark as may be deceptively similar to the plaintiff's trademark. It was the case of the plaintiff that the plaintiff for the reason of not marketing Dehumidifiers in India was neither giving any warranty nor any after sales service for the said Dehumidifiers in India and the illegal sale thereof by the defendant caused loss of reputation to the plaintiff in as much as the purchasers from the defendants on not being able to claim on the warranty and get the after sales service were likely to think ill of the plaintiff. The defendant had further tampered with the products by erasing the serial and model numbers, which could have helped to identify and track the origin of the products. Delhi High Court issued an injunction against the defendants. The use by the defendants of GE instead of Global Electronics on their invoices clearly indicated that the defendants thereby wanted to pass off their business and their products as that of the plaintiff and intended to confuse and deceive the customers and public at large. Therefore, it was held that the defendants by using the said

23 CS(OS) No. 2285/2006, Date of decision: 20.02.2007 (India).
24 *Ibid.*
25 CS (OS) No.1283/2006, Date of decision: 18.12.2008 (India).

monogram clearly infringed the trademark of the plaintiff and sought to pass themselves off as the plaintiff.

In the case of ***Louis Vuitton Mallettier v. Abdul Salim,***[26] suit was filed for protection of rights in the trademark "Louis Vuitton", trademark/logo "LV" and the "Toile monogram" design. The plaintiff as the registered proprietor of the aforesaid marks/logo/monogram sought order against the defendants from selling, offering for sale, advertising or dealing in hand bags, wallets luggage, footwear, leather and imitation of leather and goods bearing the aforesaid trademarks/logo/monogram. The cause of action for the suit was the import by the said defendants of counterfeit goods of the plaintiff bearing the aforesaid trademarks/logo/monogram. Injunction was also claimed restraining the said defendants from importing the aforesaid goods and passing off the same as plaintiff's goods. Decreeing in favor of the plaintiff, defendant was proved to be illegally importing counterfeit goods of the plaintiff and infringing the registered trademarks/logo/monogram of the plaintiff; and hence it was held that defendant was not entitled to do so.

In the case of ***Wipro Cyprus Private Limited v. Zeetel Electronics,***[27] the appellant had filed a suit for permanent injunction, restraining the Respondents from using the trade mark YARDLEY or any other phonetically similar expression in any media which can infringe the Appellant's registered Trade Mark. The appellant alleged that the Respondent was passing off their talcum powder, body spray and other cosmetic preparations as and for the business and products of the Appellant. The Appellant/Plaintiff had earlier purchased the registered trademark, namely 'Yardley' with all its variants from Lornamead Group Ltd., which had got its trademark registered in India under the Trade Marks Act. Consequently after such purchase, the Plaintiff filed an application for getting the registration transferred in its name. Thus, the Plaintiff, being the assignee of the said trade mark, had the right to manufacture the said product in India and sell it using the said trademark. While so, without any manner of right, the Defendant tried to import the talcum powder and body spray having the Plaintiffs' trademark from Singapore. It was contended by the defendant that:

26 CS (OS) 90/2006 (India).
27 2010 (44) PTC 307 (Mad) (India).

1. The goods tried to be brought into India are nothing but the original products manufactured by the assignor of the Plaintiffs' trade mark and in such a case, as per Section 30(2)(c) of the Trade Marks Act, 1999 no action would lie as against the Defendant. There is no embargo for importing genuine goods bearing the trademark similar to that of the trademark of the Plaintiff and the Plaintiff cannot claim monopoly over that trademark.
2. The impugned goods have been imported from Singapore to India. The trader in Singapore virtually obtained those goods only from U.K. manufactured by the very assignor of the Plaintiff who still holds the trademark and manufactures goods in U.K. and exporting countries like Singapore, Malaysia etc.

On the other hand, it was contended by the Plaintiff that by virtue of Sections 28 and 29 of the Trade Marks Act, 1999, once the assignee (Plaintiff here) has got the assignment of the trademark from the original registered owner the former has got exclusive right to use it in India. If the Defendant is permitted to (parallel) import such product in violation of Clause (c) of Sub-section (6) of Section 29 of the Act, then the very purpose of the assignment of the trademark from the original owner would be rendered nugatory. The Madras High Court in this case held that the Defendant cannot import such goods into India. It was observed that when the assignor of the trademark transferred the trade mark in favour of the Plaintiff, the plaintiff acquired exclusive right to use it. A plain reading of Section 28 of the Trade Marks Act, 1999 amply make the point clear that the Plaintiff being the assignor of the trade mark is having the exclusive right of using it in India. If Section 28 of the Act is interpreted in any other manner, that would amount to rendering Sub-section (1) of Section 28 nugatory. Also, if the Defendant is allowed to import the goods bearing the Plaintiffs registered trade mark, then it would amount to violating Section 29(6)(c) of the Act. Harmonious construction of legislation is the bed rock of interpretation of statutes. Sections 28 and 29 of the Act should be read conjunctively and Section 30 of the Act has to be read subject to Sections 28 and 29 of it. If Section 30 is read in isolation, it would render the aforesaid Sections 28 and 29 otiose. In fact, Section 30 should be treated as the proviso to Sections 28 and 29 of the Act. Statute has to be interpreted keeping in view their objects. The very object of getting once trade mark registered is to have exclusivity and if that exclusivity

itself is taken away by any dubious interpretation, it would render the entire statute meaningless. However, the Court observed that since there is no simulation or emulation of a registered trade mark by another person, who want to deceptively use the same, no case for passing-off is made out.

Conclusion

Even though we have guidelines, rules and legislations governing imports and protection intellectual property right, individually, however, the same does not provide all the answers to the questions emanating issues regarding parallel imports in respect of Intellectual Property rights which is very important to have a clear understanding of the topic and also for reaching definite conclusions. Even though there are cases which mention the issue of parallel imports and their impact on various intellectual property rights, it is yet to be made certain whether India follows the principle of national exhaustion or international exhaustion in respect of various intellectual properties. So far as the trademark law in India is concerned, at present, we follow the principle of international exhaustion as held by the Delhi High Court in the case of ***Kapil Wadhwa v. Samsung Electronics.***[28] However, it is yet to be made certain if other high courts and the Apex Court would also take the similar view as the Delhi High Court or a different view. This would only be ascertained if and when the issue of Parallel Imports with regard to trademark law is raised in any case before any other Court. Till then we may say that India follows the principle of international exhaustion in respect of trademark which means if a trademark owner sells a product under trademark protection in India, his right to the product's further sale in India as well as abroad comes to an end.

28 2013 (53) PTC 112 (Del.) (India).

EMERGING HORIZONS OF RIGHT TO PRIVACY AS A PART OF RIGHT TO LIFE

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"If the right to privacy means anything, it is the right if the individual, married or single, to be free from unwarranted governmental intrusion."

- William J. Brennan

Introduction

Everyone's life is precious and beautiful and each of us must respect one's human dignity. The most important socio-political event characterizing the second half of the twentieth century is the international effort to preserve the human rights of individuals. The framers of Indian Constitution were very much aware about the significance of human nobility and worthiness and hence they incorporated the right to life and personal liberty in Indian Constitution while framing the same. The notion of fundamental rights has been borrowed from US Constitution. The Constitution of India preserves the right of every section of the society as well as restricts the State not to infringe anyone's rights and freedoms as guaranteed by the Constitution. Even this right has been given universal status under the ambit of Universal Declaration of Human Rights, 1948. The preamble of UDHR says, "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The right to life represents a fundamental human right, which due to its importance, goes beyond personal interest, being relevant for the whole society. Therefore, this fundamental right to life acquires a social dimension, so it is necessary to guarantee it by international treaties and conventions, as well as norms of domestic law. It is interesting to establish the moment when the protection of right to life begins, an aspect which entails in different legislations.[1] Naturally, right to life must be given utmost protection because it is an inalienable, important, fundamental and transcendental basic right of every man. Article 21 of the Constitution covers a unique place and is enforceable against State. Article 21 of the

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1 Ruxandra Raduacnu, *Protecting the Right to Life-A Fundamental Human Right-By Norms Under Criminal Law,* FACULTY OF LAW AND ADMINISTRATIVE SCIENCES (Oct. 15, 2017, 11:40 AM), http://www.uab.ro/reviste_recunoscute/reviste_drept/annales_10_2007/raducanu_en.pdf.

Constitution of India, a very familiar fundamental right, applicable to all persons under Part III of the Constitution of India. Meaning of term "life" is defined in ***Munn v. Illinois,***[2] Field, J. spoke of the right to life in the following words:

> *"By the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with outer world."*

It is under the wider aspect of right to life from where 'right to privacy' emanates. Deprivation of right to privacy will not only denude the life of its effective content and meaningfulness but it would make life impossible to live and survive. And yet such privacy of life will not be in accordance with the procedure established by law, if this right is not regarded as a part of the right to life.

Right to Life Under Article 21 of Indian Constitution

Right to life is one of the important fundamental rights of the citizens as well as aliens, as protected by Indian Constitution. Assuring the right to life is undoubtedly the pivotal and inevitable point in the concept of the protection and safeguarding the human rights. Right to Life is considered as one of the primordial Human Rights. The importance of right to life can be judged simply on the basis that there are diversified views of the leaders of the world regarding almost every issue about Human Rights concern.[3] Everyone's right to life should be respected and honored irrespective of their age, class, color, creed, sex, language, religion, nationality or any of them. It can be understood that the term 'life' does not merely means the right of an animal existence. It can be bestowed with other magnitudes including right to safety of life, right to basic standard of living, right to privacy, right not to be injured or unjustly treated or with cruelty. Bearing the inspiration by the Indian values and ethos most commonly expressed in one of our Shanti Mantra:

"…Sarvebhavantusukhinah, Sarvesantuniraamayaah, Sarvebhadraanipashyantu, Maakaschitdukhabhaagbhavet…"

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2 94 U.S. 11, 113 (1877).

3 Atique Tahir, *Right to Life as a Human Right,* 23 AL-IDAH JOURNAL OF INTERNATIONAL ISLAMIC UNIVERSITY 23-25 (2012).

Framers of our Indian Constitution perceived the human being beyond a mere physical entity and incorporated Article 21 which speaks that, *"No person shall be deprived of his life or personal liberty except according to procedure established by law"* in Part III of the Constitution of India under the heading Fundamental Rights. The object of this fundamental right under Article 21 is to prevent encroachment upon personal liberty and deprivation of life except according to procedure established by law and to make an environment where justice shall triumph. It clearly means that this fundamental right has been provided against State only. If an act of private individual amounts to encroachment upon the personal liberty or deprivation of life of other person; such violation would not fall under the parameters set for the Article 21.[4]

There is no doubt that Indian Judiciary lived up to the expectations of the Constitution framers, both in interpreting and implementing Article 21 initially, but there are left little complications as to the viability of Article 21 in modern times. Looking at the wider arena of right to life, it can be said that broader connotation of 'right to life' aims at achieving 'justice' as mentioned in Preamble through the overall well-being and development of the citizens.

Right to Privacy

The matter of right to privacy has become a major concern in present day time. According to Black Law's Dictionary, "right to privacy means right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned". Right to privacy in India has been provided under Article 21 of Constitution of India; Section 43, 43A, 66E and 72A of Information Technology Act, 2000 and some other enactments like Income Tax Act etc. Recently in 2009, there came a landmark decision[5] on consensual homosexuality including Section 377 of Indian Penal Code, 1860 and Article 14, 19 and 21 of Constitution of India. It was held that "right to privacy means to protect a private space in which a man may become and remain himself." This notion has not only triggered the controversies among the legislative bodies but the judicial officers as well. The aspect which remains contentious is what all is to be included and what all is to be excluded under the ambit of 'right to privacy.' The biometric informations so provided are important from the government's perspective and there lies a

4 Himangshu Ranjan Nath, *Right to Life and Personal Liberty under the Constitution of India: A Strive for Justice,* GAUHATI UNIVERSITY (Oct. 15, 2017, 12:06 PM), https://poseidon01.ssrn.com/delivery.php?ID=pdf.

5 Naz Foundation v. Govt. of NCT of Delhi, 2009 Del. HC 546 (India).

number of advantages like Aadhaar based Direct Transfer Subsidy, Jan Dhan Yojna, Passport in 10 days, Digital locker, Voter Card Linking, Monthly Pension Provident Fund Opening new bank account, Digital Life Certificate and SEBI facilities. As quoted by jurists, "Privacy is a matter of illustration and interpretation. It is not a close ended right rather an open ended right. It will take time before the nature of the right to privacy settles down. It will have to pass the test of reasonable restrictions, as stated under Constitution of India, when it is codified."

Report on NCRWC and Various Privacy Bills in Parliament

In 2002, the National Commission to Review the Working of the Constitution[6] recommended a constitutional amendment in the form of Article 21-B, which shall make an express provision of 'right of privacy' as a fundamental right under Part III of the Constitution. There was also a proposed bill drafted in the year 2011. A Bill to provide for the right to privacy to citizens of India and regulate the collection, maintenance, use and dissemination of their personal information and provide for penalization for violation of such right and for matters connected therewith or incidental thereto. Some of the highlights of the proposed Bill are as follows:[7]

1. It creates a statutory Right to Privacy by means of a broad definition and then creates specific of protections for it. Recognizing the Right to Privacy not to be absolute, the Bill identifies various breaches that are permitted. In the Bill, certain prohibited acts are also identified for which civil remedies as well as criminal sanctions are created.
2. The government interception and telephone tapping mechanism is changed moderately from the existing system. The modification is with respect to several procedural safeguards which are put into place to avoid unauthorized and unnecessary tap orders.
3. A regulatory mechanism is created through Data Protection Authority of India. It will exercise supervision over private parties which will engage in the collection and storage of personal data.
4. Further, in the system suggested, the Bill identifies specific officers/position holders in various entities (that may be involved in various breach of the right)

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6 Sabreen Ahmed & Shubhankit Singh Sengar, Right to Privacy – Is UIDAI a Violation of an Individual's Fundamental Right?, 16 WORLD JOURNAL ON JURISTIC POLITY 6-8 (2016).

7 Ministry of Law & Justice, Government of India, *Report on National Commission to Review the Working of the Constitution,* Report No. 62 (2002).

who shall be held responsible, in case of any wrong act or any default.

5. Disputes under the Bill will be referred to the Cyber Appellate Tribunal which has been set up under the Information Technology Act. These disputes are primarily in the nature of claims by individuals against private data controllers.

However, there came another Bill in 2014 which made few changes in 2011 Bill. It was not for the first time but in fact many times attempts have been made to introduce the Privacy Bill but all went in vain. Various Privacy Bills were introduced like in 2009, 2011, 2014, 2015 and 2016 but none of them has turned out into an effective law. It's a challenge for the Parliament to decide as to what all constitutes privacy under the arena of right to life and personal liberty. Parliament will also have to define reasonable restrictions in the case of right to privacy as it involves the issues of national security.

Right to Privacy as A Part of Right to Life: Integral Part Test

The Constitution of India does not expressly provide a right to privacy. However, the judiciary has interpreted the notion of right to privacy, primarily through Article 21 of Indian Constitution (Right to Life and Personal Liberty) through its various landmark pronouncements. None of the rights under Constitution is absolute and therefore limitations are imposed in one way or another. Similarly, the constitutional right to privacy in India is subject to a number of restrictions. These restrictions have been culled out through the interpretation of various provisions and judgments of the Supreme Court of India:[8]

1. In ***Maneka Gandhi v. Union of India***,[9] it was held that the right to privacy can be restricted by procedure established by law, which procedure would have to be just, fair and reasonable;
2. Article 19(2) of Constitution of India, 1950 states that reasonable restrictions can be imposed on the right to privacy in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence;

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8 Apar Gupta, *Analysis of the Privacy Bill,* 2011, INDIA LAW AND TECHNOLOGY (Oct. 15, 2017, 9:55 AM), https://iltb.net/analysis-of-the-privacy-bill-2011-100108829519.

9 Centre for Internet and Society India and Privacy International, The Right to Privacy in India, PRIVACY INTERNATIONAL ORGANISATION (Oct. 14, 2017, 10:29 AM), https://privacyinternational.org/sites/default/files/UPR27_india.pdf.

3. In ***Gobind v. State of M.P.,***[10] the court decided that the right to privacy can be restricted if there is an important countervailing interest which is superior and the right to privacy can be restricted if there is a compelling state interest to be served;
4. The judges in ***R. Rajagopal v. State of Tamil Nadu,***[11] held that the protection available under the right to privacy may not be available to a person who voluntarily thrusts her/himself into controversy.
5. In ***Zoroastrian Cooperative Housing Society v. District Registrar Co-Operative Societies,***[12] the court reiterated that like most fundamental rights in the Indian Constitution, the right to privacy has been mostly interpreted as a vertical right applicable only against the State, as defined under Article 12 of the Constitution, and not against the private citizens.

In 1978 i.e. almost 40 years back, when freedom of press was not considered to be a fundamental right, Justice P.N. Bhagwati in ***Maneka Gandhi Case,*** had observed that freedom of press in as important part of freedom of speech and expression thereby laying down "Integral Part Test". He opined that "even if a right is not specifically named in an Article, it may still be a fundamental right covered by some clauses of that Article, if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that of fundamental right."[13]

Thus, by applying the *'Integral Part Test'* it is enunciated that right to privacy is, in its de facto and de jure sense, a fundamental aspect of the right to life. Right to privacy has a deep relation with right to life and the same can be concluded from right to privacy by allowing an individual the right to be let alone, to be free from unwarranted interference from the State, to have control over personal information and physical information and to be free from physical invasion and disturbances.[14] Therefore the right to privacy is of the 'same basic nature and character' as right to life and thus passes the *"Integral Part Test"*.

Right To Privacy Not Implicitly Recognised: Pre 1975 Status

Prior to Maneka Gandhi's verdict i.e. before 1978, this notion of right to life was construed in its

10 AIR 1978 SC 597 (India).
11 AIR 1975 SC 1378 (India).
12 AIR 1995 SC 264 (India).
13 AIR 1997 Guj. HC 136 (India).
14 Maneka Gandhi v. Union of India, AIR 1978 SC 597 (India).

narrow sense. Initially it was only supposed to be a guarantee against the executive action unsupported by law.[15] In 1954, the Supreme Court in ***M.P. Sharma v. Satish Chandra,***[16] rejected the contention that there exists a right to privacy under Article 20(3), due to the absence of any provision analogous to the Fourth Amendment of the U.S. Constitution. The question of a constitutional right to privacy under Part III of the Constitution was first raised in the decision of ***Kharak Singh v. State of U.P.,***[17] where the petitioner was subjected to continuous surveillance under Regulation 236 of the U.P. Police Regulations. The majority opinion on the question of the existence of right to privacy was that "our Constitution does not in terms confer any like constitutional guarantee". But Justice Subba Rao, while pronouncing the minority opinion, observed that "it is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty."[18] Although, the Supreme Court began to accept certain points of the minority view, the right to privacy was still waiting for its place in Indian constitutional jurisprudence.

Right to Privacy Implicitly Recognised: Post 1975 Status

In ***Gobind v. State of Madhya Pradesh,***[19] the Supreme Court held that a 'limited' right to privacy was implied within the ambit of Part III of the Constitution, which originates from the Articles 19 and 21. In this judgment, Justice Mathew observed that the right to privacy exists within the penumbral zones of the fundamental rights explicitly guaranteed under Part III of the Constitution.[20] The Apex court in ***Sunil Batra v. Delhi Administration,***[21] observed that a minimal infringement of a prisoner's privacy is unavoidable as the officers have an obligation to keep a watch and ensure that their other human rights are being duly observed.

Moreover, the Supreme Court in ***State of Maharashtra v. Madhukar Narayan Mardikar,***[22] held that even a 'women of easy virtue' is entitled to her privacy and nobody has the authority to invade her privacy at his sweet will.[23] The Supreme Court in ***S.P. Gupta v. Union of India,***[24]

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15 Anubhav Khamroi & Anujay Shrivastava, *The Curious Case of Right to Privacy in India,* JINDAL GLOBAL LAW SCHOOL (Oct. 15, 2017, 10:36 PM), http://iclrq.in/editions/apr/12.pdf.

16 Shashi Kant Varma, Right to Life, INTERNATIONAL JOURNAL OF TECHNICAL RESEARCH (Oct. 14, 2017, 08:31 PM), http://ijtr.nic.in/articles/art40.pdf.

17 AIR 1954 SCR 1077 (India).

18 AIR 1962 SCR 332 (India).

19 *Supra* note 15.

20 *Supra* note 11.

21 *Supra* note 15.

22 (1978) 4 SCC 494 (India).

23 AIR 1991 SC 207 (India).

24 Indian Drugs and Pharmaceuticals Ltd. v. Workmen, (2007) 1 SCC 408 (India).

held that a balance needs to be struck between the right to information and right to privacy. The court reiterated the point that a right to privacy is not an absolute and can be infringed to serve a serious public concern. In ***Indian Express v. Union of India,***[25] it was held that 'public interest in freedom of discussion of which freedom of the press is one aspect stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently, the decisions which may affect themselves. In another landmark judgment,[26] the Supreme Court held that telephonic conversations are private in nature and thus telephone tapping would be unconstitutional unless conducted by a procedure established by law. The court concluded by saying that 'we have, therefore, no hesitation in holding that right to privacy is a part of right to life and personal liberty enshrined under Article 21 of the Constitution and once the facts in each case constitute a right to privacy under Article 21 is attracted, the said right cannot be curtailed, except according to procedure established by law.'[27] Right to privacy is not absolute in nature and can be restricted through lawful means for the prevention of crime, disorder or protection of health or moral or protection of rights or freedom of others.[28]

Most importantly after ***Maneka Gandhi's Case,*** the Supreme Court interpreted Article 21 of Indian Constitution has directed a new era of augmentation about the horizons of the right to life. Personal Liberty in Article 21 covers a variety of rights and some have status of fundamental rights and given additional protection under Article 19. Triple Test for any law interfering with personal liberty:

1. It must prescribe a procedure as contemplated under Article 21;
2. The procedure must withstand the test of one or more of the fundamental rights covered under Article 19 which may be applicable in a given situation; and
3. It must withstand test of Article 14.

The law and procedure authorizing interference with personal liberty and right of privacy must also be right, just, fair, reasonable and not arbitrary, fanciful or oppressive.[29] The important landmark decision which leads to the widening the concept of Article 21 of Indian Constitution was in the case of ***Maneka Gandhi v. Union of India,***[30] of the word personal liberty, it covers

25 AIR 1982 SC 149 (India).
26 1986 AIR 515 (India).
27 People's Union for Civil Liberties v. Union of India, (1997) SC 568 (India).
28 *Ibid.*
29 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 485 (4th ed. Universal Law Publishing, 2015).
30 N.S. Nappinai, *Privacy and the Constitution,* TECHNOLOGY LAW FORUM (Oct. 14, 2017, 10:29 PM), https://cis-india.org/internet-governance/privacy-and-the-constitution.

variety of many more fundamental rights, i.e. right to speedy trial, right to bail, right to information, right to legal aid, right to reputation, right against torture, right to live with human dignity, right to education, right to family pension, right to good health, right to live in a healthy environment, right against sexual harassment, right to go abroad, right against custodial violence, right against handcuffing, right against delayed execution, right against bar fetters and right against solitary confinement and many more. It has made it obligatory on part of the state to fulfill many aspects; the term Life and Personal Liberty was elaborated in its expansive meaning to move beyond mere animal existence. Therefore no one can deprive the life without just and fair process of law. This case gave a new dimension to the Article 21 and apex court held that right to live is not merely confined to physical existence but it includes within its ambit the right to live with human dignity as well.[31]

Status Quo of Right to Privacy under Right to Life: After 2000

The Court has taken very divergent views in different circumstances as far as right to privacy is concerned. In 2002, the Delhi High Court held that a person who is suffering from the dreadful disease of AIDS cannot claim the right to privacy and cannot maintain the right of secrecy against his proposed bride and laboratory which tested his blood.[32] Later the above decision was as such upheld by the Supreme Court in ***Mr. X v. Hospital Z,***[33] wherein it was stated that the wife has an unequivocal right to have full fledge information about proposed husband's health and the concerned medical authority has the legal authority to inform about the same. Similarly, the court also quoted that compelling a woman to undergo a medical examination for determining his virginity would be deemed to be a gross infringement of her right to privacy.[34] In such cases, the courts can exercise this power only after a detailed analysis of the case which prima facie compels the need to conduct such examination. Delhi High Court also gave a similar view by stating that a party to a legal proceeding cannot be compelled to undergo any scientific test against his/her will, which in turn will result into violation of his/her right to privacy.[35]

Recently in 2017, the Bombay High Court in ***Shaikh Zahid Mukhtar v. State of Maharashtra,***[36] held that Section 5D of the Maharashtra Animal Preservation Act, 1976 violated the right to

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31 *Supra* note 10.

32 Dhanajay Aggrawal, *Right to Life with Human Dignity: Constitutional Jurisprudence,* SHODHGANGA (Oct. 14, 2017, 10:29 AM), http://shodhganga.inflibnet.ac.in/bitstream/ 10603/89946/10/10_chapter%20-ii.pdf.

33 X v. Z, AIR 2002 Del 217 (India).

34 (2003) 1 SCC 500 (India).

35 Surjit Singh Thind v. Kanwaljeet Kaur, AIR 2003 P&H 353 (India).

36 Ashit Kapur v. Union of India, AIR 2004 Del. 203 (India).

privacy of an individual and thus, should be struck down. The Patna High Court in its judgment ***Confederation of Indian Alcoholic Beverages Companies v. State of Bihar,***[37] held that Indian citizens have the right to enjoy their liquor within the confines of their house, in an orderly fashion, and that right is culled out from the right to privacy under Article 21 of the Constitution of India.

Right to privacy under the ambit of Right to life has always remained a contentious issue. In order to cull out the same, many landmark pronouncements have been made but the question "whether right to privacy is a fundamental right or not, as far as the information linked with Aadhaar is concerned?" remained unanswered. Privacy has been deduced as a part of Right to life but the information under 'Aadhaar' is often treated as violation of right to privacy of persons thereby infringing their right to life under Article 21 of the Constitution. The persons claiming 'Aadhaar' to be consisting of their confidential information seemed to have forgot that right to privacy is not an absolute right under Constitution and hence reasonable restrictions can be imposed thereupon. In order to sort out that whether the information given under 'Aadhaar' comes within the reasonable restriction that can be imposed on right to privacy or not, the Supreme Court gave its landmark judgment on this particular aspect in 2017.

Supreme Court's Verdict on Right to Privacy in 2017

In 2015, there were batch of petitions challenging the Aadhaar scheme as a violation of privacy. The petitions have challenged the Aadhaar card project, with its bio-metric registration process and linkage to basic and essential subsidies as a violation of citizen's right to privacy. The Supreme Court under then Chief Justice of India, H.L. Dattu decided to set up Constitution Bench to re-look the question in the light of raging controversy that Aadhaar card scheme is an invasion into citizen's privacy. The five-judge bench led by Chief Justice of India H.L. Dattu said that the purely voluntary nature of the use of the Aadhaar card to access public service will continue till the court takes a final decision on whether Aadhaar scheme is an invasion into right to privacy of the citizen or not.[38]

In 2017, the question that was put up before nine judge bench of Supreme Court was whether privacy is a fundamental right and basic structure of the Indian Constitution or not. The bench is to decide a bunch of petitions challenging the constitutionality of the Aadhaar scheme, primarily whether the scheme which requires the parting of biometric details of citizens to access welfare

37 (2017) 2 ABR 140 (India).
38 PLJR(4) 369 (India).

and benefits, is a violation of the right to privacy or not.[39] The arguments made by the government were based on the notion that right to privacy cannot be considered as a fundamental right under Article 21 of the Constitution of India. Constitution framers never intended to include right to privacy under the ambit of right to life under Article 21. Aadhaar has 115.15 crore people enrolled, that is nearly 98% of the population. Privacy is a vague concept to define. Privacy is non-negotiable; confidentiality is non-negotiable under the Aadhaar Act. Privacy cannot be inserted as a new fundamental right into the Constitution. Another argument made was that for something to be a fundamental right, it has to be tangible and exact. Privacy has no exactitude, in fact, the concept of privacy varies from person to person and if made a fundamental right, it would open a flood of litigation. Petitioner's strongly argued for declaring 'right to privacy' a fundamental right. They contended that privacy is deemed to be embedded in every aspect of 'life and liberty'. "All human choices are an exercise of liberty and they all presuppose privacy". Right to privacy is not mentioned in Indian Constitution in its de facto state but it does not mean that it does not exist at all. Article 19(1) (a) expressly mentions about freedom of speech and expression but still freedom of press was interpreted in the light of Article 19(1)(a). Framers of Indian Constitution never intended to interpret the Constitution in its narrowest sense. Petitioners argued that 'we have unbroken line of decisions since 1975 recognizing the right to privacy.'

Privacy includes the right to be left alone, freedom of thought, freedom to dissent, bodily integrity, and informational self-determination etc'. A five-judge Bench headed by Chief Justice J.S. Khehar earlier declared that the larger bench would sit to examine the correctness of the two judgments delivered in the cases of ***Kharak Singh*** and ***M.P. Sharma*****,** wherein it was held that right to privacy was not a fundamental right. Therefore, the nine-judge Bench concluded these petitions. The Bench comprised of Chief Justice J.S. Khehar and Justices J. Chelameswar, S.A. Bobde, R.K. Agrawal, Rohinton Nariman, A.M. Sapre, D.Y. Chandrachud, Sanjay Kishan Kaul and S. Abdul Nazeer. Following conclusions were laid down by our learned judges. Petitions are disposed of in following terms: the decision in M.P. Sharma that privacy is not a fundamental right stands overruled; the decision in Kharak Singh that privacy is not a fundamental right stands overruled; right to privacy is protected as intrinsic part of right to life and liberty and all decisions subsequent to Kharak Singh make the position clear and will hold the field.

Judges have demolished Centre's stand that privacy is an elitist concept by giving their opinions. Justice Chandrachud stated that "Life and personal liberty are inalienable rights. These are

rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation but limitations can be imposed the right to privacy as well."

Justice Khehar said that "Right to privacy, an inherent right, be unequivocally a fundamental right embedded in Part III of the Constitution of India, but subject to restrictions specified, relatable to that part. Hence, this is the call of today".

Justice Chelameswar enunciated that "No legal right can be absolute. Every right has limitations. This aspect of the matter is conceded at the bar. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case to case basis depending upon the nature of the privacy interest claimed."

Justice Bobde declared that "The right to privacy is inextricably bound up with all exercises of human liberty - both as it is specifically enumerated across Part III and as it is guaranteed in the residue under Article 21. Any interference with privacy by an entity covered by Article 12's description of the 'state' must satisfy the tests applicable to whichever one or more of the Part III freedoms the interference affects. If a man has to die with dignity, he has to have some privacy."

Justice Nariman held that "It is clear that Article 21 would, therefore, not be the sole repository of these human rights but only reflect the fact that they were 'inalienable'. On this score, it is clear that the right to privacy is an inalienable human right which inheres in every person by virtue of the fact that he or she is a human being."

Justice Sapre pronounced that "I do not find any difficulty in tracing that the 'right to privacy' emanates from Preamble (liberty of thought, expression, belief, faith and worship as well as fraternity and dignity of the individual); Article 19(1)(a), Article 19(1)(d) and lastly Article 21. Right to privacy is a part of fundamental right of a citizen guaranteed under Part III of the Constitution. However, it is not an absolute right but is subject to certain reasonable restrictions, which the State is entitled to impose on the basis of social, moral and compelling public interest in accordance with law."

Justice Agrawal said that "Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the court embarking on a constitutional function of that nature which is entrusted to Parliament. Privacy is the

constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level, privacy sub serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty."

Justice Nazeer stated that "Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable."

The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them."

Justice Kaul held that "Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent. Aside from the economic justifications for such a right, it is also justified as protecting individual autonomy and personal dignity. The right protects an individual's free, personal conception of the 'self.' The right of publicity implicates a person's interest in autonomous self-definition, which prevents others from interfering with the meanings and values that the public associates with her."

The nine judge bench of the Supreme Court has unanimously delivered its judgment in Justice ***K.S. Puttuswamy (Retd.) v. Union of India,***[39] on 24.08.2017, holding that the privacy is a constitutionally protected right which not only emerges from the guarantee of life and personal liberty in Article 21 of the Constitution, but also arises in varying contexts from the other facets of freedom and dignity recognized and guaranteed by the fundamental rights contained under

39 Krishnadas Rajagopal, *Right to Privacy Verdict: A Timeline of SC Hearings,* THE HINDU, August 24, 2017, at p1.

Part III of the Indian Constitution. It is a judgment that will have a bearing on civil rights as well as Aadhaar. The judgment has a doctrinal component in it. The Central Government's stance was that there is no fundamental right to privacy is based on the precedent of two Supreme Court judgements: ***M.P. Sharma v. Satish Chandra (1954) and Kharak Singh v. State of Uttar Pradesh*** (1962) which noted that the Constitution did not 'specifically protect the right to privacy.' Those observations were based on the Supreme Court's then – doctrinal position on fundamental rights crafted in the ***A.K. Gopalan v. State of Madras*** (1950) judgment.[40] But as justice D.Y. Chandrachud notes in his opinion, this doctrine was set aside by 11 judge bench in ***R.C. Cooper v. Union of India*** (1970) judgment and 1978's judgment in Maneka Gandhi v. Union of India by a seven judge bench established the new doctrine that the distinct fundamental rights are not carved out from each other but overlap.

Conclusion

'Privacy' falls under the umbrella of right to life and mirror the ingredients of 'right to life' thereby carrying the similar nature and features as that of fundamental right under Article 21. Thus, it can be duly established that not only the Judiciary but also the Legislature at certain instances have recognized the essential Right to Privacy and the need to make it a statutory right. However, for it to become a fundamental right, the Parliament needs to make a constitutional amendment to that effect and finally give the citizens of India the unequivocal and paramount right to protect their privacy from any external interference.[41] It is difficult to find such a noble, lofty, dignified illustrations and interpretations as provided by the Supreme Court of India to the concept of right to life and personal liberty elsewhere in the world.

The Indian concept did not confine the right to life and personal liberty only to one's physical entity. It means to strive for all rights of a person so that justice shall triumph.[42] Indian Constitution is deemed to be a 'living constitution' that which is bound to change/amend with the changing circumstances and situation of the nation. Nothing can remain static and similarly the ambit of fundamental rights. The scope of fundamental rights is to be widened with the moulding time but the basic norm of the country is to be kept unchanged. The same has been reiterated in Article 21 wherein the judges have declared 'right to privacy' as its part and parcel.

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40 *Ibid.*

41 (2017) SC 456 (India).

42 Jayachandran, *A Sterling Judgment on Right to Privacy,* LIVEMINT (Oct. 15, 2017, 4:20 PM), http://www.livemint.com/Opinion/s6nsmGDtanyexJtDF9ZZlK/A-sterling-judgement-on-right-to-privacy.html.

The only thing which can be focused upon is that even if the ambit of Article 21 is increased thereby adding 'right to privacy' under it, still the same limitations are supposed to be applied on this right as well because no right under the constitutional scheme of India can be absolute.

The Apex Court led a great importance on reasonableness and rationality of the provision and it is pointed out that in the name of undue stress on Fundamental Rights and Individual Liberty, the ideals of social and economic justice cannot be given a go-by. Thus it is clear that the provision Article 21 was constructed narrowly at the initial stage but the law in respect of life and personal liberty of a person was developed gradually and a liberal interpretation was given to these words. New dimensions have been added to the scope of Article 21 from time to time.[43] The right to privacy judgment is one of the most landmark judgments of independent India. It not only learns from the past, but also sets the wheel of liberty and freedom for future. The Supreme Court of India has once again proved to be the sole guardian and protector of Indian Constitution.

43 *Supra* note 15.
44 *Supra* note 4.
45 Vidhan Maheshwari, *Article 21 of the Constitution of India – The Expanding Horizons,* LEGAL SERVICE INDIA (Oct. 15, 2017, 06:18 PM), http://www.legalserviceindia.com/articles/art222.htm.

CRYONIC PRESERVATION OF HUMAN BEINGS: ETHICAL AND LEGAL IMPLICATIONS

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"The 'tragedy' of the slow growth of immortalism pertains... not so much to me or to us, the committed immortalists. We already have made our arrangements for cryostasis after clinical death, signed our contracts with existing organizations, and allocated the money. We will have our chance, and with a little bit of luck will 'taste the wine of centuries unborn."[1]

-Robert Chester Wilson Ettinger [2]

(December 4, 1918 – Cryopreserved 23 July, 2011)

Introduction

The instinct of survival is said to be one of the most powerful instincts of all experienced by humans and animals alike. This powerful impulse to survive is what has driven most living species to adapt to changing environments where the governing notion for any species was "survival of the fittest."[3] The will to survive is what made humans fight for a better standard of life by discovering and inventing techniques and methods that will assist in saving human lives from the epidemics that once plagued the earth and claimed several lives due to lack of advances in science and medicine. The human race has come a long way from mere survival, with revolutionary advancements in the field of medical technology which have improved the quality of life as well as its duration. In the present day, several medical procedures have become a matter of routine, which were unthinking able and unachievable just few centuries ago. This instinct to survive has led mankind to push the boundaries of conventional science in order for us to marvel in the benefits of what science has to offer. Among various examples of new medical

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1 Famous Quotes, THE GOOD READS (Oct. 9, 2017, 10:04 AM), https://www.goodreads.com/quotes/6498716-the-tragedy-of-the-slow-growth-of-immortalism-pertains-mostly.

2 Robert Chester Wilson Ettinger (born December 4, 1918 – cryopreserved 23 July, 2011), a Second Lieutenant Infantryman in the United States Army during World War II.

3 Survival of the fittest is a phrase coined by famous biologist, Charles Darwin. In his terms the best explanation of the term describes the evolutionary biological process of natural selection, wherein the species that creates the most copies of itself shall be shall be the one to survive the uncertainties that future beholds. THE BRITANNICA (Oct. 9, 2017, 10:04 AM), https://www.britannica.com/topic/animal-behavior/History-and-basic-concepts#ref497943.

marvels is organ transplants, surrogacy, gender change operations, cardiac surgeries, chemotherapies for cancer patients, aesthetic surgeries, surrogacy, new reproductive technologies, cloning, stem cell research, cryopreservation etc.

Death is the ultimate nemesis of life. Man fears for his life as he does not want to surrender to death and hence he has invested a lot of time and energy in discovering new methods which would help him in achieving his penultimate motive of cheating death for a while longer, if not escaping it altogether. Medical science has come a long way from conservative curative care and has developed into a preventive science now. To further this need of immortality, human species has come a long way and is not at the brink of new medical era of revolutionary preventive science, namely, Cryonic Life Extension. The term Cryonic Life Extension is a collective term used to describe cryonic preservation of cells, tissues, blood, organs and even full bodies of humans and animals alike so as to halt the ageing process till the time medicine/cure to a presently untreatable ailment is discovered in the future upon which, the subject of cryopreservation will be thawed, cured and brought back to life.

The notion that the concept of Cryonic Life Extension is of recent origin, is misfounded and is not factually accurate. The seeds of this revolutionary idea were sown much earlier and the first recorded attempt at preserving life through freezing at very low temperatures dates back to the year 1662 when, Francis Bacon, and English philosopher became the subject of his own experiment.[4] It is said that, the idea flashed in his head while he was on a journey to Highgate when all the snow around him inspired him to use it to preserve meat. Unfortunately, Bacon contracted a severe chill and dies three days later due to his novice experiment. Nonetheless, he laid the foundation of low temperature preservation which has presently developed into a sophisticated and systematic process of preserving living as well as dead bodies.

It is often said that fact is stranger than fiction and it is in the fiction that seeds of facts may be found. In 1931, Neil R. Jones toyed with the idea of cryonic preservation in his science fiction novel, *The Jameson Satellite* wherein the story revolves around, the titular character's corpse is preserved at sub-zero temperatures and is set on the remarkable journey to orbit the earth. When the human race goes extinct, machines and computers inhabit the earth and they discover Jameson. In order to seek information about him and his predecessors who occupied the planet,

4 M. Gillies, *A History of Cryonic Preservation,* MY SEND OFF (Oct. 9, 2017, 10:04 AM), https://mysendoff.com/2013/06/a-history-of-cryonic-preservation.

they revive him from his cryo-sleep, repair his brain by installing it into a computer. This story, at the least descries the real life instance of neurosuspension and transplant which is very much possible in present day and age. [5]

Therefore, it is right to state that cryonic life extension as a concept has been on the mind of various scientists since a long time, however, the sophistical techniques and modern methods have been perfected recently, which are still on their journey of improvement. The evolution of cryonics as a sophisticated and proper medical science has been intricately traced in the section that follows. It gives an account of medical, social and legal progression in the field related to cryonics with special emphasis on the lives of people most intimately connected with it.

Cryonic Preservation: Meaning and Kinds

The term Cryonic Life Extension is very wide in its ambit which encompasses cryonic preservation of cells, tissues, organs, body parts and even full human bodies, in extremely low temperatures with the help of cryoprotectant in the hope of being revived in the future when science and technology permit. The ideology behind cryopreservation is to preserve bodies of dead people who died of incurable diseases, for undefined period of time in the hope that one-day medical science would have made remarkable progress to revive them back to life by successfully curing the medical condition which became the cause of their death. According to the Cryonics Institute, a U.S. organization that offers the service, the fundamental goal is "to give people a second chance at life" and extend human lifespans.[6]

As mentioned earlier, cryonic preservation is done at several levels to extend the life span of the preserved cell, tissue, organs etc. Due to the very nature of technology, it is easier for slender sections and minute clusters of singular cells, to be cryopreserved as the management of their cool down process is more efficient. Following is a list of most widely cryopreserved biological material across the globe:

1. Umbilical Cord Blood
2. Semen Cryopreservation or Sperm Banking
3. Eggs/Oocyte Cryopreservation
4. Embryo Cryopreservation

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5 Francisco Memoria, *First-ever Human Head Transplant to Take Place in December,* THE MERKLE (Oct. 9, 2017, 10:04 AM), https://themerkle.com/first-ever-human-head-transplant-to-take-place-in-december.

6 Meera Senthilingam, *What is Cryogenic Preservation?*, CNN (Oct. 9, 2017, 10:04 AM), http://edition.cnn.com/2016/11/18/health/how-cryopreservation-and-cryonics-works/index.html.

5. Stem Cells Cryopreservation
6. Ovarian Tissue Cryopreservation
7. Human Brain Cryopreservation
8. Full Body Cryopreservation

It is pertinent to mention here that Full Body Cryopreservation is further divided into two subcategories depending upon the timing of preserving an individual's body, namely: (a) Pre-Mortem Cryopreservation and (b) Post Mortem Cryopreservation.

Pre-mortem cryopreservation means the low temperature freezing of an individual's body before his death. This is prohibited in jurisdictions across the world as any such act of freezing a person while he is still alive will amount to cessation of life and hence would amount to murder. However, it has been suggested by many scientists that pre-mortem cryopreservation will greatly enhance the chances of revival of a person once a cure for his disease is found. On the other hand, **Post-mortem cryopreservation** denotes the process of freezing an individual's body upon his/her death. This practice is not expressly legally prohibited in any jurisdiction except for the Columbian Province of Canada. **Post mortem cryopreservation** has been going on the United States since 1960's.

Definition of Basic Expressions

In order to understand the concept of Cryonic Life Extension and its fundamental procedures, it is important to shed some light upon the key words or basic expressions associated with the science of Cryonics. Some of the expressions repeatedly used in course of this research are as follows: -

a) **Cryonics:** The term Cryonics is derived from the Greek word *'kryos'* which means cold or freezing.[7] In 1965, Karl Werner coined the term *"cryonics"* from the Greek word, *"cryo,"*[8] meaning cold.

b) **Cryonicists:** The scientists who ascribe to the science of cryonics.[9]

c) **Cryogenics:** The term Cryogenics is derived from two Greek words; namely, *'kryos'* which means cold or freezing and *'genes'* which means being born or

7 Definition of Cryonics, CAMBRIDGE DICTIONARY (Oct. 9, 2017, 10:04 AM), https://dictionary.cambridge.org/dictionary/english/cryonics.

8 Saul Kent, *The First Cryonicist,* CRYONICS (Oct. 9, 2017, 10:04 AM), http://www.alcor.org/cryonics/cryonics8303.txt. See also Daniel R. Spector, Legal Implications of Cryonics, 18 CLEV.-MARSHALL LAW REVIEW 341 (1969).

9 Adam A. Perlin, *To Die in Order To Live: The Need For Legislation Governing Post-Mortem Cryonic Suspension,* 36 SOUTHWESTERN UNIVERSITY LAW REVIEW 33 (2007-2008).

produced. "Cryogenics" is "the science of producing and behaviors of materials on very low temperatures, particularly temperatures in the range of liquid helium i.e. below -180 degree Celsius."[10]

d) **Cryogenicist :** A specialist or practitioner in the field of cryogenics.[11]

e) **Cryobiology:** "Cryobiology" is "the study of effects of low temperatures on biological materials or systems of living organisms, which may include study of proteins, cells, tissues, organs, or whole organism."[12]

f) **Cryobiologists:** An expert in the field of Cryobiology.

g) **Cryonic Preservation:** Cryonic Preservation is the practice of freezing, at extremely low temperatures (-180 degree Celsius), the body or head of a person who is legally dead, in order to preserve it for possible resuscitation at a future time when physical repair and treatment are available.[13]

h) **Cryonic Suspension:** Cryonic suspension, or low temperature anabiosis,[14] refers to preservation of either a "living" or a "dead" human body by freezing or supercooling.[15]

i) **Reanimation:** The act of reviving an individual who has been cryogenically preserved is called reanimation.[16]

j) **Suspended Animation:** When it becomes possible to freeze a patient before clinical death, by perfected methods which allow reanimation at will, the frozen patient will be in a state referred to as "suspended animation."[17] Historically speaking this process was initiated in the year 1663, when an English scientist, Henry Power, composed a mixture of ice and salt and

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10 Definition of Cryogenics, MERRIAM WEBSTER DICTIONARY (Oct. 9, 2017, 10:04 AM), https://www.merriam-webster.com/dictionary/cryogenics.

11 Definition of Cryogenicist, OXFORD DICTIONARY (Oct. 9, 2017, 10:04 AM), http://www.oxforddictionaries.com/definition/english/cryogenicist.

12 David M. Baker, *Cryonic Preservation of Human Beings: A Call for Legislative Action,* 98 DICKINSON LAW REVIEW 677 (1993-1994).

13 *See* Webster's New Universal Unabridged Dictionary 440 (2nd Ed. 1979). BRIAN WOWK & MICHAEL DARWIN, CRYONICS: REACHING FOR TOMORROW 57 (Alcor Life Extension Foundation, 1991).

14 A temporary state of suspended animation or greatly reduced metabolism.

15 Curtis Henderson & Robert C.W. Ettinger, *Cryonic Suspension and The Law: Reflections on the New Biology,* 15 UCLA LAW REVIEW 414 (1967-1968).

16 Ben Best, Cryonics - Frequently Asked Questions, CRYONICS: THE ISSUES (Oct. 9, 2017, 10:04 AM), http://www.benbest.com/cryonics/CryoFAQ.html.

17 *Ibid.*

immersed a jar of eels in it, thereby freezing them. The following night they were thawed and resuscitated which gave birth to the idea of of "suspended animation."[18]

k) **Cryogenic Interment:** If the patient is frozen after clinical death, as several already have been, the frozen storage may be referred to as "cryogenic interment."[19]

l) **Cryoprotectant:** It is a chemical used to protect biological tissue from freezing damage caused due to ice crystallisation during the process of freezing in cryopreservation.Two common cryoprotective agents are dimethyl sulfoxide (DMSO) and glycerol. Glycerol is used primarily for cryoprotection of red blood cells, and DMSO is used for protection of most other cells and tissues.[20]

m) **Vitrification:** Vitrification, which means "turn into a glass," is known in cryobiology as a process that occurs when water is cooled too fast to form ice crystals.[21] Cells and tissues are frozen using a cryoprotectant in order to reduce damage to the cell caused due to ice crystallisation.

n) **Cryonaut:** A person who is preserved through the process of Cryonic Preservation is known as a "Cryonaut".

o) **Supercooling:** Supercooling is the process of lowering the temperature of a liquid or a gas below its freezing point, without it becoming a solid.[22]

The Process of Cryonic Preservation Explained

Death is not an event, but prognosis of gradual process of decomposition of body, which can be divided into different types based on the lapse of time.[23]

1. The first stage is termed as clinical death or apparent death[24] which occurs when the outward appearances of vital functions such as respiration, circulation and

18 R. PREHODA, SUSPENDED ANIMATION (Chilton Book Company, 1969); Guttman, Khalessi and Berdinkoff, *Whole Organ Preservation* 6 CRYOBIOLOGY 339 (1970).

19 Smith, Through a Test Tube Darkly: Artificial Insemination and the Law, 67 MICHIGAN L.R. 127 (1968).

20 David H. Yawn, *Cryopreservation,* ENCYCLOPAEDIA BRITANNICA (Oct. 9, 2017, 10:04 AM), https://www.britannica.com/technology/cryopreservation.

21 Brian Wowk, *How Cryoprotectant* Works, 28 CRYONICS 3 (2007) (Oct. 9, 2017, 10:04 AM), https://www.alcor.org/cryonics/cryonics0703.pdf.

22 Definition of Supercooling, MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 2069 (6th ed. 2003).

23 The President Commission for the Study of Ethical Problems in Medical, Biomedical and Behavioral Research, *Defining Death: A Report on the Medical Legal and Ethical Issues in the Determination of Death* (1981).

24 A person is regarded as clinically dead when his cardiac, circulatory and respiratory functions cease to exist.

motor activity cease to exist.[25]

2. The second stage is biological death[26] or relative death which is a term used to describe the bodily state between the cessation of cardiac and respiratory activity.[27] However, from a biological point of view, death occurs gradually and thus even after a recognition of clinical death, certain biological activities occur.[28] Complete resuscitation is quite possible in the early stages of relative death.

3. Finally, there is absolute death or cellular death, which is not complete until at least two days after clinical death and refers to the irreversible degeneration or disorganisation of individual body cells.[29] This refers to the state where the resuscitation of a body as a whole or even where the resumption of physiological functions of either individual organs or cells is impossible.[30]

4. Legal death[31] is different from clinical death and biological death and under current law, only a person who has been pronounced as legally dead can be cryonically preserved. However, the process of stabilization for cryopreservation has to start before biological death sets in.

Cryonics: Legal and Ethical Issues

Since its inception, the field of medical science has proliferated itself from its elemental state which was limited to diagnoses of disease, prescription of medication or at the most surgical treatment. The contemporary health practice has overstepped its original boundaries and extended to subject matters like Euthanasia, Clinical Trials, Abortion, Artificial Reproductive

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Nirmala Agarwal, *What is the difference between clinical death and biological death?,* PRESERVE ARTICLES (Oct. 9, 2017, 10:04 AM), http://www.preservearticles.com/ 201101123102/difference-between-clinical-death-and-biological-death.html.

25 A. Malnin and L. Perry, *A Review of Tissue and Organ Viability,* 4 CRYOBIOLOGY 104 (1967).

26 Brain/biological death occurs four to six minutes after clinical death and is defined as irreversible brain damage as manifested by absolute unresponsiveness to all stimuli. Nursing News, *Clinical Death Versus Brain Death: Which Comes First?,* NURSE BUFF (Oct. 9, 2017, 10:04 AM), http://www.nursebuff.com/2012/01/clinical-death-versus-brain-death-which-comes-first.

27 D. High, *Is Natural Death an Illusion?* HASTINGS CENTRE REPORT 37 (1978).

28 E.H. ALBANO, THE MEDICAL EXAMINER'S VIEWPOINT 19-20 (1969).

29 P. Aberhard, *"et.al.," Management of Profound Accidental Hypothermia with Cardiorespiratory Arrest,* 195 ANNALS SURGERY 492 (1982).

30 Capron and Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal* 121 U.PA. L.REV. 87 (1972).

31 Legal Death is when a person is declared death under the law. It occurs on the pronouncement of death by a qualified physician. For legal and medical purposes, the following definition of death has been proposed-the irreversible cessation of all of the following:

(1) total cerebral function, usually assessed by EEG as flat-line.

Techniques and Surrogacy, Plastic and Esthetic Surgery, E-medicine, Mental Health Care, Organ Transplant and the likes. Advancement of technology in health care has revolutionized the earlier organic forms of treatment to new, but sometimes, ambiguous issues like extension of human life by "Cryonic Preservation". However, legal development in the field has not been as brisk as scientific advancement, and law is often found to be either inadequate or non-existent in most impending fields. There are several aspects of the medical field which are running, ungoverned and unregulated due to the very nature of intricate science involved in it. Developing medical practices like Surrogacy, sex change surgeries, Clinical trials, E-medicine, and most recently Cryonic Life Extension have not only medical implications but social and psychological implications which effect the individual, his family as well as the social circle in which he moves.

Cryonic Life Extension is regarded as one of the most outstanding concepts offered by medical science in the entire history of mankind. Developments in this field are in its infancy, but legal challenges posed to Cryonicists are colossal. Some of the legal issues are discussed as follows:

1. Is Post-Mortem Cryopreservation the Right Method of Disposal of a Dead Body?:

The law has not so far defined a person to include a dead person. The dead body, however, has limited legal rights, which cannot be detached from it, even if the body is denuded of the life, chief among them is the right to remain silent.[32] From the time of the ancient Egyptians, the conviction has been that corpses have the right to rest undisturbed and unmolested.[33] William Henry Francis Basevi, in his 1920 book The Burial of the Dead, wrote that across history, cultures with almost no other rituals in common treat their dead with reverence.[34] Additionally several international instruments deal with right of the dead bodies in context of proper disposal.[35]

The first roadblock in the process of Cryonics is the legal quandary of disposal of dead body. In the light of above, Cryonic Preservation process is faced with major legal challenges, as the very

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(2) spontaneous function of the respiratory system, and
(3) spontaneous function of the circulatory system.

32 Section 3 (42) of the General Clauses Act defines a person to include any company or association or body of individuals, whether incorporated or not.

33 Ramji Singh Mujeeb Bhai v. State of U.P. & Ors. Civil Misc. Writ Petition No. 38985 of 2004 (India).

34 *Dahlia Lithwick, Habeas Corpses: What are the rights of dead people?,* SLATE (Oct. 9, 2017, 10:04 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2002/03/habeas_corpses.html.

35 A. Nasim and P. Beena, *Rights of the Dead,* 5(5) INTERNATIONAL JOURNAL OF MANAGEMENT RESEARCH AND REVIEW 298 (2015).

nature of the procedure involves a method of treatment of the dead body in a way which is in complete contrast with the conventional methods of disposal of dead bodies. The preservation of body after legal death in sub-zero temperatures raises several legal and ethical questions. Keeping ethical and religious considerations aside, the act of preserving a dead body this way is, strictly speaking neither legal nor illegal. The State is obliged under law as well as under its powers as a welfare state, to protect the rights of dead persons in its extended meaning under Article 21 of the Constitution of India for disposal of a dead body by way of decent and dignified cremation/ burial in accordance with the religion beliefs kept or professed.[36] Therefore, some may argue that cryonic preservation of dead bodies leads to a serious infringement of the fundamental right of the dead to get a proper burial or cremation.

However, the counter argument for the above may be made in a reverse manner, wherein it can be argued that fundamental right of a person is infringed in case of refusal to allow the body to be subjected to cryonic preservation, in contravention to the wishes of the deceased. The Transplantation of Human Organs Act, 1994, expressly lays down the right to protection of dead body from being mutilated, wasted or its organs to be taken out, except by the consent of the person, when he was alive, or on the consent of his kith and kin or the State if body is unclaimed. Therefore, the Transplantation of Human Organs Act expressly addresses a scenario wherein the deceased wished for his organs or body to be donated after his death, which marks a departure from the conventional methods of disposal. The moot point here is that if the law allows a person to donate his body or organs after death for certain reason, then to raise any objection or bar on cryonic preservation would amount to infringement of Article 21 of the Constitution and any

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36 Some of the international instruments dealing with rights of the dead are as follows: -

(a). Article 16, of Geneva Convention 1949 IV provides *"As far as military consideration allow, each party to the conflict shall facilitate the steps taken to protect the killed – against ill treatments."*

(b). Article 3(a) of the 1990 Cairo declaration on Human Rights in Islam provides *"In the event of the use of force and in case of armed conflict- it is prohibited to mutilate dead bodies."*

(c). Australian Defense Force Manual (1994) provides *"The remains of the dead, regardless of whether they are combatants, non- combatants, protected persons or civilians are to be respected, in particular their honour, family rights, religions convictions and practices and manners and customs at all times they shall be humanely treated."*

(d). The Central African Republics Manual (1999), states in volume 2 that *"Dead enemy must be treated well".*

(e). The UK Military Manual (1958) states *"The dead must be protected against maltreatment".*

(f). The US Field Manuel (1956) provides that *"Maltreatment of dead bodies" is a war crime".*

(g). U.S. Naval Hand book (1995) provides that mutilation and other mistreatment of the dead are representation of war crimes.

(h). UN Commission on Human Rights in a resolution adopted in 2005 underlined the importance of dignified handling of human remains, including their proper management and disposal as well as of respect for the needs of families.

such classification would amount to discrimination.

Also the Indian Succession Act, 1923 provides for execution of the Will of a person, after he has died. Under circumstances where a person, in his Will expresses a wish to be cryonically preserved upon death, the law states that such Will must be executed. The failure to so do will amount to infringement of the Law of Succession as well as fundamental rights of a person. This issue was recently raised in an English case of ***JS v. M & F***[37] wherein a fourteen year girl, who was suffering from terminal cancer, fought a successful legal battle in the court of law to win the right to be cryonically preserved after death. Allowing the application for disposal of body via execution of will, the Hon'ble Mr. Justice Peter Jackson opined that, despite the girl being under eighteen years of age, she was in charge of her full mental faculties and understood the consequences of cryonic preservation after death. Additionally, in some jurisdictions, it is argued that right to dispose of the body as desired by a person comes with in the ambit of Right to Privacy. In ***Kent v. Trask,***[38] Judge Timlin observed that,

> *"This court concludes that the Adherents, including Dora Kent, under Article I, section I of the California Constitution and the Fifth and Ninth Amendments to the United States Constitution have a privacy right to exercise control over his/her body and to determine whether to submit his/her body, or any portion thereof, including the brain, to pre-mortem cryonic suspension. (In ruling on the application, this court in no way comments directly or indirectly on the wisdom of such a choice)."*[39]

2. Cryonic Life Extension or Assisted Suicide?

Further more, Cryonics can only be applied to a person who has been pronounced "legally dead". Any departure from such practice, i.e. freezing a person before legal death will amount to murder in most jurisdictions. However, a celebrated cryobiologist, Dr. Cynthia Gorney, during the course of her research, proposed that a terminal cancer patient; should be frozen before clinical death, if it improves his chances of revival.[40] The terminally ill patient who wishes to benefit from such treatment is faced with the dilemma that present life must cease in hope of future recovery. Some facets of this dilemma are exemplified by ***Donaldson v. Van de Kamp***[41]

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37 *Supra* note 36.
38 JS v. M and F Re JS (Disposal of Body) Case No: FD16P00526 [2016] EWHC 2859 (Fam), (2016).
39 Kent v. Trask, 20-22 Super. Ct. Cal. (1989).
40 *Ibid.*
41 *See* Mike Perry, For the Record: Unity and Disunity in Cryonics, 13(8) CRYONICS 4-5 (1992).

wherein constitutional right to pre-mortem cryonic suspension of body and the assistance of others in achieving that state was extensively debated.[42] In short, the appellant in this case based his plea on the underlying rationale of the California right-to-die cases,[43] which recognize a patient's right to refuse unwanted medical treatment including the right to refuse life-sustaining medical treatment. Donaldson argued that, similar to the patient's interests in the right-to-die cases, his interest in seeking cryonic suspension outweighs the countervailing state interests at issue.[44] Unfortunately, the Trial Court as well as the Appellate Court rejected his argument and ruled that any such act would amount to aiding, advising, or encouraging of another to commit suicide.[45] However, this case left several legal questions unanswered. In Donaldson, Thomas A. Donaldson sought the declaration of a constitutional right to pre-mortem cryonic suspension of his body and the assistance of others in achieving that state. Donaldson, a forty-six-year-old mathematician and computer software scientist, suffered from a malignant brain tumor that was diagnosed by his physicians in 1988. This tumor was inoperable and continued to grow and invade his brain tissue. Donaldson's condition gradually deteriorated into a persistent vegetative state ultimately resulting in his death.

Donaldson petitioned the California courts, seeking a declaration that he had a constitutional right to achieve cryonic suspension before his natural death. His doctors believed that if Donaldson waits until his natural death to be suspended, future reanimation will be futile because the tumor will have destroyed his brain. In addition, Donaldson's doctors sought an injunction against criminal prosecution for their participation in the suspension, because Donaldson, once suspended, would be considered "dead" under California law. Donaldson and his doctors built their novel argument upon the recent right-to-die cases in which the courts recognized a patient's right to have life-sustaining medical treatment withdrawn. Donaldson argued that his right to privacy and self-determination is paramount to any state interest in maintaining life. Thus, according to Donaldson, balancing the state's reasons to end--or "interrupt," as cryonics enthusiasts would have it--his own life was not necessary.

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42 Donaldson v. Van de Kamp 4 Cal. Rptr. 2d 59 Cal. Ct. App. (1992).?

43 Robert W. Pommer III, *Donaldson v. Van de Kamp: Cryonics, Assisted Suicide, and the Challenges of Medical Science 9,* JOURNAL OF CONTEMPORARY HEALTH LAW & POLICY 589 (1993).

44 Barber v. Superior Court 195 Cal. Rptr. 484 Cal. Ct. App. (1983).
Cruzan v. Director, Missouri Department of Health 497 U.S. 261 (1990).?
Bartling v. Superior Court 209 Cal. Rptr. 220 Cal. Ct. App. (1984). ?
Superior Court v. Bouvia 225 Cal. Rptr. 297 Cal. Ct. App. (1986).

45 *Ibid.*

The trial court dismissed the complaint for failure to state a cause of action, and Donaldson appealed to the California Court of Appeals. Because the cryonic process would necessarily involve physician-assisted death, or the aiding, advising, or encouraging of another to commit suicide, the appellate court affirmed the ruling of the trial court, holding that Donaldson did not have a constitutional right to assisted death. Additionally, in light of Donaldson's First Amendment challenge to the statute, the court upheld the criminal statute prohibiting the aiding, advising, or encouraging of another to commit suicide. It is again humbly submitted that the courts took a very restrictive approach and implemented the law mainly in letter and failed to touch the spirit. The court refused to look beyond Donaldson's death. They failed to get to the basis of his argument which was based on the cases which allowed withdrawal of life support. Although not identical, Donaldson's case was at the least comparable to a life support removal situation. However, the researcher can only understand one reason for the same, i.e. non-encouragement of cryonic procedures. It is pertinent to raise a question mark upon how some jurisdictions allow assisted suicide, but are against cryonic suspension, which is a grave violation of a patient's right to seek medical treatment.

In India the case of ***Gian Kaur v. Union Of India***[46] is the landmark judgment on whether Article 21 i.e. Right to Life includes the right to die. It has been held that "the right to live with human dignity cannot be construed to include within its ambit the right to terminate natural life at least before the commencement of the natural process of certain death." The Court emphasized that the 'right to life' under Article 21 would include the right to live with human dignity upto the end of natural life, which includes the right to a dignified life upto the point of death including a dignified procedure of death. But the 'right to die' with dignity at the end of life is not to be confused or equated with the 'right to die' an unnatural death curtailing the natural span of life. In this view of the matter, the Court disagreed with the view expressed earlier in ***P. Rathinam's Case,***[47] thus right to die a dignified death differs from 'right to die'.

3. Right to Bodily Autonomy and Right to Seek Medical Treatment

It is urged that the process of Cryonic Preservation be viewed, not from a perception of an act which ends life, rather from the viewpoint of an act which is a necessary to pause life, in order to

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46 *Id.* at 64-65. *Every person who deliberately aids, or advises, or encourages another to commit suicide is guilty of a felony.* See California Penal Code § 401 (West 1988).

47 1996 SCC (2) 648 (India).?

revive life at a later time. In other words, cryonic preservation may be equated with medical treatment. Therefore, the Court in the above mentioned case ***(Donaldson v. Van de Kamp)*** has technically interfered with the claimant's right to seek medical treatment of his choice, which is in violation of his Right to Bodily Autonomy.

In ***JS v. M and F [Re JS (Disposal of Body)],***[48] JS, a 14-year-old girl, was diagnosed with a rare form of cancer and was receiving palliative care. JS applied to the High Court because her parents did not agree about what was to happen to her body after death. In her final months, JS investigated cryonics: the freezing of a dead body in the hope that resuscitation and a cure may be possible in the future.

The law in relation to the disposition of a dead body emanates from ***Williams v Williams,***[49] which notes that a dead body is not property and cannot be disposed of by will. However, the administrator of the estate has the right to possession of the body and the duty to arrange for its proper disposal. The role of the court is not to give directions for the disposal of the body but to resolve disagreement about who may make the arrangements. In considering whether the court had the ability to grant an order with prospective effect, it was noted that JS's welfare could not be adequately protected by the court refusing to make such orders. The documents, including those from the hospital trust relating to the time of and immediately after JS's death, were disclosed to the HTA, noting that the HTA may conclude the need for proper regulation of cryonic preservation.

The Hon'ble court while delivering this judgment adopted a very cautious approach presumably because it did not want to give an impression to the general public that they endorsed or the supported the cause of cryonics. Hence the court refused to probe the fact as to whether entering a cryonic facility was a proper way of disposal of body or not.

Right to Bodily Autonomy in India

In Indian context, the rights of dead bodies find an implied protection under the Constitution of India, under the word and expression 'person' in Article 21, which is interpreted to include a dead person in a limited sense. In the case of ***Mujeeb Bhai v. State of U.P. & Ors.,***[50] the Allahabad High Court observed that,

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48 1994 Cri LJ 1605 (SC) (India).
49 JS v. M and F (Re JS (Disposal of Body), Case No: FD16P00526 [2016] EWHC 2859 (Fam), 10 November 2016).
50 Williams v Williams, [1882] LR 20 Ch.D. 659.

"The law has not so far defined a person to include a dead person. It, however, has some rights, which cannot be detached from it, even if the body is denuded of the life, which together forms a human being. ....We thus find that the word and expression 'person' in Art.21, would include a dead person in a limited sense and that his rights to his life which includes his right to live with human dignity, to have an extended meaning to treat his dead body with respect, which he would have deserved, had he been alive subject to his tradition, culture and the religion, which he professed."

The Case of Preservation of the Body of Deceased Godman Ashutosh Maharaj

In ***Dalip Kumar Jha & Another v. State Of Punjab & Others,***[51] it was held that the right to his life of an individual, which includes his right to live with human dignity, shall have an extended meaning, which will include the right to treat a dead body with respect, which a person would have deserved, had he been alive, subject to his tradition, culture and the religion, which he professed. The timeline of events that lead to the first ever judgment being delivered on the issue of cryonics are described as follows:-

January 2014	The godman popularly known as Ashutosh Maharaj was declared dead after he suffered from a fatal heart attack. However, his devotees refuse to accept this fact and declare that their guru is not dead but has merely gone into samadhi and will eventually emerge from it one day and hence they preserve his body in sub zero temperatures similar to that of Himalayan conditions suitable for meditation.
December 2014	1. A person by the name of Pooran Singh files a writ of habeas corpus seeking the release of the godman's body. However, when this writ was rejected by the court he petitioned the court for a post-mortem examination of the corpse.

51 Ramji Singh Mujeeb Bhai v. State of U.P. & Ors. Civil Misc. Writ Petition No.38985 of 2004 (India).

	2. A person named as Dilip Kumar Jha, who claims to be the son of Ashutosh, also appealed to court, demanding that the body be brought to his home town in Bihar for cremation according to local rituals. The Hon'ble Punjab and Haryana High Court ordered that the last rites for Ashutosh be performed in 15 days
February 2015	The above mentioned ruling was later suspended.
July 2017	The Hon'ble Punjab and Haryana High Court granted permission to the followers to preserve his body in a freezer, although it was unclear whether the court had agreed with the sect's argument that its founder was still alive.

Conclusion

The urge for immortality is regarded as a concept of science fiction by most lay people, despite significant scientific research and theory supporting the hypotheses behind cryonics.[52] However, recent advances in science, particularly nanomedicine and molecular nanotechnology have made it unexpectedly possible for mankind to transform this fiction to fact very soon since there is sufficient data which supports the legitimacy of cryonics.53 Many cryobiologists have claimed that first human revival from cryo-preservation may be possible, as early as 2040[54] to 2050.[55]

Therefore, in the light of above, one may conclude that cryonic preservation has gained huge momentum over the last two decades, despite the doubts about its viability and authenticity. More recently (in November 2016) a fourteen year old teenage girl suffering from cancer successfully won a legal battle in United Kingdom to be cryonically preserved,[56] subsequent to

52 Dalip Kumar Jha & Another v. State Of Punjab & Others, C.W.P. No. 7345 of 2014 & C.R.M. M-9195 of 2014 (India).

53 Marc Fisher, *In California, They Have Seen the Future ...* And It Is Cold, The Washington Post, January 24, 1988 at W20.?

54 Ryan Sullivan, *Pre-Mortem Cryopreservation: Recognizing a Patient's Right to Die in Order to Live,* 14 QUINNIPIAC HEALTH LAW JOURNAL 61 (2010).

55 Stephanie Watson, *How Cryonics Works, HOW STUFF WORKS* (Oct. 9, 2017, 10:04 AM), http://science.howstuffworks.com/life/genetic/cryonics3.html.

56 Rob Furber, *A Journey Inside The World Of Human Cryogenics, SABOTAGE TIMES* (Oct. 9, 2017, 10:04 AM), http://sabotagetimes.com/life/world-goth-day-who-wants-to-live-forever-inside-the-cryonics-institute.

which several other terminally ill children followed suit.[57] Cryonic institutes all over the world have witnessed a steep rise in both, the number of patients being preserved as well as members enrolled to be preserved in future after their death. Therefore, the current trends point towards the rise in interest in the technology and it can be stated with certainty that this trend will only grow in the years to follow. There is no doubt about the fact that this technology is here to stay.

However, the moot question is, whether the global legal community is well-equipped to counter the tsunami of legal problems cryonics technology will sweep in with it. Upon a close examination of various jurisdictions across the globe, one discovers that most legal systems are totally ill-equipped to deal with legal issues that arise for cryonic preservation. The general argument towards the lack of laws is that, cryonics is the science of the future and there is no pressing need to legislate on the topic. Unfortunately, this is not true and this misconception of the law makers will drive the judicial and allied officers into troubled waters which will be very difficult to navigate as they will be devoid of any laws to anchor them to clear shores.

Also, since legal problems can never be solved in isolation, is the social environment favorable to cryonic preservation? With the resources of the Earth already limited and depleting each minute, would it be fair for the rich, who can pay the price of being cryopreserved, to further extend their life span at the cost of the resources which should be equally divided in all human being irrespective of the financial or social status? What would be the reaction of the masses towards such prolonging of life? Will it lead to another revolt and further widen the divide between the rich and the power, powerful and the powerless, cryopreserved and dead? How will the society respond to such medical innovation? Medical science and religion have had a long standing rivalry which has spanned over centuries. What will be response of the religious men and the clerics towards immortality? Would the act of cryopreservation amount to defying the

57 Owen Bowcott and Amelia Hill, *14-Year-Old Girl Who Died of Cancer Wins Right to Be Cryogenically Frozen,* THE GUARDIAN (Oct. 9, 2017, 10:04 AM), https://www.theguardian.com/science/2016/nov/18/teenage-girls-wish-for-preservation-after-death-agreed-to-by-court.
See also, Gordon Rayner, *Girl, 14, who died of Cancer cryogenically frozen after telling Judge she wanted to be brought back to life in hundreds of years,* THE TELEGRAPH (Oct. 9, 2017, 10:04 AM), http://www.telegraph.co.uk/news/2016/11/18/cancer-girl-14-is-cryogenically-frozen-after-telling-judge-she.

58 Jessica Duncan, *Child Just Seven, signed up for freezing at cryogenic center where British Girl, 14 is frozen,* MAIL ONLINE (Oct. 9, 2017, 10:04 AM), http://www.dailymail.co.uk/news/article-3954116/Head-cryogenics-centre-British-girl-14-frozen-admits-patients-not-remember-thing-wake-s-revealed-child-just-SEVEN-signed-freezing.html.

will of God itself? Or would religion accept cryonics with a liberal mind and view it as an act to extend the life, which also is perceived as gift of God in most cultures.

It is pertinent to mention here that law makers across the world need to join hands and apply their intellectual minds to equip our legal systems so that we may be prepared to counter the tsunami of litigation that cryonics may bring with it. In India, many legislations need to be overhauled, namely, the Constitution, Indian Penal Code and Indian Succession Act in order to accommodate the legal questions raised by Cryonics. Even if the first cryonaut may rise from the dead in ten years, we need to prepare now.

ROLE OF COMPETITION REGIME IN ACHIEVING SUSTAINABLE DEVELOPMENT

Ms. Shreya Srivastava*

"Sustainable development must be an integrated agenda for economic, environmental and social solutions. Its strength lies in the interweaving of its dimensions."

-Synthesis Report of UN Secretary General on Post 2015 Sustainable Development Agenda.

Introduction

Sustainable Development is a holistic concept implying inclusiveness of growth and development. It has been a part of global consciousness since a long time and its history can be traced to the United Nations Conference on Human Environment, 1972, held in Stockholm. Though the term sustainable development was not explicitly used, international community accepted that growth has to be balanced. A comprehensive definition of sustainable development was given for the first time in the year 1982 in the Report of the World Commission on Environment and Development, popularly known as the Brundtland Commission Report. This definition, which has now gained a classical status, defines sustainable development as "development which meets the needs of current generations without compromising the ability of future generations to meet their own needs."[1]

The overall objective of sustainable development is growth that leaves no one behind. Thus, it implies inclusiveness. In order for growth to be inclusive, policies and actions must focus upon and interlink three core areas- economy, social development and environment. Thus, these three form the pillars of sustainable development, which has been substantially reinforced through various agreements entered into by member states of the United Nations over the years-such as- Rio Declaration on Environment and Development, World Summit on Sustainable Development, World Summit for Social Development, Program of Action of the International Conference on Population and Development, the Beijing Platform for Action and the United Nations Conference on Sustainable Development. These agreements provide a bedrock for sustainable development. Since, India is signatory to the aforesaid conventions and agreements,

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1 Jacobus A Du Pisani, *Sustainable Development: Historical Roots of The Concept,* 3(2) ENVIRONMENTAL SCIENCES 84 (2006).

it has consistently reaffirmed its commitment towards the achievement of development through sustainability.[2]

Recently, sustainable development has again gained the centre stage of world debate after the passing of the Sustainable Development Goals (hereinafter, SDGs) in the United Nations Conference on Sustainable Development, 2015. The UN SDGs form a comprehensive framework of commitments that aim at achieving development through sustainability. These goals are wide and varied and focus on a plethora of objectives. Seventeen in number, they aim to end poverty, protect the planet and ensure prosperity for all. This new agenda for sustainable development has transformed the debate on sustainable development by integrating its three pillars (as opposed to its predecessor- the Millennium Development Goals, which focused primarily on reducing poverty). The SDGs have been unanimously adopted by all countries, and are applicable to all, having regard to every individual country's national realities, levels of development and domestic policies and priorities.[3]

In light of this, it becomes imperative to study how competition regime can be a tool for achieving sustainable development. The competition regime consists of both the competition policy as well as the competition law. While competition policy focuses on broad policy directives focusing on trade, commerce, industry, business investment, intellectual property rights and the like; the competition law relates to the anti-competitive conduct by incumbents in the market. Together, the two promote competitive neutrality and competition. Competition laws are both domestic as well as regional. Being a crucial component of the overall policy of any nation, competition policy can, therefore, significantly contribute to inclusive growth. Thus, governments must focus on drafting competition laws and policies in light of their objective of achieving sustainable development.[4]

Competition Regime and Sustainable Development

Sustainable development is built upon the foundation of three independent yet interlinked pillars viz. economic growth, social development and environment.

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2 Barry Dalal & Clayton, *What is Sustainable Development?,* ENVIRONMENTAL MAINSTREAMING (Oct. 11, 2017), http:// www.environmental-mainstreaming.org/nssd/otherdocuments/sustdev2.doc.

3 UN Sustainable Development Summit 2015, *Sustainable Development Goals,* WORLD HEALTH ORGANIZATION (Oct. 12, 2017), http://www.who.int/mediacentre/events/meetings/2015/un-sustainable-development-summit/en/.

4 *Ibid.*

Competition Regime and Economic Development

Economic growth is the increase in capacity of an economy to produce goods and services compared from one period to another. This increase in productivity implies a higher level of output with the same level of inputs. Economic growth is a dynamic concept which has been understood from various perspectives over the years. The classical thinkers believed in absolute advantage i.e. a country can produce a good more efficiently than another country; and, comparative advantage i.e. the benefit or advantage of an economy to be able to produce a commodity at a lower opportunity cost than other economies. The neo-classical theorists explored the relationship between labour, capital and technological progress, establishing that increasing the capital stock leads to economic growth as labour can be used more efficiently. Simultaneously, technological progress, leads to economic growth by efficient utilization of labour and capital. The main sources of growth are technological progression and other external factors. On the other hand, the contemporary economic discourse revolves around the endogenous growth theory which implies that economic growth progresses due to internal drivers. Therefore, investment in human capital, innovation and knowledge are significant contributors to economic growth.

The relationship between competition and economic growth in the past has been debatable. While prima facie one would believe that competition leads to economic growth, there is some ambiguity on the matter. Several theorists have suggested that the desire for innovation stems from monopoly rents, which in turn are destroyed by the next innovation, thereby leaving no scope for competition to correct the market failure.[5] However, there is empirically tested literature available which establishes that there is strong correlation between competition and economic growth.[6]

Competition as a tool for achieving economic growth is primarily based on two channels- resource efficiency channel and the innovation channel. The resource efficiency channel refers to the evaluation of efficiencies in antitrust cases. The primary role of competition is to ensure optimal allocation of existing resources in the market. Efficiencies, thus play a key role in

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5 E.g., Tay Cheng Ma, *The Effect of Competition Law Enforcement on Economic Growth,* 7 J. COMP. L. & ECON. 301 (2011).

6 Id., See also, Mark A. Dutz & Aydin Hayri, *Does More Intense Competition Lead to Higher Growth (World Bank Group Working Paper No. 2320, 1999)* WORLD BANK GROUP E-LIBRARY (Oct. 15, 2017), https://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2320.

determining whether an impugned act must be allowed or not. There are several kinds of efficiencies that are evaluated in any antitrust case, especially merger analysis. Efficiencies can arise from production, distribution, innovation and purchasing. While productive (or technical) efficiency refers to the ability of a firm to produce a given quantity at a particular point in time using a combination of the necessary inputs (e.g. labour, capital, raw material) which minimizes production costs, dynamic efficiencies are related to the ability of a firm and its incentives to introduce new products or processes of production (or to improve existing ones).[7]

There has been a gradual shift in the acceptance of efficiencies as a defense in antitrust, from being regarded as irrelevant and even uncompetitive,[8] to being favourably accepted as having benefit to the economy. In USA, earlier cases have not regarded the efficiency defense as acceptable[9] as possible economies were not considered a good defense to illegality of actions. However, gradually the benefits of accepting efficiencies as a good defense have been realized. For instance in ***Federal Trade Commission v. United Health Inc., et. al.,***[10] the Court held that even though the law did not recognize efficiency defense in any form, in certain circumstances, the government's prima facie case may be rebutted with evidence showing that the intended merger would create significant efficiencies in the relevant market.

Efficiencies can also be observed in terms of innovation. Innovations help improve products, thereby leading to consumer welfare and consequently economic growth. It has been held by some that innovation efficiency is the most important form of efficiency generated by competitive markets and fostered by antitrust enforcement.[11] Broadly these are termed as dynamic efficiencies. Many a times a merger can raise the possibilities of future innovation on account of the possibilities of economies of scale and scope and incentive to invest in research and development activities.

Innovations, especially patents, however, require protection through the grant of intellectual property rights. It is often argued that since patents grant monopoly rights to their owners, they may lead to anti-competitive effects in the economy. However, it is now accepted that IPRs and

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7 Helen Jenkins, *Role of Efficiency Claims in Antitrust Proceedings,* OECD POLICY ROUNDTABLES (Oct. 02, 2017), http://www.oecd.org/competition/EfficiencyClaims2012.pdf.

8 Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs,* 58 AM. ECON. REV. 18 (1968).

9 United States v. Brown Shoe, 370 US 294 (1962); *See also,* FTC v. Procter & Gamble, 386 US 568 (1967) (The Supreme Court emphatically stated that 'possible economies cannot be used as a defense to illegality').

10 938 F.2d 1206, 1222 (11th Cir. 1991).

11 Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, And Technological Progress,* 62 N.Y.U. Law Rev. 1020 (1987).

competition policy are not at odds with each other. The goals of both of them are to encourage innovation, industry and competition.[12] For instance, the US Supreme Court in ***Bonito Boats Inc. v. Thunder Craft Boats***,[13] has also recognized that competition is important to the patents system by laying down that federal patent laws embody a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy. In fact restriction on the number of years for which patents are granted itself reflects a balanced approach between IPR and competition law.

Thus, competition laws propagate sustainable economic development by ensuring that economic efficiencies, productive and dynamic, both, are protected and given a boost. They lead to substantial increase in productivity enhancing production numbers, improving technology and consumer welfare.

Competition, Poverty Reduction and Social Development

Competition facilitates greater equality of opportunity by breaking down the barriers to fair competition that often help to protect incumbent elites.[14] A sound competition policy ensures a level playing field. This equality of opportunity is experienced both horizontally as well as vertically. Therefore, competition ensures inclusive growth and development.

Competition regime contributes to the development of society by reducing poverty and providing equal opportunities to the marginalized groups such as the poor, small entrepreneurs and job seekers. This is ensured through prohibiting anti-competitive agreements at vertical and horizontal levels, and, abuse of dominance. Further, the marginalized groups are also catered to by ensuring that there are no barriers to entry or exit in the market. These objectives are central tenets of any competition law and policy and can be seen flourishing in the laws of various jurisdictions.

By busting cartels, competition agencies ensure that fair prices prevail in the markets. Cartels are a consortium of producers, sellers, distributors, traders or service providers, that indulge in anticompetitive behavior, such as price fixing, bid rigging, refusal to deal, to name a few. Such

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12 Atari Games Corp v. Nintendo of America Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990).

13 489 U.S. 141 (1989).

14 Nick Godfrey, *Why is Competition Important for Growth and Poverty Reduction,* OECD GLOBAL FORUM ON INTERNATIONAL INVESTMENT (2008) (Oct. 4, 2017), http://www.oecd.org/investment/globalforum/40315399.pdf.

acts are ipso facto injurious to the welfare of consumers and the economy as a whole. It has been evidenced that cartelization leads to consumers paying on average 49 percent more, and 80 percent more when cartels are strongest.[15] If these cartels are made in essential and staple goods (such as the Vitamins Cartel), then they pose a grave danger to the consumers. They prove significantly injurious to the marginalized groups, for whom then the commodity becomes unaffordable.

Competition law therefore ensures that consumers' welfare is not jeopardized. For instance, in the USA, healthcare is a prominent sector which competition agencies keep a tab on. For instance, in ***FTC v. Phoebe Putney Health System,***[16] it was observed that the acquisition transaction would lead to higher health care costs and because the state law did not clearly articulate and affirmatively express a policy allowing hospital authorities to make acquisitions that substantially lessen competition, state action immunity did not apply to this acquisition. The Federal Trade Commission has similarly targeted the real estate foreclosure auctions. The market players artificially drove down the prices of the foreclosures by indulging in bid rigging and fraud targeting and enriched the colluding real estate investors at the expense of distressed homeowners and lending institutions. These are just a few examples among many where antitrust has played a significant role in ensuring social development.

In order to ensure reduction in poverty and overall inclusive growth, competition agencies must prioritize their actions i.e. they must set priority sectors that are essential for an economy and for the poor people. This involves the amalgamation of law and economics, as some competition authorities strengthen competition in essential goods markets in which demand elasticities are high, rather than those in which demand elasticities are low. Prioritization is beneficial as it helps competition agencies to utilize their limited resources on focused areas. Prioritization is mainly based on impact on consumer welfare, sectoral requirements and institutional or procedural considerations. It ultimately depends on the political and social goals of an economy, such as access to medical treatment, education, etc. Thus, competition laws are a reflection of the social objectives that countries want to achieve. For instance, the competition laws of South Africa included provisions to protect the historically disadvantaged persons due to the discriminatory

15 Anabel González, *How Increasing Competition Can Reduce Poverty,* WORLD ECONOMIC FORUM (Oct. 11, 2017), https://www.weforum.org/agenda/2015/07/how-increasing-competition-can-reduce-poverty/.

16 568 US (2013).

policy of apartheid.[17]

The ability to prioritize is known as targeted discretion of the competition authorities. It creates efficiencies in terms of administration, legal independence and economics. The competition authority has specialized knowledge of antitrust issues, and therefore, does good to the society through discretion. It reduces undue influence from the executive. Economically, due to limited financial and human resources, competition agencies should be able to achieve greatest economic return at lowest possible cost.[18] Prioritization can be done by law, as in Turkey; or set through strategic planning, such as the Strategic and Planning Team of UK OFT; or may informally be agreed or defined and then communicated within the agency, as in Brazil and Spain.

Therefore, prioritization helps competition agencies to dedicate their resources to strategic areas. In this manner, they are able to spur sustainable economic activity and thereby lead to inclusive growth. Effective competition policies, therefore, enhance productivity at individual, sectoral and at national level. Enhanced productivity also paves the way for innovation through investments in markets, which results in more employment generation.

Competition and Environmental Sustainability

Successful sustainable development can only be achieved when competition policy is integrated with environmental objectives of the nation. Using market mechanisms is important in green growth strategies as it allows appropriate prices to be determined. Price signals reflecting environmental externalities ensure that the correct incentives are in place for pollution abatement and innovation in green technology. For instance, the European Commission's guidelines state that horizontal environmental agreements should be considered to be in breach of Article 101(1) of Treaty on the Functioning of the European Union (TFEU) if the cooperation is not genuinely concerned with environmental objectives but serves to conceal anti-competitive practices. And even where a particular environmental scheme may be endorsed by the authorities, this may not be used as an excuse for practices involving abuse of dominance. [19]

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17 Eleanor M. Fox, *Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia,* 41 HARV. INT'L. LAW J. 579, 580 (2000).

18 United Nation Conference on Trade and Development, *Prioritisation and Resource Allocation as a Tool for Agency Effectiveness*, UNCTAD (Oct. 12, 2017), http://unctad.org/meetings/en/SessionalDocuments/ciclpd20_en.pdf.

19 Guidelines on the applicability of Article 81 of the EC treaty to horizontal cooperation agreements.

One of the tools that competition regime can use to achieve green growth is by fostering innovation. A thriving innovation policy within competition laws implies that there are low barriers to entry in the markets, in order to multiply the benefits of innovation. Barriers to entry are 'a cost of producing which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry'.[20] However, while innovation is a potent method of fostering competitive green growth, it must be ensured that the economy does not fall in the trap of concentration of innovation in the hands of firms with considerable degree of market power.

One of the areas where a strong enforcement of competition law has a positive impact upon the environment is the energy sector. The sector should be made open for all and competition agencies must ensure that energy conglomerates are not created. On the one hand, nationalisation of such industries, plays a crucial role, but it must be balanced with the freedom of trade and occupation; on the other hand, incentives must be given in competitive markets for electricity as they are engines of growth for cleaner electricity generation. In this light, public policy plays an important role in competition laws.

Environmental benefits can therefore be seen as efficiency gains as it also aims at achieving efficient utilisation of economic resources. However, environmental claims can at times lead to anti-competitive effects. Therefore, in order to bring about a compromise between the two, agreements which areotherwise anti-competitive can be allowed by antitrust regulators if they promote environmental sustainability. For instance, the European Court of Justice upheld a German law that guaranteed a certain percentage of the German energy market for alternative, renewable energy sources. The ECJ ruled that as renewable energy was a legitimate social goal, the measure would be exempted from European Union competition laws, which otherwise might have prevented the use of such policies.[21] Similarly, in the ***IFCO Case,***[22] of Germany, an agreement between German fruit and vegetable wholesalers, retailers, importers and packaging manufacturers was created for standardization of reusable fruit containers. Although it allowed for collective cost fixing, it was cleared by the Commission.

The sectoral regulators therefore need to work together to ensure that they cooperate with each other in achievement of sustainable development through competition enforcement. Thus, a

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20 Babu Nahata & Dens O. Olson, *On the Definition of Barriers to Entry,* 56 SOUTHERN ECONOMIC JOURNAL 236 (1989).

21 Markus W. Gehring, *Sustainable Competition Law,* WORLD TRADE ORGANIZATION (Oct. 15, 2017), http://cisdl.org/public/docs/news/Cancun_WTO_LegalBrief2.pdf.

22 IV/34.415 IFCO [1997] OJ C48/4.

thorough analysis needs to be made by competition agencies. Adequately weighing the pro-competitive effects of an otherwise anticompetitive act will ensure a harmonious and balanced approach towards achievement of sustainable development.

Competition Commission of India and Sustainable Development

Competition Commission of India (hereinafter, CCI) is the regulatory authority set up under the Competiton Act, 2002 (hereinafter, the Act) in order to *prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.*

The Act is primarily an economic legislation as it has been enacted keeping in view the economic development of the country. Therefore, the first and foremost objective that the tools of competition law achieve is economic growth and development. The Act enshrines three basic areas of competition protection i.e. prevention of anti-competitive agreements, prevention of abuse of dominance, and regulation of combinations.Some of the sectors of the economy that have responded positively to competition are the telecom sector, automobile sector, insurance sector, banking sector and e-commerce. Due to the extent and pervasiveness of these sectors, they have had a multiplier effect and have been success stories of inclusive growth in India.

There have been a plethora of cases where, by, regulating these areas, the CCI has ensured economic growth and development through a fair market. Through several landmark judgments the CCI has furthered the cause of sustainable development in the country. Though there is no direct reference to sustainable development in any of the orders of the CCI, the spirit of the same is reflected in the decisions, as also in its motto- 'Fair competition for greater good.'

In ***M/S Bio-med Private Ltd. v. UOI & Ors.,***[23] the CCI rightly imposed severe penalties upon the opposite parties for collusive bid rigging in the supply of Meningitis Vaccines. This decision is important as not only did the collusive behavior take place in a sector significant for human existence (i.e. the health sector), but also, because it afforded protection to the only indigenous manufacturer of the vaccine, thereby ensuring equality of opportunity irrespective of market might. The CCI has also come to the rescue of home buyers byissuing cease and desist orders against real estate conglomerates for abuse of dominant position, as was decided in the case of

23 CCI Case No. 26 of 2013.

DLF Gurgaon Home Developers Pvt. Ltd. v. Mr. Pankaj Aggarwal & Ors.[24] Thus, potential consumers who invest their hard earned savings in buying properties have been accorded protection from abusive and unfair conduct of big corporations.

A landmark decision of the CCI which incorporates the element of inclusiveness is ***RE National Insurance Companies & Ors***.[25] The fair trade regulator held four public sector insurance companies liable for cartelization in rigging the bids submitted in response to tenders floated by the Government of Kerala for selecting insurance service providers for the Rashtriya Swasthya Bima Yojna and Comprehensive Health Insurance Scheme, both aiming to provide health insurance to families living below the poverty line and other poor families. Similarly, in the energy sector, the CCI has imposed harsh penalties on Coal India Ltd. for misusing its monopoly position and unilaterally deciding fuel supply agreements. This led to increase in the power prices, which were eventually borne by the consumers. This decision would lead to sustainable production of energy, a necessity in today's day and age.

Not only is the CCI vigilant towards the activities of individuals and private corporations, but it is also wary of commercial governmental actions that can be anti-competitive. It has also extended its jurisdiction to government departments, and has thereby increased the scope of applicability of competition law. Since government, through its departments, is a provider of various goods and services in the market, any anti-competitive action on their part can have grave consequences upon the competition in the economy. By including a government department within the ambit of 'enterprise', the fair trade regulator has gone a step ahead to ensure competitive practices in public works. This will boost sustainable development and guarantee inclusive growth. Thus, CCI's recent investigation against Ghaziabad Development Authority for abuse of its dominant position in the real estate sector is commendable.[26] The Commission prima facie held that in the relevant market of "provision of services for development and sale of low cost residential flats under affordable housing schemes for economically weaker sections in Ghaziabad" the Development Authority is in a dominant position and the alleged conduct amounted to imposition of unfair price and is anticompetitive. Similarly, the CCI also initiated an inquiry against the public works department of the

24 CCI Case No. 13 & 21 of 2010 and Case No. 55 of 2012.
25 CCI Case No. 2 of 2014.
26 Shri Satyendra Singh v. Ghaziabad Development Authority, Case No. 86 of 2016 (India).

Government of Haryana for violation of Section 4 of the Act,[27] which had incorporated unfair clauses in the bid document inviting online bids for construction and repair of roads and bridges.

Another tool for achieving sustainable development through competition law is *Competition Impact Assessment* (hereinafter, CIA) for other laws, policies, rules and regulations as well. It is designed to assess how regulations have an impact on the conduct of market participants and to forecast the regulation's longer-term benefits and costs. CCI recently undertook CIA of seven legislations to determine their compatibility with completion framework in the economy.

These legislations are The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Bill, 2016; The Agriculture Produce and Marketing Committee Model Act, 2003; Public Procurement Bill, 2012; National Civil Aviation Policy, 2016; Payment and Settlement Systems Act, 2007 and RBI regulations thereunder; The Patents Act, including Intellectual Property Policy; and, Drug Pricing Control Order (DPCO) list, 2013 (under the Essential Commodities Act). It has also passed the Competition Commission of India (Competition Assessment of Economic Legislations and Policies) Guideline, 2016 to facilitate objective and transparent assessment of select upcoming /existing economic legislations and policies made from competition perspective. This would complement the proactive role of the Commission in preventing any provision inadvertently sneaking into law that may have potential to cause appreciable adverse effect on competition. Thus, it is evident that the fair trade regulator is taking an inclusive approach to ensure thriving competition in the market.

The Act also fosters growth and innovation through Section 3(5) by imposing reasonable conditions as maybe necessary for protecting any IPR. The Commission has been active in prohibiting agreements of exclusive licensing, patent pooling, tie-in-arrangements to name a few. It has been granted jurisdiction to determine cases of patent related competition matters.[28]

However, the CCI needs to be watchful of disruptive innovation. Disruption describes a process whereby a smaller company with fewer resources is able to successfully challenge established incumbent businesses.[29] Incumbent firms in such cases, pose as victims, and rely upon the antitrust agencies to penalize the disruptors for not sharing the innovation on terms that the

27 Shri Rajat Verma v. Public Works (B&R) Department Government of Haryana & Ors., Case No. 70 of 2014 (India).

28 Ericsson v. Competition Commission of India W.P.(C) 464/2014 (India).

29 Clayton M. Christenson et. al., *What is Disruptive Innovation,* HARVARD BUSINESS REVIEW (2015) (Oct. 16, 2017), https://hbr.org/2015/12/what-is-disruptive-innovation.

incumbents want, or pass orders that would help the incumbents to free ride on those innovations. This can prove to be harmful, both for the innovators as well as the consumers. In this age of fourth industrial revolution, and knowledge economy, this is a serious challenge that the CCI will have to face and must adequately provide for.

CCI has also entered into partnerships with global organizations such as the OECD to thoroughly analyze the economic policies through its Competition Assessment Toolkit, which would help eliminate restraints to competition as well as less restrictive measures that achieve the objective of public policy. India is also included in the OECD Product Market Regulation Indicator Database along with other OECD and G20 countries. The indicator measures the degree to which policies promote or inhibit competition in product markets. It measures regulatory barriers to competition through state control of business operations, legal and administrative barriers to start-ups, the protection of incumbents, and obstacles to foreign trade and investment. Further, CCI is also actively involved in the OECD's work to develop and implement international standards on competition enforcement and cooperation. Such scientific and statistical estimates help in achieving accurate competition policies. Through cooperation at an international level, the fair trade regulator is adopting best practices within the domestic system.

Conclusion

Sustainable development can only be achieved through a confluence and interlinking of various sectoral policies that focus towards inclusive growth. Therefore sustainable development spans over a plethora of law and policy areas, and, is exceptionally dynamic in nature. Thus, the competition regime needs to be developed in consonance with the economic, social and environmental realities of a nation. Competition regime contributes to the growth and development of the society by generating efficiencies, promoting innovation, ensuring availability of products at competitive prices, protecting maverick firms and preventing abuse of market power. These factors collectively provide a thriving environment for sustainable development.

Competition regime must ensure optimal synergies are created in the economy, especially in cases of merger analysis. Efficiencies are thus intrinsically related to antitrust, especially merger review, and in some instances, dominance as well. They can be used to either offset anticompetitive impact of an impugned act or become a factor of competition analysis itself.

Therefore, the fair trade regulator must determine in a transparent manner how the evaluation of efficiencies will be done- whether efficiency trade-offs need to be determined or if efficiencies should be integrated into the question of competition analysis itself. If the former is chosen, trade-offs in efficiencies must be carefully balanced, and lead to overall sustainable growth.

It is also imperative to regulate sectoral disparities in competition since competition regime pervades the different sectors of the economy. There are conflicting sectoral rules regarding anticompetitive acts, which is most evident in the choice of forum. A prime example of this is the tussle over jurisdiction in telecom matters in India. It is suggested that the government must work towards harmonizing such conflicts. This is an important exercise as harmonization of jurisdictional challenges will ensure a smoother achievement of the goals of sustainable development by ensuring effective adjudication and resolution of cases pertaining to violation of the principles of competition by the most competent authority. Competition Impact Assessment can play a crucial role in this regard. This assessment should be a cooperative exercise between the fair trade regulator, and, the different regulators and agencies in the economy.

Another important concern that must be addressed is that of political will. While the form of governance in several instances determines the nature of the economy, the political ideologies govern the procedural and substantive rules of competition in majority of the situations. Political will, therefore, plays a key role in antitrust. For instance, reflection of environmental concerns in the competition regime requires inclusion of public policy in the regime. This in turn requires political will. The legislature should therefore thoroughly analyze the economic situation of the nation and accordingly prioritize areas that require immediate attention. Further, there must be awareness about the significance of competition in an economy so that the different authorities proactively approach the fair trade regulator for competition impact assessment in their respective areas. This will usher in a thriving era of sustainable development in the economy. Last but not the least, sensitization and awareness, about sustainable development and its relationship with competition must be promoted.

THE CHILD OF THE NEW MILLENNIUM: A LAW THAT ALLOWS CHILDREN TO BE USED AS A SOURCE OF MONEY

Mr. Abhishek Mishra*

"You can't regulate child labour, you can't regulate slavery. Some things are just wrong, should be banned."

-Michael Moore[1]

Introduction

India, the leading democracy in the world, ironically bears the menace of having tens of millions of child laborers leading a life of servitude and bondage. Use of children as laborers is widespread not only in the agricultural sector but also in manufacturing industries such as match box, leather, carpet, saree, stone quarries, brick kilns gems cutting and firecrackers. These children are deprived of their fundamental right to education, to play and live an ordinary life as a child. This practice contravenes the various provisions of the constitution and the laws of India. The vast majority of India's bonded child laborers come from lower strata of the society. The parents of these children borrow money from corrupt money lenders. However, when their parents are not able to return the loans, the money lenders seize their children, forcing the children to work in factories until the money is paid back with excessive interest rates. The Child Labour (Prohibition and Regulation) Act, 1986 was enacted to regulate the socio-economic problem of child labour took nearly four decades but that law failed to curb the menace as According to Census data, there are more than 82 lakh child laborers (aged between 5 – 14 years) in India.[2] Mainstreaming of children in India is one of the most important issues as India is having a rich demographic dividend with more than 30% of population being under 14 Years of age. The Child labor Amendment Act, 2016 was much awaited law, to give some relief to those unfortunate children. But by allowing the child to help his family or family enterprise after school hours and during holidays, and work in audio-visual entertainment industry, still has not succeeded in imposing a complete ban on child labour. By allowing the same, a child would be subjected to double pressure, one of his school and other of the work he is engaged in so called

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1 Michael Moore, *Child Labour Quotes,* BRAINY QUOTE (Feb. 3, 2018), https://www.brainyquote.com/quotes/michael_moore_580143?src=t_child_labor.

2 Statistics of *Child Labour in India: State Wise,* SAVE THE CHILDREN (Feb. 3, 2018), https://www.savethechildren.in/resource-centre/articles/statistics-of-child-labour-in-india-state-wise.

Family Enterprise. Further, thirty years on, with the constitutional guarantee of the Fundamental Right to Elementary Education (Article 21 A) and the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act), Amendments to the legislation on child labour were overdue; but there is nothing much to celebrate about as far as the new Child Labour (Prohibition and Regulation) Amendment Act, 2016 is concerned. The current amendment prohibits *"the engagement of children in all jobs and of adolescents in hazardous occupations and processes"* wherein children to those below Fourteen years of age, adolescents represents to those under Eighteen years of age; but the devil intention lies in its details and rather found to be a regressive law. It has struck off the list of *hazardous occupations* for the adolescent's from 83 works to just 3 works, include just mining, explosives, and jobs mentioned in the Factory Act. This means that working in chemical industry, tea plantations, carpet weaving, have been dropped. Further, as given in section 4 even the ones listed as hazardous can be amended by the executives at their own discretion and it need not to be scrutinized by the parliament. Moreover, *Section 3 in Clause 5* permits child labor work in *"family or family enterprises"* or allows the child to be employed in *"audio-visual entertainment industry"*. Since majority of children are employed as caste-based workers, with their families trapped in debt bondage, and this debt continues to be paid by the generation of bonded labour. "The clause is also dangerous as it does not specify the working hours, it simply states that children may work after school hours or during vacations."[3] Children cannot and should not do paid work to generate the resources they need to escape from poverty. This is the job of adults—Article 24 of India's Constitution prohibits child labour below the age of 14. Children should be spending their time playing and learning, not working at paid labour.[4]

The Clause 3(2) of the Section 5 of the Child Labour (Prohibition & Regulation) Amendment Act, 2016 defeats the main Objective of the amended Act.

Section 2 of the amendment act states that the Child Labour (Prohibition & Regulation) Amendment Act, 2016 is "An Act to prohibit the engagement of children in all occupations and to prohibit the engagement of adolescents in hazardous occupations and processes and the matters connected therewith or incidental thereto."[5]

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3 Ruchira Gupta, *A Law That Allows Child Labour,* THE HINDU (Feb. 5, 2018), http://www.thehindu.com/opinion/columns/A-law-that-allows-child-labour/article14560563.ece.

4 David Gordon & Shailen Nandy, *The Extent, Nature and Distribution of Child Poverty in India,* 10 INDIAN JOURNAL OF HUMAN DEVELOPMENT 65 (2016).

5 India Third and Fourth Combined Periodic Report on The Convention on The Rights of The Child (2002-2013), CHILDREN'S INDIA (Feb. 10, 2018), http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/Ind/INT_CRC_ICO_Ind_15710_E.docx.

The Definition of the Family & Family Enterprises is Flawed

As per the Child Labor (Prohibition & Regulation) Amendment Act, 2016,

(a) ''family'' in relation to a child, means his mother, father, brother, sister and father's sister and brother and mother's sister and brother;

(b) ''family enterprise'' means any business, profession, manufacture or job which is performed by the members of the family with the engagement of other persons;[6]

The definition of "family" and "family enterprises" used in the amended act has certain loopholes are as follows-

The Amendment has widened the ambit of the word "Family"

According to family law, a family consists of "One husband, one wife, and their children, including adopted children."[8] Also, according to the Black's law Dictionary "A collective body of persons who live in one house and under one head or management." [8]

In ***K.Seenivasan v. The District Collector, Virudhunagar,***[9] which is a land dispute case, family was defined as in the usual sense, as - self, Husband, wife and unmarried children. Also in ***State of H.P. v. Amar Nath Sharma & Others,***[10] the word "family" was defined by the H.P govt as "parents, brother and unmarried sisters of the candidate".

Poverty stricken parents find it necessary for a child to contribute to the family income as soon as he/she is old enough to do so. Child labour is thus, seen by the parents and society as a means to supplement the family income, however small it may be. Any action for rigorous enforcement of child labour laws with the objective of eliminating child labour is seen as working contrary to the economic well-being of the family.[11]

There is high probability that Employers may wrongly interpret the ambit of the "Family Enterprises"

A family enterprise is a type of business which is solely owned and controlled by the members of

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6 The Child Labour (Prohibition and Regulation) Amendment Act, 2016, No. 35, Acts of Parliament, 2016 (India), Section 5.

7 JUSTICE C.K. THAKKER, LAW LEXICON 1831 (6th Edition, Ashoka Publishing House, 2008).

8 BRYAN GARNER, BLACK'S LAW DICTIONARY 234 (9th ed., St. Paul Minn. West Publishing Company, 2009).

9 2010 SCC Online Mad (5) 420.

10 1994 Supp (2) Supreme Court Cases 532.

11 A.P Varma, *Country Paper: India (Mimeo) presented* at the Inter-Regional Workshop on Improvement of Effectiveness of Enforcement of Child Labour Legislation, Bangkok, Thailand.

the same family. This implies that the child is allowed to work under the supervision of his family members and shouldn't be any problem till that supervision helps in development of the child's intellect. The definition of "family enterprise" is the phrase used "engagement of other persons" and if other persons are involved then that enterprise is no more a 'family enterprise' but becomes just an 'Enterprise'. As per the stated definition, a child who is helping in the chores at home or manning the shop after school while parent is otherwise engaged will not be interpreted as labor. Whereas a child who goes (after school) as her mother's substitute to a house as a maid, thereby exposing herself to moral, health and safety hazards would be outside the ambit of what is legally permissible.

The Working Hours for a Child are not Defined in the Current Amendment Act

The clause is dangerous as it does not define the hours of work by simply stating that children may, work after school hours or during vacations.[12] The Child Labour and Adolescent (Prohibition and Regulation) Act, 2016 totally forbids the employment of the children up to the age of 14 years but permits them to work in family enterprises after school hours and during holidays. The children who work as entertainers in audio-visual business, includes TV commercial, films, television series or any such other performing or sports activities.[13]

Child Helping Family or Family Enterprises

"Family enterprise" is any work, which allows manufacture which is performed by the members of the family with the involvement of other persons.[14]

Out of the 5,254 children rescued, one-fifth worked with their families or were part of a family-run trade.[15] The amendment of children working with families would mean that children will be allowed to work in family-run industries like carpets, embroidery, agriculture and other forms of domestic labour. This is the kind of work that starts before and after school hours until late in the night at the cost of children's health until they can no longer concentrate in the classroom or participate in school and are branded as slow learners. Unable to handle both school and work, these children are forced to give up the former. Article 39 (e)[16] provides that the State shall direct

12 The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, No. 61, Acts of Parliament, 1986 (India), Section 3 (2)(a).

13 *Supra* note 6.

14 *Supra* note 12, Explanation (b) to Section 3.

15 Employment of Children in Hazardous and Family Run Business, BACHPAN BACHAO ANDOLAN (Feb. 12, 2018), http://bba.org.in/sites/default/files/Employment%20of%20Children%20in %20Hazardous%20and%20Family%20Run%20Business.pdf.

16 INDIA CONST. art. 39(e). Article 39 (e) provides that the health and strength of workers, men and women, and

its policy to ensure that the tender age of children is not abused. Around1/5th of the children are rescued at domestic places to work but with the new law being enacted neither of them will be rescued.[17]

International Perspective

The United Nations Convention on the Rights of Child states that children have the Right to relax and play, and to join in a wide range of culture, artistic and other recreational activities.[18] According to the UNCRC, the government should protect children from work that is dangerous or might be harmful for their health or their education. This Convention defends children from dangerous and exploitative work; there is nothing in it that forbids parents asking their children to help out at home but only in ways that are safe and suitable to their age. Children's work should not jeopardize any of their Rights, including the Right to education, or the Right to relaxation and play.[19] Moreover, by allowing a child to help his family or family enterprise, he is deprived of his status of an employee[20] and would not get any wages for the services rendered and thus leading to exploitation. To reinforce the Act and provide a protective legal charter for children, UNICEF India strongly mentions the exclusion of "children assisting in family enterprises." This would protect children from being exploited in obscure forms of work, from trafficking and from boys and girls dropping out of school due to long periods of work.[20]

Clause 3A of Section 6 of the Amended Act defeats the main Objective of the Child Labour (prohibition & Regulation) Amendment Act, 2016

The clause 3A of section 6 of Child Labour (Prohibition and Regulation) Amendment Act, 2016 defeats the main objective of the act being prohibition of engagement of children in all occupations and prohibition of engagement of adolescents in hazardous occupations and processes.

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the tender age of children shall not be abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

17 Bandhua MuktiMorcha v. Union of India & Others, AIR 1997 SCC 549 (India).

18 Article 31 (1) of UNCRC provides that States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
Article 31(2) provides that States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

19 Article 32 (1) of UNCRC provides that States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

20 *Supra* note 7, at 1636.

The Amendment Act has limited the Scope of Hazardous Activities

The list of occupations and processes defined as hazardous as per the proposed changes to the Amendment Bill is limited to three items, namely mines, inflammable substances and explosives, and hazardous activities as listed in the Factories Act, 1948. It can be observed that adolescents might be employed in industries which are apparently non-hazardous or works that are carried out at homes and thus not covered under the above schedule. For instance, a child employed as a domestic helper does not fall under the list of hazardous jobs but it could turn out to be both hazardous and stressful due to the treatment meted out to them by their employers. In ***Hemendra Bhai v. State of Chhattisgarh,***[21] if an occupier employs his children who were below age of 14 years for the purpose of Beedi making in his house, for such case S.3 of Act would not be applicable in view of proviso and thus, it cannot be said applicant had committed offence under S.3 of Act. As one cannot determine an exhaustive list of forms of labour and categorize them into hazardous and non-hazardous, there will eventually be a set of work that does not fall in either list and the law will be silent on; making these categories of employment beyond the ambit of this law.[22]

The Activities not Included in the List Can Also Affect the Health of the Child

The basic object of The Child Labour (Prohibition and Regulation) Amendment Act, 2016 is to prohibit the engagement of children in all occupations and to prohibit the engagement of adolescents in hazardous occupations.[23] ***In Court on its Own Motion and Others v. State of Punjab and Others,***[24] it was held, as Right to education was made Fundamental, it would follow that as far as children up to age of 14 years were concerned, since they were to be provided free education and there would be absolute ban and prohibition from childlabour, Provisions contained in clause 3A of the Act authorizing use of childlabour in so called non- hazardous industries would offend constitutional mandate and would no longer be a good law. In line with the ILO Convention 182 Article 3(d)[25] and as per section 5(1)[26] of Child Labour (Prohibition and Regulation)Act, 1986, the child labour technical committee can advise the prohibition of any occupation when it is found to be detrimental to the health and safety of a child. There is no

21 Press Centre, *UNICEF Concerned about Amendments to India's Child Labour Bill,* UNICEF: FOR EVERY CHILD (Feb. 14, 2018), http://www.unicef.org/media/media_92021.html.
22 2003 (1) CGLJ 1.
23 *Supra* note 15.
24 *Supra* note 6.
25 2013 (3) RCR (Criminal) 298.
26 International Labour Organization Convention No. 182.

rational reason to conclude that occupations that are considered detrimental to health and safety of a 14 year old will not be the same for the child between 14-18 years as well. Especially since all below 18 years are considered minors in India. Also in the case, ***Nishar v. State of Uttar Pradesh and others,***[27] alleged child labour was found cleaning utensils in petitioner's tea shop. Tea shop is neither a hazardous industry, nor cleaning of utensils is a hazardous process and nor it is factory. Thus at the end the case was quashed as it was not applicable. The paragraph 1 of Article 3 of ILO Convention 138 that is also known as Minimum Age Convention, 1973' states 'The minimum age for admission to any type of employment or work which by its nature or the conditions in which such work is being carried out is likely to jeopardize the health, safety or morals of children shall not be less than 18 years.[28]

Right to Education is violated by the present Amendment Act

The Constitution (Eighty-Sixth) Amendment Act, 2002 introduced Article 21A which makes the Right to Education as a Fundamental Right. This Article entails the State to provide free and necessary education to the child under 14 years.[29] The Right to education was originally not considered as a Fundamental Right in the Constitution and was included only as a directive principle under Article 45 which required the State to strive to arrange for, within a period of 10 years from the commencement of the Constitution of India, for open and compulsory education for all children until they complete the age of 14 years.[30] Article 45 was also read as supplementary to Article 24 which bars employment of a child below the age of 14 years, for if the child is not to be employed below the age of 14, he must be kept occupied in some educational institution. Article 45 also supplemented Articles 39(e)[31] & (f).[32]

The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to

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27 *Supra* note 12, at Section 5. Section 5: Child Labour Technical Advisory Committee. (1) The Central Government may, by notification in the Official Gazette, constitute an advisory committee to be called the Child Labour Technical Advisory Committee (hereafter in this section referred to as the Committee) to advise the Central Government for the purpose of addition of occupations and processes to the Schedule.

28 2010 (127) FLR 316.

29 ILO Convention No. 138, Minimum Age Convention, 1973. Article 1: Each Member for which this Convention is in force undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.

30 Bachpan Bachao Andolan v. Union of India, AIR 2011 SC 3361 (India); Ashoka Kumar Thakur v. Union of India, (2006) 6 SCC 1, AIR 2006 SC 2648 (India).

31 MP JAIN, INDIAN CONSTITUTIONAL LAW WITH CONSTITUTIONAL DOCUMENTS 1721 (6th Edition, Lexis Nexis, 2010).

32 *Supra* note 16.

him. The Supreme Court has implied the "Right to Education" as a Fundamental Right from Art. 21. The word 'life' has been to include 'education' because education promotes good and dignified life.[33] The most affected strata of the society are that of the marginalized and deprived communities. Children are employed between the age of 5 to 14 years without any basic and elementary education, health, access to nutrient food and leisure. Poverty is the source of child being forced to do labour and the children are being deprived of their meaningful Right to life, relaxation, education, etc.[34] Whereas, Article 26(1)[35] of the Universal Declaration of Human Rights also assures that everyone has the Right to education which shall be free, at least at elementary and Fundamental stages.[36]

Early Childhood Development Should be a Priority for India: Recent Report

The alleviation of children from poverty should be a priority for India, Even with the huge progress made by India still remains the largest number of children are suffering from extreme poverty in the world. Despite the advances, the study shows that the top ten countries that account for the largest numbers of children at risk remained unchanged since 2004. India tops this list, followed by China, Nigeria, Bangladesh, Indonesia, Pakistan, Ethiopia, DR Congo, Tanzania, and the Philippines. Together, these countries accounted for 64% of all children at risk in 2010. Out of the 34 countries that had a prevalence rate of 60% or higher for children at risk, 28 countries are from sub-Saharan Africa alone. Regionally, south Asia experienced the largest drop, though it continues to host the highest numbers of children under 5 who are at risk of poor development.

Last year, Jim Yong Kim, the president of the World Bank, promised to name and shame countries that failed to check stunting in children less than five years of age. Yong Kim's move could be particularly embarrassing for India, which even with progress in the fight against malnourishment, continues to lag behind its peers.[37]

A recent Harvard School of Public Health study showed that poor growth in early childhood

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33 *Id.,* at art. 39 (f). Article 39(f) provides that children should be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment

34 *Supra* note 31, at 1722.

35 *Supra* note 17.

36 Article 26 (1) of the UDHR lays down that everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

37 *Supra* note 31, at 1723.

results into feeble academic performance, resulting in poorer earning power later on in life. The researchers quantified this loss at $177 billion in lost wages for children born in developing countries, and they argued that every dollar invested in early childhood development yields a return of $3.[38] Early childhood development should be a priority for India, with or without Yong Kim's warning.

Recommendations

1. The "family" definition mentioned in the child labour (prohibition and regulation) amendment act, 2016 has a very different meaning as compared to other definitions as it also includes more family members namely fathers sisters and brothers and mothers sister and brother, thus opening the chances for exploitation of children by their uncles or aunties engaged in occupations harmful to their safety, it had been found that most of the exploitation and abuse of the child are done by the immediate family members. Thus, definition of "family" and "family enterprises" used in the amended act is in urgent need to be redefined.
2. The Act is weakly drafted and could become detrimental to implementation of the law and conviction of offenders. Under section 6 of the Amendment Bill, 2016, when clause 3A and its proviso is read together one can observe that the section allows the Central Government to notify a list of hazardous labour and the proviso allows it to notify a list of non-hazardous labour. Rather, the power to amend the list must be vested with the parliament.
3. The Act brings down the list of hazardous jobs from the earlier 83 occupations to just 3 works: mining, inflammable matters, and hazardous processes under the Factories Act.
4. The Central Government has altogether overlooked the provision of the ILO Convention 138 which states that occupations should also comprise of those jobs which can jeopardize the safety and morals of children. It is therefore, recommend that the meaning of hazardous processes be reviewed and widened

38 Ragini Bhuyan, *Early Childhood Development Should be a Priority For India,* LIVE MINT (Feb. 28, 2018), https://www.livemint.com/Politics/9M6fISPWvz6rhRKtFDMHiL/Early-childhood-development -should-be-a-priority-for-India.html.

to include all those processes that may jeopardize health, safety and morals of the children.

5. The Govt. should take proper effective steps to decrease the population and give the employment to the parents of child labour.
6. There is a need to encourage & fund NGOs like Bachpan Bachao Andolan, CARE India, Child Rights and You, Global march against child labor, RIDE India etc. who have been working on mission mode to eradicate child labour in India.

Conclusion

At present, in spite of policy of the government regarding removal of child labour, the various steps taken in this direction and the laws passed about it haven't controlled the ongoing child labour. This is possible only with the co-operation of all sections of the society and the law enforcement agencies and by removing or minimizing the causes of child labour. The main thrust should be on controlling the population of the country, education of the children and providing sufficient funds for its removal from the gross domestic product of India.

There is a need for acceptance of the problem of child labour as a curse in the Indian society. It not only requires a collective conscience that decriminalizes the act but it had also to be understood by the Government that child labour is the main barrier to access to education for children in India. Therefore, it is the duty of the Union to make available facilities and chances in the rehabilitation of the child labour to develop their personality as responsible citizens. It is totally oblivious to the extent of exploitation and suffering of innumerable adolescent children, who move from working on construction sites, to sweat shops and farms and so on, and who are trapped by the hardships of fulfilling their basic needs and struggle for survival. The burden of the state's inability to provide social protection, food security, employment, universal health care, access to credit and financial support to their parents falls on the adolescent children. Curiously, the main aim of the amendment - to ban children up to the age of 14 in any occupation - is being defeated.

The youth are forced to waste the formative period of their life in order to act as helping hand for their family. This has negative effect on their education by depriving them of opportunity to study. This in long run would affect economic output and hence GDP as the young generation would not be able to contribute to skill India mission, progress of sciences and technology. Furthermore, not mentioning the number of hours that a child may work in his family enterprise is even more disastrous. It not only dilutes the intent but also opens the door for continued exploitation. There are no provisions to ensure that the child would be working in a non-hazardous family enterprise and that he or she would be doing so only after school hours. It would be having adverse effect upon the Education of the child. Hence, much is needed to make laws more laws more strict and precise but a duty to take care of these innocent lives also rest on us. Alone we can do so little, together we can do so much, therefore, it's a high time that we all should take some collective steps to eradicate the social evil such as child labour. Horror tales of child labour turns more horrific when these unfortunate innocent lives become pivotal to larger crime circles like human trafficking, organ trading, child prostitution and pornography. If we ignore them today, they would be exploited, rebuked and ignored in the coming years. Therefore, we have no right to complain tomorrow, when the same child returns and strikes with vengeance. Hence, it's high time to realize now that how important it is for the children to grow and study, as they are the ones who will shape the future of our nation. Children are precious; let them be children and not workers. Let us give them a pen, so they can draw a picture of developed India. Rabindranath Tagore had aptly remarked that "for every child that is born, it brings with it the hope that God is not yet disappointed with men."[39] The author concludes this paper with the following quote by the Nobel Prize Winner and Child Rights Activist Kailash Satyarthi:

I dream for a world which is free of child labour, a world in which every child goes to School. A world in which every child is given his Rights.

-Kailash Satyarthi[40]

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39 *Ibid.*

40 Rabindranath Tagore, *Rabindranath Tagore Quotes,* AZ QUOTES (Feb. 28, 2018), http://www.azquotes.com/quote/759322.

41 Kailash Satyarthi, *Kailash Satyarthi Quotes,* BRAINY QUOTE (Feb. 14, 2018), https://www.brainyquote.com/quotes/authors/k/kailash_satyarthi.html.

AGE IS JUST A STATE OF MIND: EXPANDING THE DEFINITION OF CHILD UNDER THE POCSO ACT, 2012, TO INCLUDE MENTAL AND FUNCTIONAL AGE

Ms. Fury Jain*

"While ageing is a universal experience, the rates of ageing are not uniform."

- Graham J. Mitnitski [1]

Introduction

Growing older, many of us come across the common saying, 'Age is just a state of mind, you are only as old as you think you are.' Often intended to compliment an older person for their youthful persona, this paper expounds the concept further, discussing the possible implications of such an idea on the present definition of a 'child' in our legal system.

The UN Convention on the Rights of the Child, 1989 defines a child as 'every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier.'[2] The term 'eighteen years' is generally understood as the 'biological or chronological age' of the individual; the time until their eighteenth birthday.[3] Similarly, the Prevention of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act') defines the term 'child' to mean any person below the age of eighteen years.[4]

Expanding the Notion of 'Legal Infancy'

In recent times, such definitions have been criticised for their exclusivity, exposing a serious lacunae in our legal system. In this light, this paper discusses the legal position of individuals excluded by such a definition; people who may have the body mass, weight and height of an adult, but in reality, behave like children of say, six to eight years, for their mental age stops progressing.

In the aforementioned context, this paper attempts to answer the following question-

"Should the child of the new millennium only be understood as one with a biological

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1 Graham J. Mitnitski, et. *al., Dynamics of Cognitive Ageing: Distinguishing Functional Age and Disease from Chronological Age in a Population,* 150 AMERICAN JOURNAL OF EPIDEMIOLOGY 1045 (1999).

2 Article 1, UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations Treaty Series, vol. 1577, p. 3.

3 Child Rights International Network, *Article 1: Definition of the child,* CRIN (Mar. 26, 2018), https://www.crin.org/en/home/rights/convention/articles/article-1-definition-child.

4 The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (India). Section 2 (1) (d).

age below eighteen years, or is it time for the legislature to expand this definition, and recognize the concept of mental and functional age as well?"

The author's primary argument is that the definition of a 'child' should engulf and embrace, in its connotative expanse, the 'mental and functional age'[5] of a person or the age determined by the prevalent science pertaining to psychiatry so that a mentally retarded person or an extremely intellectually challenged person who has otherwise crossed the chronological age of 18 years, can be included within the holistic conception of the word 'child.' The definition should not be conferred with a restricted meaning to convey the words 'eighteen years' as singularly and exclusively associated with the 'biological or chronological age,'[6] having nothing to do with the real concept or conception of the word 'age.'

Judicial Restraint as a Necessary Evil

In the case of ***Eera (through Dr. Manjula Krippendorf) v. The State*****,**[7] the Supreme Court faced this unique question through a Special Leave Petition filed by a Dr. Manjula Krippendorf, a 60-year old doctor from New Delhi,[8] whose daughter of 38 years was suffering from cerebral palsy,[9] and was raped by a man in the year 2010. The Prosecutrix was suffering from this physical and mental disorder since her birth and though she was biologically aged 38 years, the petition claimed that she had not mentally grown beyond six years. This proposition was supported by medical certificates from neuro-physicians and psychologists at AIIMS, New Delhi.

As a relief, the mother had sought adjudication of the case by a Special Court established under the POCSO Act,[10] contending that her daughter's 'mental or functional age' was between 6 to 8 years.[11] While the accused in the case had passed away, the mother had fought for similarly placed victims.

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5 BRYAN GARNER, BLACK'S LAW DICTIONARY 1222 (9th ed., St. Paul Minn. West Publishing Company, 2009).

6 *Id.*, at 66.

7 (2017) 15 SCC 133.

8 Eera (through Dr. Manjula Krippendorf) v. State (NCT of Delhi) and Another, (2017) 15 SCC 133 (India).

9 Sankar C. and Mundkur *N., Cerebral Palsy: Definition, Classification, Etiology and Early Diagnosis,* 10 INDIAN JOURNAL OF PAEDIATRICS 72 (2005).

10 *Supra* note 4, at Sections 2 (1) (l) and 28.

11 Apoorva Mandhani, *Rape Cases of Mentally Challenged Victims Cannot Be Shifted to POCSO Courts: Supreme Court,* LIVE LAW (Mar. 26, 2018), http://www.livelaw.in/rape-cases-mentally-challenged-victims-cannot-shifted-pocso-courts-sc-read-judgment/.

Although the maximum punishment for rape under both the IPC[12] and the POCSO Act[13] is life imprisonment, under the latter, the child victim benefits from many procedural safeguards that protect his/her privacy, confidentiality and well-being through all stages of the judicial process.[14] For instance, to ensure confidentiality, the POCSO Act prohibits the media from disclosing any information that may reveal the child's identity, and places a positive obligation on relevant police officers[16] and the Special Court[17] to ensure that the child's identity[15] is protected from the public media. To protect the child's privacy, the accused's advocate is not permitted when the child's statement is being recorded by the Magistrate,[18] while the presence of parents and other confidantes is allowed.[19] To protect the child's mental well-being, the Act provides for statements to be recorded at the child's residence, or any other place of his/her choice.[20] Moreover, the police officer recording such statement must not be in uniform.[21] Wherever possible, statements should be recorded by audio-video electric means,[22] single-visibility mirrors,[23] curtains, etc.

The victim also benefits from a congenial atmosphere and a child friendly procedure that ensures that the child is not called repeatedly to testify in court,[24] and allows a family member, friend, guardian or other relative in whom the child has trust or confidence, to be present in court,[25] that includes inter alia, in camera proceedings[26] with a one year ceiling to complete the trial,[27] and the assistance of translators/interpreters[28] and special educators.[29] Most importantly, and as a near cardinal rule, it is ensured that at no point of time does the child come in contact with the accused in any way.[30] In the aforementioned case, the Supreme Court was alive to the

12 The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India), Section 376.
13 *Supra* note 4, at Sections 6 and 8.
14 *Id.*, at Preamble of the Act.
15 *Id.*, at Section 23.
16 *Id.*, at Section 24 (5).
17 *Id.*, at Section 33 (7).
18 *Id.*, at Section 25 (1).
19 *Id.*, at Section 26 (1).
20 *Id.*, at Section 24 (1).
21 *Id.*, at Section 24 (2).
22 *Id.*, at Section 26 (4).
23 *Id.*, at Section 36 (2).
24 *Id.* at Section 33 (5).
25 *Id.* at Section 33 (4).
26 *Id.* at Section 37.
27 *Id.* at Section 33 (2).
28 *Id.* at Sections 26 (2) and 38 (1).
29 *Id.*, at Sections 26 (3) and 38 (2).
30 *Id.*, at Sections 24 (3) and 36 (1).

principles of purposive interpretation, but did not hold in favour of the Prosecutrix. However, the Court ordered the Delhi State Legal Services Authority to grant maximum compensation to the victim, 'in view of the special features of the case.'

In the author's opinion, the Supreme Court showed due restraint in declining to apply the provisions of the POCSO Act, 2012, to mentally retarded adults whose mental age may be that of a child, as a judicial interpretation reading 'mental and functional age' into the current definition would amount to judicial overreach.[31] Justice Dipak Misra, in his majority judgment, rightly opined that "(A judge's) ability to create in the name of judicial statesmanship is not limitless. It has boundaries. He cannot afford to romance all the time with the science of interpretation."

That the legislature cannot 'declare' law is embedded in Anglo-Saxon jurisprudence. A legislative judgment is anathema. Thus, the Supreme Court's decision is also in line with the Mostequiean separation of powers doctrine where the judiciary should not transgress from the field of judicial law making into the field of legislative law making. However, it is this very ratio behind the Supreme Court's reluctance that is telling, and is relevant to the topic under discussion. Not once in the judgment has the Supreme Court opined against the idea of expanding the definition to include the mental and functional age. The Court has wisely refrained from commenting on the merits of the argument, rightly holding that ruling on the matter would be outside its domain, and would have led to transgression of the judiciary in the field of legislative law making.[32] Such a decision is in line with Supreme Court's recent trend in judicial restraint, as exhibited in its judgment of ***Shyam Narayan Chouksey v. Union of India*** in early 2018, where the Court held that playing of the national anthem in cinema halls is optional, allowing a 12-member inter-ministerial committee to take a final call on the matter.[33]

POCSO is meant to protect children from sexual offences. To extend it to adult victims based on mental age would require determination of their mental competence. This requires adequate statutory provisions and rules; which the legislature alone is competent to enact. It is now upon the Legislature to consider the introduction of legal provisions to determine mental competence,

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31 PLD, *Persons With the Mental Age of a Child Do Not Fall Within the Purview of POCSO, Rules Supreme Court,* PARTNERS FOR LAW IN DEVELOPMENT (Mar. 26, 2018), http://pldindia.org/bi-monthly-legal-news/persons-mental-age-child-not-fall-within-purview-pocso-holds-sc/.

32 PTI, *POCSO Focuses on Children, Age Cannot Include Mental Age: Supreme Court,* THE INDIAN EXPRESS (Mar. 26, 2018), http://indianexpress.com/article/india/pocso-focuses-on-children-age-cannot-include-mental-age-sc-4761509/.

33 Shyam Narayan Chouksey v. Union of India, (2018) 2 SCC 574 (India).

so that victims and witnesses with inadequate mental development may effectively testify in court, especially in cases involving sexual offenders.[34]

Distinction between Mental Retardation and Mental Illness

Contrary to popular opinion, the law differentiates between mental retardation (or the 'feeble-minded') and mental illness. These two streams run close together, but are not parallel.[35] The irony of our current legal system is that while it provides for children below the chronological age of eighteen years on one side of the spectrum,[36] and mentally ill people on the other side,[37] people with mental retardation and intellectual disability are often left unprotected. Their status as a victim/witness, the appropriate forum for their trial/evidence and the facilities they may avail of are therefore generally subject to the inherent power of the relevant High Court under Section 482 of the Code of Criminal Procedure. As a logical corollary, the remedy becomes discretionary, and is subject to additional time, money and effort that is required to prefer such an application to the High Court.

In the case of ***Suchita Shrivastava and Anr. v. Chandigarh Administration,***[38] the appellant was a mentally retarded woman at a Government run welfare institution. On learning of her pregnancy, the UT administration approached the High Court for termination, while she continued to express a willingness to bear the child. The Supreme Court overruled the decision of the High Court that had held that it was in the best interests of a mentally retarded woman to undergo an abortion. The Court observed that there is a clear distinction between 'mental illness' and 'mental retardation' for the purpose of the 1971 Medical Termination of Pregnancy Act.[39] The Court held that 'a developmental delay in mental intelligence should not be equated with mental incapacity,' and that 'while a guardian can make decisions on behalf of a 'mentally unsound or mentally ill person,' the same cannot be done on behalf of a person who is in a condition of 'mental retardation.'

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation)

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34 Editorial, *Questions of Age - On Supreme Court's ruling on POCSO Act,* THE HINDU (Mar. 26, 2018), http://www.thehindu.com/opinion/editorial/questions-of-age/article19365965.ece.

35 F. Woodbridge, *Physical and Mental Infancy In The Criminal Law,* 87 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 427 (1939); T. NADELHOFFER, THE FUTURE OF PUNISHMENT: THE OXFORD SERIES IN NEUROSCIENCE, LAW AND PHILOSOPHY 81 (Oxford University Press, 2013).

36 *Supra* note 4; The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016 (India).

37 *Supra* note 12, Section 84.

38 Suchita Shrivastava and Anr. v. Chandigarh Administration, (2009) 9 SCC 1 (India).

39 The Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971 (India), Section 3 (4)(a).

Act, 1995 also clearly differentiates between the two terms. The Act defines mental retardation as 'a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence.'[40] The same definition has also been incorporated in the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.[41]

Recognition of the Notion of 'Mental Age' in Foreign Jurisdictions

Republic of South Africa

The inclusion of the concept of 'mental or functional age' into the definition of 'child' is not an unprecedented one. In 2007, South Africa passed its Criminal Law (Sexual Offences and Related Matters) Amendment Act.[42] Section 68 of the Act amends Clause 1 of Section 170A of South Africa's Criminal Procedure Act, 1977 to include individuals under the 'mental age of eighteen years' under its protective ambit. The amended section reads as follows-

> *"Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological 'or mental age' (emphasis added) of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary."*[43]

In 2014, a similar question came up before the Supreme Court of Appeal of South Africa, in the case of ***Daniel Johannes Stephanus Van Der Bank v. The State,*** that dealt with a 19-year old rape victim whose mental age was between 6-8 years old. Even though the offence in question was committed before the Criminal Law Amendment came into existence, the court used the principle of purposive interpretation, and applied the expanded definition retrospectively to find in favour of the victim.[44] In the ultimate analysis, the Supreme Court of Appeal confirmed the view of the High Court by holding that the trial was correct in rejecting that the complainant had

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40 The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, No. 1, Acts of Parliament, 1996 (India), Section 2 (r).

41 The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, No. 44, Acts of Parliament, 1999 (India), Section 2 (g).

42 The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, No. 32, Acts of Parliament, 2007 (South Africa).

43 The Criminal Procedure Act 1977, as amended up to Criminal Law (Forensic Procedures) Amendment Act 2010, No. 51, Acts of Parliament, 1977 (South Africa).

44 Daniel Johannes Stephanus Van der Bank v The State (245/15) [2015] ZASCA 10 (South Africa).

consented to engage in sexual activities as it was proven in court that even though she was chronologically/biologically above eighteen, she was intellectually backward with a mental age of six to eight years old.

Canada

The concept has also been recognized in Canadian jurisprudence. In the case of ***Her Majesty The Queen v. D.A.I.,*** the Supreme Court of Canada eloquently summed up the Court and Parliament's position by stating as follows-

> *"The final and most compelling answer to the equivalency argument is simply this: When it comes to testimonial competence, precisely what, one may ask, is the difference between an adult with the mental capacity of a six-year-old, and a six-year-old with the mental capacity of a six- year-old? Parliament, by applying essentially the same test to both under Section 16(3) and Sections 16 (1) (3) and 16 (1) (6) of the Canada Evidence Act,*[45] *implicitly finds no difference."*[46]

Principle of Purposive Construction

The principle of purposive construction[47] is required to be adopted keeping in view the intrinsic perspective of the POCSO Act and construction should be placed on the word 'age' to compositely include biological and mental age, so that the protective umbrella meant and recognized for the child under the law to avoid abuse and exploitation is achieved. Some important provisions from the POCSO Act in this regard are as follows-

1. The interests of the child, both as a victim as well as a witness, need to be protected.[48]
2. It is therefore, proposed to enact a self contained comprehensive legislation..

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45 The Canada Evidence Act, R.S.C. 1985, c. C-5. (Canada).

46 Her Majesty The Queen v. D.A.I, R. v. D.A.I, 2012 SCC 5 (Canada).

47 The purposive approach sometimes referred to as purposive construction, purposive interpretation, or the "modern principle in construction" is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment (that is, a statute, a part of a statute, or a clause of a constitution) in the light of the purpose or objective for which it was enacted. The historical source of purposive interpretation is the mischief rule established in Heydon's Case. Purposive interpretation was introduced as a form of replacement for the mischief rule, the plain meaning (literal) rule and the golden rule to determine cases. Purposive interpretation is exercised when the courts utilize extraneous materials from the pre-enactment phase of legislation, including early drafts, committee reports, etc. The purposive interpretation involves a rejection of the exclusionary rule. This approach has been followed by the Supreme Court of India in many cases. For ex: Tirath Singh v. Bachittar Singh, AIR 1955 SC 830 (India); Shamrao V. Parulekar v. District Magistrate, Thana Bombay, AIR 1952 SC 324 (India).

48 Eera, supra note 8.

With due regard for safeguarding the interest and well-being of the child at every stage of the judicial process incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishing of Special Courts for speedy trial of such offences.[49]

3. And whereas sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

Likes of the appellant in the case of ***Eera v. State***[50] who suffer from mental retardation or intellectual disability are unable to keep pace with biological age and their mental growth and understanding is arrested and unless they get the protection of law that the legislature has conceived, it would be an anathema that the law that has been brought in to protect the class, that is, child, leaves out the part that is affected worse than children under the chronological age of eighteen. This is especially necessary when the person in question is the victim of sexual offences. In such cases, an expanded definition allows such matters to be transferred to the Special Court under the POCSO Act, allowing the victim/witness to benefit from a trial conducted in a congenial, friendly and comfortable atmosphere.

Thus, when medical evidence has established the mental age, the victim's biological age should not be the governing yardstick, and the mental/functional age should decide the appropriate forum for trial.

An Expanded Definition Does Not Cause Violence to the Existing Laws

Definition of 'Years' under the General Clauses Act, 1897

While the term 'years' has been defined in the General Clauses Act as a period of 365 days,[51] the term 'age' has not been defined, and can signify both mental as well as chronological age. Thus, it is possible to interpret the word 'age' in a particular provision to mean 'mental age' without offending the term 'year.'

Definition of 'Child' under the POCSO Act, 2012

Secondly, introducing the concept of mental or functional age does not cause any violence to Section 2 (1) (d) of the POCSO Act, but on the contrary, it would be in accord with the context of the scheme of the POCSO Act, 2012, and also inject life into the words which constitute the

49 *Ibid.*
50 (2017) 15 SCC 133 (India).
51 The General Clauses Act, 1897, No. 10, Acts of Parliament, 1897 (India). Section 3.

fulcrum of the spirit of the legislation that is meant to protect the victims. The legislature has used the word 'child' and restricted it to the age of 18 years, but when a mentally retarded child is incapable of protest and suffers from inadequacy to understand, chronological age should not be the guiding factor or laser beam but the real mental age, for the cherished purpose of the POCSO Act is to give protection to the child and check sexual abuse of the child.

Victim's Fair Trial Rights Under the POCSO Act, 2012

Thirdly, if such an interpretation of the word 'child' is accepted, and the trial is held by a Special Court under the POCSO Act, the accused is in no way affected as the punishment for the offence remains the same even if the trial is held by the Court of Sessions under the Code of Criminal Procedure.

Capacity to Understand as a Governing Yardstick Recognized by the Indian Penal Code

Recognition of the concept of mental and functional age is also in consonance with established jurisprudence about the age and/or scope of criminal responsibility in India. For instance, the Indian Penal Code recognizes a person of unsound mind to be on the same pedestal as a child[52] which indicates that the IPC prescribes protection on the basis of maturity of understanding, to the persons suffering from unsoundness of mind.[53] Emphasis is on departure from the chronological age by the Legislature, laying stress on the capacity to understand the nature and consequences of the act.[54]

Section 89 of the IPC stipulates that nothing done in good faith for the benefit of a person under twelve years of age or of unsound mind by or by the consent of its guardian would be an offence by reason of any harm which it may cause or be intended by the doer to cause or be known by the doer to be likely to be caused to that person.[55] Section 90 deals with consent known to be given under fear or misconception. It also encapsulates consent of an insane person, and consent of a child under twelve years of age.[56] Section 98 covers right of private defence against the act of a person of unsound mind and when an act which would otherwise be an offence is not an offence by reason of want of maturity or understanding.[57] Section 305 deals with abetment of suicide of

52 *Supra* note 12, Section 82.
53 *Id.,* at Section 84.
54 Elavarasan v. State, AIR 2011 SC 2816 (India); Seralli Wali Mohammed v. State of Maharashtra, AIR 1972 SC 2443 (India).
55 *Supra* note 12, Section 89.
56 *Id.,* at Section 90.
57 *Id.,* at Section 98.

child or insane person and provides punishment with death or imprisonment for life, or imprisonment for a term not exceeding ten years.[58]

Point being, the Indian Penal Code prescribes protection on the basis of 'maturity and understanding of a child' and the same protection has been extended to persons suffering from unsoundness of mind. Therefore, it is limpid that a penal law sometimes makes departure from the chronological age by placing more emphasis on capacity to understand the nature and consequences of an act. The author's argument has been structured on this very basis, of treating the mental age of an adult within the ambit and sweep of the term 'age' that pertains to the definition of a child under the POCSO Act, 2012.

Arguments Against the Concept

Most arguments against the expansion of the definition revolve around the risk of creating ambiguity, chaos and unwarranted delay in proceedings, and the potential of vitiating the trial, in the case of an accused venturing on the correctness of the mental age. These arguments emphasize that the concept of mental age is one on which scientific views and methods vary, and thus such an interpretation would breach the settled principles of criminal jurisprudence and usher in uncertainty.

At this juncture, it is prudent to point out that in the aforementioned case of ***Eera v. State,***[59] the Supreme Court was conscious to the arguments listed above. In fact, these are the very reasons why the Court opined that to extend the definition to adult victims based on mental age would require 'determination of their mental competence.' This requires adequate statutory provisions and rules; which the legislature alone is competent to enact.

In any case, similar arguments have not stopped the legislature from making laws to expand or restrict the notion of legal infancy in the past. While a child below the age of seven years is absolutely doli incapax,[60] the culpability of a child above seven and under twelve years of age depends on his/her 'maturity of understanding' to judge the consequences of their conduct. In the case of ***Heeralal v. State of Bihar,***[61] the Supreme Court used parameters like the child's conduct, words used, gestures made, and nature of offence to draw a conclusion regarding said maturity of understanding.

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58 *Id.,* at Section 305.
59 *Supra* note 50.
60 *Supra* note 12, Section 82.
61 *Id.,* at Section 83; Krishna Bhagwan v. State of Bihar, 1989 Pat LJR 507(2) (FB) (India), Abdul Sattar Haji Ibrahim Patel v. State of Gujarat, AIR 1965 SCC 810 (India).

No other legislation in India explains the fluid nature of legal infancy better than the Juvenile Justice (Care and Protection of Children) Act, 2015. In case of a heinous crime committed by a child above sixteen years of age, the law empowers the Juvenile Justice Board to assess the child's 'mental and physical capacity' and the 'ability to understand' the consequences of their act, using the assistance of experienced psychologists and psycho-social workers and other experts.[62] If the assessment is in favour of maturity of understanding, the child may be tried as an adult.[63]

Conclusion

Recent case law presents the Parliament with a unique problem, that can be solved in one of two ways- (a) by generalizing and stating that the notion of legal infancy is limited, and that the definition of a 'child' has always interpreted using the chronological age, or (b) by looking into the historical origin of the rule and its primary objective to determine whether, in view of modern scientific knowledge, it should be expanded to include mental and functional age as well.[64]

The government's stance on the matter in the case of ***Eera v. State***[65] is highly appreciated, with Mr. P.K. Dey, counsel on behalf of the State, supporting the petitioner's argument about an expanded definition of the term 'child.'

However, to take a final stance on the matter through appropriate amendments in the legislation, and guidelines for ascertaining the mental and functional age in a clear and uniform matter is not an easy task. These must be decided after intense deliberations and parliamentary discourse. Nevertheless, one hopes that the legislature delivers in favour of an expanded definition, lest the letter of the law is satisfied, while its spirit is buried fifty fathoms deep.

62 AIR 1977 SC 2236 (India).
63 The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016 (India). Section 15 (1)
64 *Id.,* at Section 15 (2).
65 *Supra* note 35.
66 *Supra* note 8.

CLASSROOM 2.0: SPARING THE ROD VIS A VIS CONSTRUCTIVE CHILD DISCIPLINE

Mr. Gaurav Hooda*

"If people are good only because they fear punishment, and hope for reward, then we are a sorry lot indeed."

-Albert Einstein

Introduction - Corporal Punishment: Still the Need of the Hour?

According to the Black's Law Dictionary, Corporal Punishment is a Physical punishment as distinguished from pecuniary punishment or a fine; any kind of punishment of or inflicted on the body, such as whipping or the pillory; the term may or may not include imprisonment, according to the context.[1]

Corporal punishment has been a form of punishment in schools in India for a long time and sadly, this form of punishment still continues to thrive today in spite of the various acts and laws passed by the government to ban corporal punishment. Many western countries have banned corporal punishment and there are several laws that protect children from being hurt in such a brutal manner. However, most schools in India still advocate this type of punishment. "Spare the rod and spoil the child" is a popular quote among teachers and parents alike in many parts of the country.[2]

Hitting people violates their fundamental rights to respect for their physical integrity and human dignity, as set forth in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Children are people too and equal holders of human rights.This is confirmed in the United Nations Convention on the Rights of the Child, which is also the first international instrument to require protection of children from 'all forms of physical or mental violence' (Article 19). The Committeeon the Rights of the Child, treaty body for the Convention, has consistently interpreted it as requiring prohibition of all corporal punishment, including in the family. It has emphasized this in its concluding observations on reports from more than 130 states, in the conclusions of two days of General Discussion on

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1 Ritchie v. People, 22 Colo. 251, 43 Pac. 1026; People v. Winchell, 7 Cow. (N.Y.) 525.

2 A. Vinothini Sylvia, *Attitude of Teachers Towards Corporal Punishment,* IMPACT JOURNALS (Feb. 6, 2018, 10:45 AM), http://impactjournals.us/download.php?fname=1-8-1463209346-2.hum-attitude%20 of%20 teachers %20towards%20corporal%20punishment.pdf.

violence against children (in 2000 and 2001), and in its first General Comment on 'The Aims of Education.'[3]

Condemnation of corporal punishment on the basis of the child's human rights, quoting the Convention and the Committee on the Rights of the Child, has been expressed by other human rights bodies and by judgments of high-level courts in all continents.[4]

Types of Corporal Punishment in Schools

There exists three types of corporal punishment in Indian schools:

Physical Punishments:

1. Making the children stand as a wall chair.
2. Keeping the school bags on their heads.
3. Making them stand for the whole day in the sun.
4. Make the children kneel down and do the work and then enter the class room.
5. Making them stand on the bench.
6. Making them raise hands.
7. Hold a pencil in their mouth and stand.
8. Holding their ears with hands passed under the legs.
9. Tying of the children's hands and making them to do sit-ups.
10. Caning and pinching and twisting the ears.[5]

Emotional Punishments:

1. Slapping by the opposite sex.
2. Scolding, abusing and humiliating.
3. Label the child according to his or her misbehavior and send him or her around the school.
4. Make them stand on the back of the class and to complete the work.
5. Suspending them for a couple of days.
6. Pinning paper on their back and labeling them "I am a fool", "I am a donkey" etc.

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3 Stuart N. Hart, *Eliminating Corporal Punishment: The Way Forward to Constructive Child Discipline,* UNESCO ASIA AND PACIFIC REGIONAL BUREAU FOR EDUCATION 14 (2005).

4 Stuart N. Hart, *"et. al.", Eliminating Corporal Punishment: The Way Forward to Constructive Child Discipline, UNESDOC:* UNESCO (Feb. 6, 2018, 11:34 PM), http://unesdoc.unesco.org/images /0013/001392 / 139209e.pdf.

5 Sridhar M., *Corporal Punishment: Violation of Child Rights in Schools,* LEGAL SERVICE INDIA (Feb. 7, 2018, 6:09 AM), http://www.legalservicesindia.com/articles/punish.htm.

7. Teacher takes the child to every class she goes and humiliates the child.
8. Removing the shirts of the boys.

Negative Reinforcement:

1. Detention during the break and lunch.
2. Locking them in a dark room.
3. Call for parents or asking the children to bring explanatory letters from the parents.
4. Sending them home or keeping the children outside the gate.
5. Making the children sit on the floor on the classroom.
6. Making the child clean the premises.
7. Making the child run around the building or in the playground.
8. Sending the children to principals.
9. Making them to teach in the class.
10. Making them to stand till the teacher comes.
11. Giving oral warnings and letters in the diary or calendar.
12. Threatening to give TC for the child.
13. Asking them to miss games or other activities.
14. Deducting marks.
15. Treating the three late comings equal to one absent.
16. Giving excessive imposition.
17. Make the children pay fines.
18. Not allowing them into the class.
19. Sitting on the floor for one period, day, week and month.
20. Placing black marks on their disciplinary charts.

More often than not, when the teachers fail to conduct the class in an effective manner, or have had some issues in their personal life,[6] they resort to corporal punishment as a method to gain and establish authority over children. They hardly realize how serious its implications would be, for a child, psychologically.

6 Rashmi Belur, *Despite Ban on Corporal Punishment, Incidents Surface From Time to Time in Bengaluru* (According to psychiatrists and teacher trainers, the main reasons are stress and disturbed personal life of teachers, besides lack of adequate training to manage the kids), THE NEW INDIAN EXPRESS (Feb. 9, 2018, 3:30 PM), http://www.newindianexpress.com/cities/bengaluru/2017/dec/07/ despite-ban-on-corporal-punishment-incidents-surface-from-time-to-time-in-bengaluru-1720817.html.

Objective of the Paper

The Paper aims to deal with the issue of Corporal Punishment, at the very outset, by tackling the concept, which is rightly forbidden by various International Covenant's, followed byIndia's commitment to prohibiting corporal punishment, enunciating upon the legality of corporal punishment, concluded by a report on India's Human Right Record.

Commitment to Prohibition: Current Legality of Corporal Punishment in India

"I learned discipline from my Father. Not in terms of Corporal Punishment, but being determined in what you do, and sticking by it."

-Ryan Reynolds

Section 89 of the Penal Code, 1860 (in Jammu and Kashmir the Ranbir Penal Code) states: "Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person.…" The Government has confirmed that this provides a legal defence for the use of corporal punishment.[7]

Provisions against violence and abuse in the Penal Code, the Juvenile Justice (Care and Protection of Children) Act 2015, the Protection of Child Rights Act 2005, the Protection of Women from Domestic Violence Act 2005 and the Constitution are not interpreted as prohibiting all corporal punishment in childrearing. The National Charter for Children 2003 confirms children's right to protection from all corporal punishment (Art. 9), but this is not reflected in legislation.[8]

In 2010, Government representatives in SAIEVAC (South Asian Initiative to End Violence against Children) developed a national action plan to achieve prohibition, and in 2011 endorsed a report on progress towards prohibiting corporal punishment in South Asian states which included an analysis of the reforms required in India.[9] In the third/fourth state party report to the

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7 Third/Fourth report of the UN Committee on the Rights of the Child, *Committee on the Rights of the Child,* Fifty Ninth Session, 16 January to 3 February 2012, Ch. 4, Para 40 (2012).

8 The Sparkle Research Report: Supporting Positive Alternatives in Raising Kindness in Education, *Corporal Punishment of Children in India,* END CORPORAL PUNISHMENT (Feb. 12, 2018, 06:40 PM), http://www.endcorporalpunishment.org/assets/pdfs/states-reports/India.pdf.

9 SAIEVAC (South Asia Initiative to End Violence against Children), *Prohibition of Corporal Punishment of Children in South Asia: A Progress Review, Committee on the Rights of Child,* General Comment No. 8, Para 11 (2011).

UN Committee on the Rights of the Child, dated 2011, the Government confirmed that corporal punishment of children is not considered an offence due to section 89 of the Penal Code; this was to be rectified by the drafting of a Prevention of Offences against the Child Bill which would make corporal punishment an offence.[10] However, in 2011 this Bill was replaced by a bill on sexual offences – as enacted, the Protection of Children from Sexual Offences Act 2012, which did not prohibit corporal punishment. The National Policy for Children 2013, adopted in April 2013, provides for protection of children from "all forms of violence" but specifically refers to corporal punishment only in connection with education.

The Government accepted the recommendation to prohibit corporal punishment in all settings made during the Universal Periodic Review of India in 2012.[11] In the same year, the Ministry of Women and Child Development proposed amendments to the Juvenile Justice (Care and Protection of Children) Act 2000 which would include a new section on corporal punishment, defining and punishing such punishment in line with the Penal Code provisions on the offences of causing hurt and grievous hurt. The Act as adopted in 2015, did not achieve full prohibition of corporal punishment (Juvenile Justice Act). The Government again accepted recommendations to prohibit corporal punishment in all settings during its third cycle Universal Periodic Review in 2017.[12]

Alternative Care Settings

Corporal punishment is prohibited in child care institutions in the Juvenile Justice (Care and Protection of Children) Act 2015, in force from January 2016. The Act states in Article 82:

> *(1) Any person in-charge of or employed in a child care institution, who subjects a child to corporal punishment with the aim of disciplining the child, shall be liable, on the first conviction, to a fine of ten thousand rupees and for every subsequent offence, shall be liable for imprisonment which may extend to three months or fine or with both.*
>
> *(2) If a person employed in an institution referred to in sub-section (1), is convicted of an offence under that sub-section, such person shall also be liable for*

10 *Supra* note 7.

11 Universal Periodic Review – India, United Nations Human Rights Council (UNHRC), A/HRC/21/10, Report of the Working Group, Para. 138 (2012).

12 Universal Periodic Review III – India's National Report 27th UPR Session of UNHRC, United Nations Human Rights Council (UNHRC), A/HRC/36/10/Add.1, *Report of the Working Group: Addendum* (2017).

dismissal from service, and shall also be debarred from working directly with children thereafter.

(3) In case, where any corporal punishment is reported in an institution referred to in sub-section (1) and the management of such institution does not cooperate with any inquiry or comply with the orders of the Committee or the Board or court or State Government, the person in-charge of the management of the institution shall be liable for punishment with imprisonment for a term not less than three years and shall also be liable to fine which may extend to one lakh rupees.

Corporal punishment is defined in the Act as "the subjecting of a child by any person to physical punishment that involves the deliberate infliction of pain as retribution for an offence, or for the purpose of disciplining or reforming the child" (Art. 2(24)). A child care institution is defined as a "children's home, open shelter, observation home, special home, place of safety, specialized Adoption Agency and a fit facility recognized under this Act for providing care and protection to children, who are in need of such services" [Art. 2(21)]. A "fit facility" is "a facility being run by a governmental organization or a registered voluntary or non-governmental organization …" (Art. 2(27)). Corporal punishment was previously unlawful in child care institutions under the Juvenile Justice (Care and Protection of Children) Rules 2007.

But corporal punishment is lawful in non-institutional forms of care under section 89 of the Penal Code 1860. There is no prohibition of corporal punishment in care settings in Jammu and Kashmir, where it is lawful under the Ranbir Penal Code.

Day Care

There is no explicit prohibition of corporal punishment, which is lawful under Section 89 of the Penal Code 1860 ("Ranbir Penal Code"). The National Early Childhood Care and Education (ECCE) Policy 2013, adopted in September 2013, provides for services for children up to the age of six. It states that in the provision of early education, a National ECCE Curriculum Framework will be developed within six months of notification of the policy and in this context "an enabling and loving environment devoid of corporal punishment will be ensured".[13] There is no reference specifically in law reform to prohibit corporal punishment, but the policy does

13 National Early Childhood Care and Education (ECCE) Policy 2013, Ministry of Women and Child Development, Three- Six Years, Para. 5.2.3. (2013).

provide in general for the development of a Regulatory Framework[14] and "appropriate legislation"[15] to support implementation of the policy.

Schools

The National Policy for Children, 2013 states that in education, the state shall "ensure no child is subjected to any physical punishment or mental harassment" and "promote positive engagement to impart discipline so as to provide children with a good learning experience".[16] Law reform has gone some way prohibiting corporal punishment in schools but is not yet complete.

Corporal punishment is prohibited in some schools under the Right to Free and Compulsory Education Act, 2009 (RTE Act). Article 17 states:

> "(1) No child shall be subjected to physical punishment or mental harassment.
>
> (2) Whoever contravenes the provisions of sub-section (1) shall be liable to disciplinary action under the service rules applicable to such person."

The Right of Children to Free and Compulsory Education Rules, 2010 provide for implementation of the Act, including awareness raising about the rights in the Act, procedures for monitoring implementation, and complaints mechanisms when the rights are violated.

In 2014, the Ministry of Human Resources Development issued guidance ("Advisory for Eliminating Corporal Punishment in Schools under Section 35(1) of the RTE Act, 2009") which sets out the national law relevant to corporal punishment in schools, the international human rights standards, steps that may be taken to promote positive child development and not resorting to corporal punishment, and the role of national bodies in implementing the RTE Act, stating: "This advisory should be used by the State Governments/UT Administrations to ensure that appropriate State/school level guidelines on prevention of corporate punishment and appropriate redressal of any complaint(s), are framed, disseminated, acted upon and monitored."

However, the Act , including the prohibition of corporal punishment, applies only to children aged 6-14; neither the Act nor the Rules apply in Jammu and Kashmir, and according to Government figures for 2013 corporal punishment was banned in schools under the Act in only 34 states/territories.[17]

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14 *Ibid.*

15 *Id.,* at Para 10.9, Planning, Effective Planning is an Essential Prerequisite for an ECCE Program.

16 *Supra* note 13, at Section 1, Para. 4.6.

17 India Country Report, Report prepared by the Global Initiative to End All Corporal Punishment of Children, 1 May 2014, CRC/C/IND/Q/3-4/Add.1, Reply to list of issues, 29 and 31 (2014).

Furthermore, the Act was amended in 2012 to state that [Art. 1(5)]: "Nothing contained in this Act shall apply to Madrasas, Vedic Pathsalas and educational institutions primarily imparting religious instruction."[18] The amendment followed a ruling by the Supreme Court in April 2012 that the Act does not apply to unaided minority schools.[19]

In another ruling by the Gujarat High Court, it was confirmed that where the law prohibits corporal punishment in schools, section 89 of the Penal Code cannot be used as a legal defence for its use.[20]

Penal Institutions

Corporal punishment is unlawful as a disciplinary measure in penal institutions under the Juvenile Justice (Care and Protection of Children) Rules 2007, which states in Chapter VI: "Principle of Safety (no harm, no abuse, no neglect, no exploitation and no maltreatment): (a) At all stages, from the initial contact till such time he remains in contact with the care and protection system, and thereafter, the juvenile or child or juvenile in conflict with law shall not be subjected to any harm, abuse, neglect, maltreatment, corporal punishment or solitary or otherwise any confinement in jails and extreme care shall be taken to avoid any harm to the sensitivity of the juvenile or the child … ."

However, there is no explicit prohibition of corporal punishment in penal institutions in Jammu and Kashmir: the Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act, 2013 punishes cruelty but does not prohibit at all corporal punishment. The Juvenile Justice (Care and Protection of Children) Act, 2015 confirms prohibition in observation homes and other institutions for children in conflict with the law (Art. 82).

Combating Discipline in the Twenty First Century: The Road Ahead

"The right of corporal punishment is one of the plagues of the society."

-Fyodor Dostoevsky

Corporal Punishment: Prevalence, Predictors and Implications for Child Behavior and Development

Corporal punishment has not been found to be an effective means of achieving positive long-term developmental outcomes, such as moral internalization or social problem-solving.

18 The Right of Children to Free and Compulsory Education (Amendment) Act, 2012, No. 30, Acts of Parliament, 2012 (India).

19 Society for Unaided Private Schools of Rajasthan v. U.O.I. & Another, Writ Petition (C) No. 95 of 2010 (India).

20 Hasmukhbhai Gokaldas Shah v. State of Gujarat, Special Criminal Case No. 12 of 1993 (India).

Corporal punishment threatens the physical well-being of the child. There is always a risk of physical harm, particularly for young children; and the more such punishment is used, the more likely it is to progress to severe forms of violence.[21]

The Way Forward to Constructive Child Discipline

Discipline is an often misused word, especially when it is mistakenly equated with punishment. To many teachers, discipline means punishment. "This child needs disciplining" translates into **"This child needs spanking or caning." This is wrong.**

"Discipline is the practice of teaching or training a person to obey rules or a code of behavior in both short and long terms."[22]

Discipline shapes a child's behavior and helps them to learn self-control when it provides encouragement, not painful & meaningless consequences. If you are a parent, or your friends have children, think back to a child's first year or two of life. How was he or she taught to clap hands, to walk, or to talk? You or your friend probably used teaching techniques like showing through example (also known as "modeling"), as well as giving praise and opportunities to practice; not yelling, spanking, insulting, or threatening.

This encouragement is a type of reward that stimulates the child to work, learn, and achieve. It builds self-esteem because the child learns that he or she was directly responsible for earning his or her praise or other reward. Children can choose to earn it, or not to earn it. This gives them a feeling of control over their lives, which is a key ingredient for healthy self-esteem.

A Case Study: Ramon's Change[23]

The new week started off much as the week before had. Ramon was continuing his disruptive, unruly behavior and was driving everyone crazy. But I had thought a lot about Ramon over the weekend. I began to think about how he was making me feel, and the overwhelming emotions that surfaced were anger and irritation. According to the book, Cooperative Discipline, the way we feel when a student acts inappropriately gives us clues about the student's goals for the misbehavior. Once we understand why the student is doing what he is doing, it is easier to find

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21 *Supra* note 3.

22 Welker J. Eileene., Make Lemons Into Lemonade: Use Positives for Disciplining Children, PROVIDER PARENT PARTNERSHIPS (Feb. 15, 2018, 09:50 PM), http://ohioline.osu.edu/hyg-fact/5000/5153.html.

23 *Ellen Berg, Case Study,* UNESDOC: UNESCO (Feb. 16, 2018, 10:50 PM), http://www.middleweb.com/msdiaries01/MSDiaryEllenB7.html.

appropriate ways to deal with him.[24]

Feeling angry is a clue that the student is seeking power, and irritation is a clue that the student is seeking attention. As I thought about it, I understood that most of Ramon's irritating behaviour was done in front of peers and adults in as loud and wild a manner as possible in order to get attention. Once he had our attention, he sought power by directly refusing to comply with our requests to stop, causing most of us to become extremely angry. I then realized that I had willingly been giving Ramon control over me and my classroom. I can't blame him; after all, I am responsible for my own actions. I began to understand that although I could not control him, I could control what I did and said. A new plan and attitude were created.

I resolved on Wednesday morning that no matter what Ramon did, I would not give him the attention that his misbehavior was demanding. I would ignore him. When he came to class ten minutes late, I pretended he hadn't entered. I gave the teacher's aide a piece of paper and asked her to record everything Ramon did, but not to interfere with his behavior in any way.

Ramon did everything but get naked during that class period. He ran up and down the aisles, played with another student's hair, put the aide's glasses on, inched towards the door as if he was going to walk out and even climbed behind the aide on her chair. We said nothing. The rest of the class looked at me like I was crazy. I explained to them that our business was much too important to be interrupted by those who were not interested in learning, so we were going to go on as usual. I could have kissed every one of those students who, although they occasionally giggled to themselves, completely ignored his antics, even when he would try to bother them. Ramon's behavior intensified. Throughout the period, Ramon continually asked me to go to the bathroom, to go to the Assistant Principal's office, and to go to the security guard's desk. I continued to ignore him.

Then, an amazing thing happened. Instead of walking out, he sat down. By the end of the class as I was dismissing students by name, he came up to me and said, "Can I go too, Mrs. Berg?" He waited and waited as I called every other student's name, asking to go but not leaving until I gave him permission. I wondered what would happen the next day. Would there be any change, or would I have to endure another round of Ramon's horrible behavior?

On Thursday, Ramon came on time, complete with paper, pencil, and book. He sat down quietly and raised his hand to ask questions. For the entire period, he didn't get out of his seat or talk

24 ALBERT LINDA & DESISTO PETE, COOPERATIVE DISCIPLINE (American Guidance Service, 1996).

without permission. He was a little squirmy, but I know what a hard time he has staying still. He didn't do any of his assigned work, but I think controlling his own behavior was work for Ramon.

What have I learned? It is not good enough to rely on what we have "always done." If I had continued with the same old strategies that supposedly had worked for me in the past, I know there would have been no change in Ramon's behavior. I know some teachers believe that students should simply act appropriately because we tell them to, but the reality is that many will not. We are adults, and we have a responsibility to change what we do to meet the needs of all students, not just the ones who sit still, behave appropriately, or understand a concept the first time we explain it to them.

Ramon taught me that I cannot make anyone do anything, but I can change my classroom conditions to try to influence their decisions. The school librarian once told me that the real teaching begins when a student is having problems. We also cannot control everything, and we certainly cannot control anyone else, but we do have some power in the classroom. It is the power of what we, as professionals and human beings, choose to do in response to difficult situations.

Seven Principles for Positive Child Discipline[25]

1. Respect the child's dignity
2. Develop pro-social behavior, self-discipline, and character
3. caximize the child's active participation
4. Respect the child's developmental needs and quality of life
5. Respect the child's motivation and life views
6. Assure fairness (equity and non-discrimination) and justice
7. Promote solidarity

Universal Peroidic Review of India's Human Rights Record

"If we are ever to turn toward a kindlier society and a safer world, a revulsion against the physical punishment of children would be a good place to start."

-Dr. Benjamin Spock

India was examined in the first cycle of the Universal Periodic Review in 2008 (Session 1). No

25 *Supra* note 3.

recommendations were made specifically concerning corporal punishment of children. However, the following recommendation was made and was accepted by the Government:[26]

"Take into account recommendations made by treaty bodies and special procedures, especially those relating to women and children, in developing a national action plan for human rights which is under preparation (Mexico)".

Examination in the Second cycle took place in 2012 (Session 13). The following recommendation was made during the review:[27]

"Introduce legislation to prohibit corporal punishment of children in all settings (Liechtenstein)" The Government accepted the recommendation.[28]

In 2017 India underwent its Third cycle examination (Session 27). The following recommendations were made:[29]

"Introduce legislation to prohibit corporal punishment of children in the home and in all other settings, including as a sentence under traditional forms of justice (Liechtenstein);

"Introduce comprehensive and continuous public education, awareness raising and social mobilization programs on the harmful effects, of corporal punishment (Liechtenstein);

"Establish a database of all case of violence against children and explicitly prohibit all forms of corporal punishment of children under 18 of age in all settings (Zambia)".

The Government accepted all three recommendations.[30]

Instances of Corporal Punishment: A Research over the Past Decade

1. A survey conducted in Mumbai by the Podar Institute of Education between February and May 2017 involving 700 teachers (350 each in private and government schools) found around 50% of teachers in private and government schools reported shaming students to discipline them. Around 45% of teachers in government schools and 52% in private schools reported hitting children to

26 Peter Newell, Briefing on India for the Committee on the Rights of the child, 23 May 2008, A/HRC/8/26, *Report of the Working Group,* Para. 86(11), (2008).

27 Report of the Working Group on the Universal Periodic Review, Human Rights Council, Twenty-first session, 9 July 2012, A/HRC/21/10, *Report of the Working Group, Para.* 138(104), (2012).

28 Draft report of the Working Group on the Universal Periodic Review, Human Rights Council, Twenty- First Session, 17 September 2012, A/HRC/21/10/Add.1, *Report of the Working Group: Addendum,* (2012).

29 Draft report of the Working Group on the Universal Periodic Review, Human Rights Council, Twenty-seventh session, 8 May 2017, A/HRC/WG.6/27/L.8, *Draft report of the Working Group: Unedited Version,* Paras 5(233), 5(234) and 5(235), (2017).

30 Draft Report of the Working Group on the Universal Periodic Review, Human Rights Council, Thirty-sixth session, 6 September 2017, A/HRC/36/10/Add.1, *Report of the Working Group:* Addendum, (2017)

discipline them – these figures have reduced since the institute's 2015 survey, which found 83% of teachers in government and 58% in private schools used physical punishments to discipline students.[31]

2. The 'Play It Safe' opinion poll conducted by UNICEF, and Mumbai Smiles, involving interviews with almost 5,000 children across Maharashtra, found children in rural areas experience more physical punishment at home than those in cities and towns: three out of five children in rural areas – and two in five in urban areas – were slapped, forced to stand outside their homes, locked in a room or had their ears pulled as punishment. Of the rural children interviewed, 57% said they were slapped (compared to 43% of urban children), 66% had ears pulled by elders (compared to 34% of urban children) and 55% were locked in a room (compared to 45% of urban children). The survey also found children in joint families experienced more violence than those in nuclear families or single parent families.[32]

3. A survey conducted in Mumbai and Bengaluru in July-September 2016 by Early Childhood Association (ECA) found on average 37% of parents threaten to hit their children, 66% hit their children, 15% sometimes hit their children and only 19% said they do not hit their children. Of those that do hit their children, this is most commonly done by both parents (76%), followed by mothers (18%), and least often by fathers (7%). After hitting the child, 53% of parents feel bad and so hug the child and/or promise a gift, 12% say sorry to the child and 36% do nothing. On average, 80% of parents said hitting has not helped to improve the child's behaviour and so now they must hit more; 11% said hitting has improved the child's behaviour and 9% didn't comment.[33]

4. A study carried out in 60 schools across 6 districts of West Bengal has revealed that, despite a ban, corporal punishment still exists in as many as 30% of the schools covered, with 90% of teachers in most schools claiming that since

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31 Puja Pednekar, *After Corporal Punishment Was Banned, 50% Mumbai Teachers Resorted to Shaming Students:* Survey, Hindustan Times, July 15, 2017.

32 Puja Pednekar, *Study: Rural Kids Face More Physical Abuse,* Hindustan Times, March 29 2017.

33 Early Childhood Association (ECA), Survey on bribing, threatening and keeping secrets, Mumbai, India: Early Childhood Association (ECA), (2016).

abolition of corporal punishment they were finding it difficult to control students. Some teachers have resorted to other (also illegal) methods, with girls in 22 schools complaining of inappropriate touching by teachers while administering punishment; the use of verbal abuse and insult was reported in 13 schools.[34]

5. A working paper published in 2014 documented a survey of nearly 3,000 children on corporal punishment in Andhra Pradesh (now bifurcated into Andhra and Telangana) from 2002 to 2009 and concluded that corporal punishment was prevalent and frequent in a typical school: 92% of children aged 7-8 years reported witnessing corporal punishment in the last typical week at school, while 77% said they had experienced it. Among older children (aged 13-14 years), 68% had witnessed corporal punishment and 34% had experienced it at school in the last week.[35]

6. A 2011 report on gender equality which involved 6,011 respondents aged 10-35 found that physical, verbal and emotional violence, including in the name of "discipline", was common in homes and schools, and that mothers and fathers were the main perpetrators of violence.[36]

Recommendations & Suggestions

"Infliction of pain or discomfort, however minor, is not a desirable method of communicating with children."

-American Medical Association, (1985)

We are currently going through a period where the treatment of children and young people is being scrutinized very carefully and methods of discipline in school are being debated upon. Corporal punishment which traditionally had a pride of place in pedagogy where the maintenance of strict discipline was required is beginning to lose its ground. The whole debate regarding discipline and punishment of children and young people is now a ground of conflict, controversy and struggle.[37]

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34 City Level Programme of Action (CLPOA), Association for Social and Health Advancement (ASHA) & Action Aid, *Children's Voice to Community Child Protection Mechanism in West Bengal:* A Study, Kolkata: City Level Programme of Action (CLPOA), (2015).

35 *Ibid.*

36 Plan India, *Engaging Men and Boys towards Gender Equality: The State of the Girl Child in India,* (2011).

37 Ranjana Bhatia, *Elimination of Corporal Punishment in Schools:* Bane or Boon, RESEARCH GATE (Feb. 19,

The ill effects of corporal punishment include humiliation, loss of self-respect, degradation, feeling of helplessness and lowering of self-worth. This often leads to aggressive behavior or withdrawal.[38] Regular spanking of children overtime makes them cheats/liars, disobedient, devoid of feelings and bullies.[39] Children's cognitive development can also be affected by frequent punishment or spanking. This results in their poor academic performance in schools. [40]

Alternatives to Corporal Punishment

The preference of many educators for corporal punishment does not depend on a lack of alternatives; demonstrably effective alternatives are numerous. Many of these alternatives are based on learning theory approaches. These emphasize the extinction of inappropriate behavior by the elimination of rewards that maintain undesirable behavior, in conjunction with reinforcement of desirable behavior. This combination of extinction and reinforcement procedures has been shown to be very effective in managing classroom behavior of disruptive students.[41] These alternatives provide parents and teachers with a focus on child development. They present strategies which can lead to less violent behavior in children and they can help decrease the frustration and helplessness in parents and teachers which often lead to physical punishment.

1. One of the most useful ways to achieve healthy child development is to promote words instead of actions. If a child would verbalize his feelings, he would learn to delay action. Increasing the child's capacity to put words to feelings and actions, results in increased tension regulation, self awareness, and thoughtful decision-making. This process can be accomplished by the following means:

i. Talking and using words instead of actions, i.e., talk rather than hit. Talk with the child about what behaviors are acceptable or not, what is safe or dangerous, and why.

2018, 11:33 PM), https://www.researchgate.net/profile/Ranjana_Bhatia2/publication/ 270453919_Elim ination_of_Corporal_ Punishment_in_SchoolsBane_or_Boon/links/54ab6c020 cf25c4c472f7765/Elimination-of-Corporal-Punishment-in-SchoolsBane-or-Boon.

38 Sternberg K., "et. al.", *Effect of Domestic Violence on Children's Behavior Problems and Depression,* 29 DEVELOPMENTAL PSYCHOLOGY 44-52 (1993).

39 Straus M. A., *"et. al.", Corporal Punishment by Parents and Subsequent Anti-Social Behavior of Children,* 155 ARCHIVES OF PEDIATRICS AND ADOLESCENT MEDICINE 761-767 (1997).

40 Straus M.A., & Paschall M.J., *Corporal Punishment by Mothers and Child's Cognitive Development:* A Longitudinal Study, Paper presented at the 14th World Conference of Sociology, Montreal, Quebec, Canada (1998).

41 SULZER-AZAROFF B. & MAYER G.R., ACHIEVING EDUCATIONAL EXCELLENCE (New York: Holt, Rinehart & Winston, 1986).

ii. Listening to the child - find out why he/she did or did not do something.

iii. Explaining your reasons - this will enhance the child's decision-making capacities.

2. The word "discipline" comes from the Latin word for "teaching" or "learning." Children's behaviors have meaning, and behaviors are directly connected to their inner feelings. Thus, discipline is a process which addresses their behaviors and the feelings.

3. Help the child label his or her feelings with words as early as possible. The nine inborn feelings (interest, enjoyment, surprise, distress, anger, fear, shame, disgust, and dissmell) should be labeled with words. This will facilitate tension regulation and aid the transition to more mature ways of handling emotions.

4. Positive reinforcement like rewards and praise will enhance the child's self-esteem when appropriate standards are met. Positive reinforcement is more effective in obtaining long term behavioral compliance than frightening and shaming punishments.

5. Set a good example for the child. The child wants to be like his parents and teachers. Children identify with their parents and teachers, and they will put feelings and actions into words when they see their parents or teachers doing this. Who the parents and teachers are, and how they behave, will have a profound impact on the development of children. Your child will follow your lead.[42]

Assessment of Corporal Punishment by Various Headmasters

The deliberations of a roundtable meet of principals of over 40 reputed schools of NCR on the theme "Elimination of Corporal Punishment: Bane or Boon in the Garb of Human Rights" (Roundtable meet organized by Amity Institute of Education, November 2007) were as follows:

1. No violence against children is justifiable. Corporal Punishment does not correct but suppresses undesirable behaviour.[43]

2. Discipline is necessary but discipline is not equivalent to punishment.

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42 Paul C Hollinger, *Effective Alternatives to Physical Punishment: The View From Psychoanalysis and Infant and Child Development,* PSYCHOLOGY TODAY (Feb. 20, 2018, 11:00 PM), https://www.psychologytoday.com/us/blog/great-kids-great-parents/200909/ef fective-alternatives-phys ical-punishment-the-view-psychoanaly

43 *Supra* note 41.

3. Pre-service and in-service programs for teachers, principals, and other school staff should be improved to induct them to techniques for building better interpersonal relations, positive guidance in the classroom, and new strategies for maintaining student interest.
4. Corporal Punishment should be completely wiped off from the system and teaching should be made joyful experience for teachers as well as students (Ms. C. Gurumurthy, Director Academics, CBSE).
5. The key to instilling a co-operative attitude in children is to avoid extremes of authoritarian or permissive child rearing.
6. Even verbal violence should not be permitted in schools (Prof. A.K. Sharma Former Director, NCERT).
7. Counselors should be involved to understand a child's psychology and to deal with his misdemeanour.
8. Deprivation and motivation should be done simultaneously to discipline a child. While doing so, all stakeholders i.e. parents, peers and counselors should be involved (Ms. Bharati Sharma, Principal Amity International School).
9. Corporal punishment adversely affects a student's self-image and contributes to disruptive and violent behaviour (Mr. Ashok Pandey, Principal, Ahlcon International School).
10. If the children are loved and their feelings are respected, the situation of punishing them will not arise.
11. Teachers who love their students unconditionally would never find any occasion to hit or hurt them.
12. Corporal Punishment perpetuates a cycle of child abuse, causes mental and physical injury to a child and creates emotional stress and low self-esteem amongst students (Ms. Meenu Goswami, Principal, K.R. Mangalam World School).
13. Workshops and Training Programs on "Child Behaviour and Psychology" should be conducted on regular basis.

14. Case studies and real life situations should be taken up by Teacher Training Institutes so that they can churn out teachers who are more caring and understanding towards children.[44]
15. Teachers need to adopt "Positive re-enforcement" and "Assertive Discipline" while dealing with students (Mr. Minhas, Principal, Guru Harkishan Public School, Chandigarh).
16. A culture has to be developed where the word "Punishment" is rooted out from the system.[45]

Concluding Remarks

With the advent of western culture steadily creeping into our cultural fabric, we are all concerned about the future of our children who are being bombarded by the information explosion and increasing consumerism and commercialization. While we all agree and have to abide by the order of the Honorable Court banning corporal punishment in schools, we also realize that disciplining a child is very important. The measures to be adopted for disciplining the child need to be given a serious thought. These measures have to keep in mind the behavioristic and humanistic requirements of the individuals as well as the society on the whole.

44 *Ibid.*
45 *Ibid.*

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