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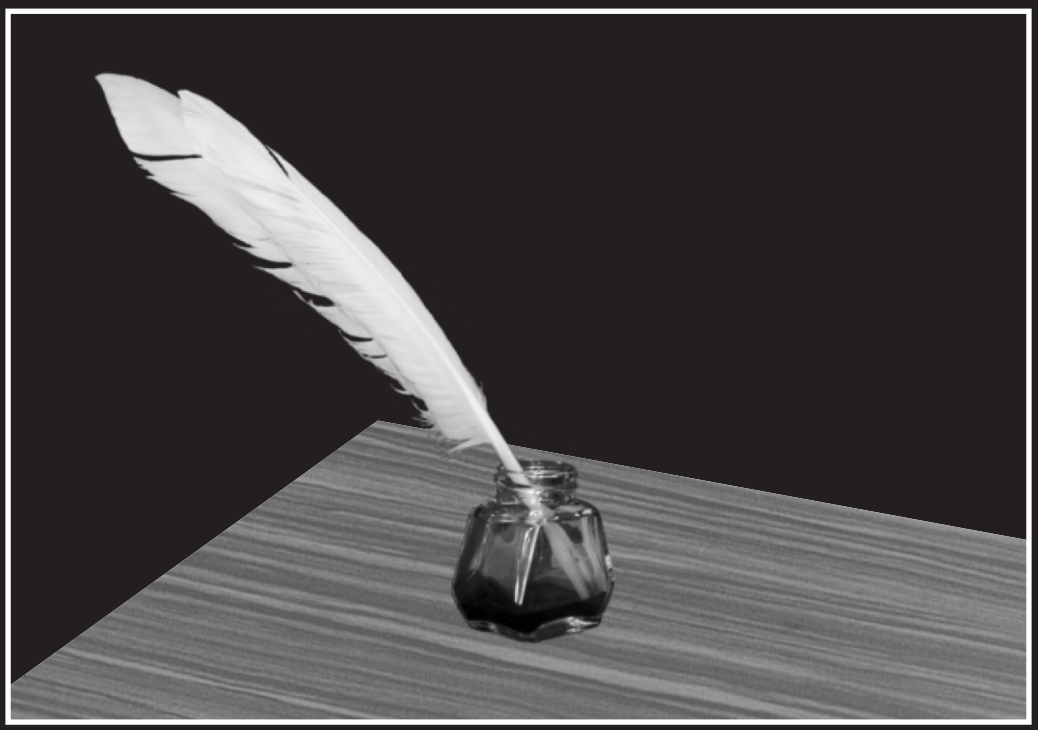

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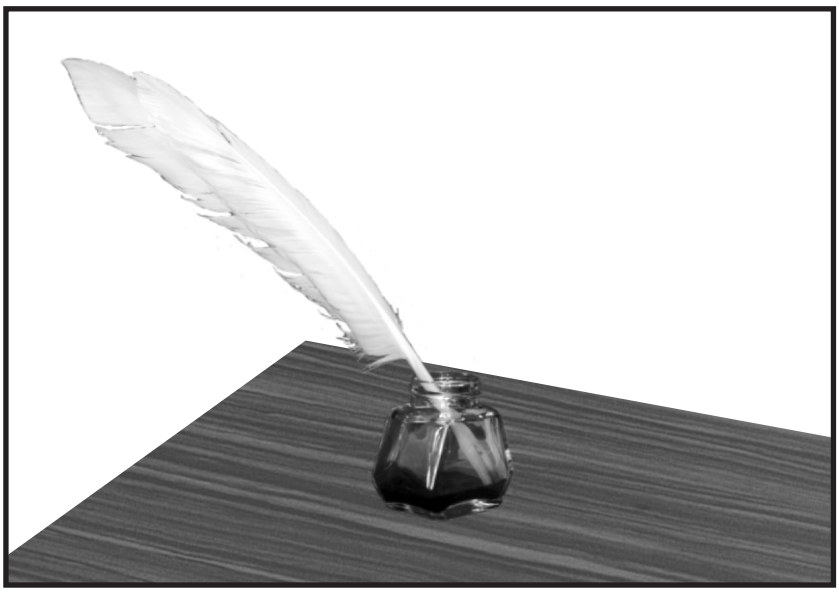

Army Institute of Law

Sector 68, Mohali

Contents

RELIGION v. REFORM: ROLE OF INDIAN JUDICIARY VIS-À-VIS 'ESSENTIAL RELIGIOUS PRACTICES' TEST

Aishwarya Deb*

INTRODUCTION

"Religion is most threatening to liberal democracy where it informs national identity or permeates everyday life.[1]*"*

Religion is undoubtedly an important facet of Indian nationhood. However one cannot deny the fact that in India, primarily, the source of discrimination has been religious personal laws, unlike other countries where it results from the codification of the prejudices of the powerful.[2] Despite such inconveniences, it is difficult to identify a person without referring to his or her religion, owing to the fact that India is a deeply religious society and religion also provides certain perks to respective communities. In such a scenario, religion in India is not just a problem to overcome but also a presence to be accommodated. The concept of religious freedom in India, enshrined under Article 25 of the Constitution of India, has been clubbed with a mandate to the state to intervene in religious affairs which go against the societal order. This emanates from the idea that even though Indian nationalism commits itself to social reform, it is anchored to rival and contentious religious or cultural traditions. So much so, the State, more often than not, has to intervene in matters of religious concern in pursuit of justice. However, the inability of the State to develop any proper mechanism in achieving the fundamental objective of the Constitution, i.e. to seek an amelioration of the social conditions of people long burdened with inequities of religiously based hierarchies, has exacted the Judiciary to take a remedial measure. This eventually led to the development of the 'essential religious practices' test by the Supreme Court of India, in its earliest days, in order to determine the immunity of religious practices from State intervention.

Back then, it was inevitable for the judges to avoid the questions of theological controversy considering the fact that religion was inscribed in routine social patterns in India.

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1. Gary Jeffrey Jacobsohn preface to GARY JEFFREY JACOBSOHN, THE WHEEL OF LAW (2003).

Subsequently, the Judiciary began applying the doctrine in matters which sought to bring about societal transformation. Considering the fact that religion plays a profound role in people's lives, it became somewhat necessary for the Courts to inquire into the essentials of religion in order to give effect to social reform efforts which would otherwise have been overshadowed by the complex religious practices. Since then, it has been a juridical journey of determining 'essential religious practices' to arrogating to itself the right to decide the 'essentials of religion'. While embarking upon such a journey, the judiciary has more often than not been burdened by interpretive responsibilities that exceed their field of expertise. Such an attempt made by the Judiciary, even though necessary for guaranteeing the rights of people, has been criticised by many scholars as an interventionist approach. So much so, the scholars believe that such an approach has led the Court to become a seat of theological authority rather than a constitutional authority. For instance, recently, the Supreme Court deliberated upon the issue of triple talaq in the case of ***Shayara Bano v. Union of India***[3] , and declared the practice as arbitrary and unconstitutional, relying upon the said doctrine of essential religious practice. It is true that the use of this test has facilitated remedying of several social evils, similar to the aforementioned, hence promoting the interests of justice at large. However, it would be pertinent to note that the Court could have used reasoning based only on gender discrimination instead of resorting to the scriptures of Muslim personal laws and figuring out whether triple talaq is an essential practice of Islam. Similarly, with the case of ***Goolrokh Gupta***[4] pending before the Supreme Court, we only have to wait and watch whether the Court refrains from using the essential religious practices doctrine and adopts an approach towards horizontal application of fundamental rights instead. The issue pertaining to the legitimacy of the doctrine, which has hardly ever been questioned in the Court of law, however remains unanswered. Secondly, what also remains debatable is the issue regarding the capacity of the Courts when they interpret the religious doctrines and rule exclusively on the interpretation of the same. The fact that the doctrine has been used by the Courts in various circumstances, that also quite inconsistently, portrays the arbitrary use of discretion by various Courts. The role of the Supreme Court as the protector of individual's fundamental rights is conflicting with its role as a constitutional court, when it is

2. GARY JEFFREY JACOBSOHN, THE WHEEL OF LAW 104 (2003).
3. (2017) 9 SCC 1.
4. Mehal Jain, Parsi Woman's Identity Crisis: Prima Facie No Case For Accepting 'Doctrine Of Merger Of Wife's Religious Identity With That Of Husband, Observes SC, (December 7, 2017), http://www.livelaw.in/parsi-womans-identity-crisis-prima-facie-no-case-accepting-doctrine-merger-wifes-religious-identity-husband-observes-sc/.

acting as a religious authority in determining the essentials of religion. In such a scenario, it is pertinent for us to explore the likelihood on the part of the Courts to make shift from the said test in cases where an alternative approach can be possibly resorted to. In order to understand the efficacy of the test and the role of the Courts as a theological authority, the author makes a brief comparison with the doctrine of 'margin of appreciation' in religion cases followed by the European Court of Human Rights(ECtHR), which is empowered to protect the rights guaranteed under the European Convention on Human Rights(ECHR). These are certain issues which will be untangled in the course of this paper as the author attempts to analyse the essentiality of the test in redressing social evils and bringing about necessary social changes vis-à-vis the role of the Indian judiciary.

TRACING THE EVOLUTION OF "ESSENTIAL RELIGIOUS PRACTICES" TEST

Even though the Constitution of India provides a secular model for our country, the fact which cannot be ignored is that religion is mixed up in everything which ultimately proves detrimental for attainment of social justice. From the provisions of the Constitution it is quite obvious that the framers had been committed to unsettling practices entrenched in our society by many years of experience. That being the case, India supposedly follows an 'ameliorative secularism model'[5] whereby it seeks to bring about parity between the social reform efforts and the contentious issues of religion and culture.

During the initial years, immediately after the enactment of the Constitution, the Supreme Court had to face the difficult task of defining as to what practices would be eligible for constitutional protection, considering the fact that such practices had been followed by people since time immemorial but were contrary to the constitutional schema. While deliberating upon such issues, the Court also had to resolve appeals against the existing legislations on managing of religious institutions and had to make an attempt to decide which elements are essentially religious. Subsequently, the Court assumed the role of an interpreter of the tenets of various religions, especially Hinduism in the initial years, enabling itself to strike down those tenets that conflicted with the functioning of the Constitution. Thus, in its adjudication as to what constitutes an essential part of religion, the Court framed the highly debatable but frequently resorted to test of essential religious practices. The term 'essential' was coined because the

5. *Supra note 2, at 94.*

Courts had to make distinction between matters of religion and matters of secular activity amenable to state regulation.[6] The attempt was made by the Supreme Court in order to undertake ameliorative action to address the inequalities meted out against the lower caste Hindus and to the indigenous tribes.[7] The driving force behind such an attempt made by the Supreme Court was the legal challenges faced by the State while taking actions for the purpose of fulfilment of social justice and its intervention in reforming the social practices such as abolishing untouchability and allowing entry of lower castes into temples. The Supreme Court seems to have indirectly gathered the idea of resorting to an 'essential religious practice' test by strictly interpreting the words of Dr. B.R. Ambedkar, who believed that *"....there is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond the beliefs and such rituals as may be connected with ceremonials which are essentially religious."*[8] The framers of the constitution themselves left open the debate on religious freedoms by providing the power to the State under Article 25 of the Constitution to make legislations *"regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice."*[9] In order to put a rest to this debate, it seemed essential for the Supreme Court to elaborate the test in order to determine the extent of the right under Article 25. The interesting point to note is that the Court preferred to lay down essential practices test rather than simply subjecting the practices or impugned legislations to the test of public order, morality and health, to which Articles 25 and 26 are already subject.[10] Therefore, instead of denying constitutional protection on the ground that a certain practice violated public order, morality or health[11] , the Court preferred to resort to the test and declare that a certain practice was not an essential part of a particular religion. The Supreme Court elaborated this test in the case of *Commr., Hindu Religious Endowments Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt*[12] , to draw a demarcation between what are matters of religion and what are not. In the aforementioned case, the Supreme Court recognised

6. Shylashri Shankar, A Juridical Voyage of "Essential Practices of Religion" From India to Malaysia and Pakistan, (Feb. 8, 2018), http://www.cprindia.org/articles/juridical-voyage-%E2%80%9Cessential-practices-religion%E2%80%9D-india-malaysia-and-pakistan.
7. *Id., at 14.*
8. CONSTITUENT ASSEMBLY DEBATES, December 02, 1948 speech by DR. B.R. AMBEDKAR, (Feb. 8, 2018), http://parliamentofindia.nic.in/ls/debates/vol7p18b.htm.
9. INDIA CONST. art.25.
10. Justice Aftab Alam, The Idea of Secularism and the Supreme Court of India, (October 14, 2009), https://gandhifoundation.files.wordpress.com/2009/10/justice-aftab-alam-2009-gf-annual-lecture2.pdf.
11. *Id.*
12. AIR 1954 SC 282.

the constitutional legitimacy of the Madras Hindu Religious and Charitable Endowments Act, 1951, regulating Hindu temples and institutions, thereby setting a precedent for deciding on subsequent appeals pertaining to the constitutionality of the legislations governing religious affairs. Subsequently, the Supreme Court in *Sri Venkataramana Devaru v. State of Mysore*[13] , resorted to the essential practices doctrine while deliberating upon whether the exclusion of some people, i.e. the untouchables from entering in a Hindu temple was an essential part of Hinduism. In such a scenario, the essential practices doctrine was rather a progressive test designed by the Apex Court to decide upon matters of religion in order to maintain the main facet of our Constitution, i.e. secularism. For a matter of fact, these disputes arising out of the conflict between religious freedom and state intervention to bring about social change, led to the insertion of the term "secular" in the Preamble to the Constitution of India by the forty-second amendment in order to reaffirm the intent of the State to be neutral towards all religious belongings. It is not surprising that the essential religious practice doctrine came into existence much before the insertion of the term 'secular' in the year 1976, owing to the fact that the apical court must have thought that the only way to reaffirm the concept of a secular state would be only possible by segregating what is essential of a religion from the non-essential elements.

The Supreme Court went one step ahead in the case of ***Durgah Committee v. Syed Hussain Ali***[14], in its role of an exponent of religious tenets by not only extending its role in defining what is essential or not to a religion, but also arrogating to itself the ability to rationalise religion and to eliminate from it mere superstitions. The Court went on to say that the religious practices, which might have sprung from superstitious beliefs that are *"extraneous and unessential assertions to the religion, would naturally have no immunity against state intervention"*[15] and would therefore lose it validity after the reformative measures taken by the instrumentalities of the State. Thus, attempting to isolate what is integral to religion from what is not, proved to be necessary. As a matter of fact, thereafter, in order to pass the essential practices test, in addition to being integral to religion, a practice would have to be shown not to be the product of superstition. It is pertinent to note here that this minor change of usage in the test empowered the Court to now determine what religious practices could be followed and what could not, based on the Court's determination of the essentiality of such practice.

13. AIR 1958 SC 255.
14. AIR 1961 SC 1402.
15. *Id., at ¶33.*

For instance, the Supreme Court in ***Mohd. Hanif Qureshi v. State of Bihar***[16] , held that cow slaughter did not constitute an essential part of Islam and hence dismissed the claims of the petitioners. Similarly, the test has been applied by the Court rather inconsistently in cases of varied facts and circumstances. For example, in the case of ***Sardar Syedna Taher Saifuddin Saheb v. Satate of Bombay***[17] , the Court upheld the authority of the spiritual and temporal head of the Dawoodi Bohra Community to excommunicate as an essential religious practice and struck down a law against religious excommunications. The majority judgement stated that, *"what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion"*[18] . In his concurring opinion, Justice Ayyangar held that Article 25(1) protected the essential and integral practices of the religion, which were not subject to law providing social welfare under 25(2)(b)[19].

From the very discussion above, it is clear that the Courts' approach, at least in its early days was shaped in the desire to reform and reshape certain social and religious practices. This is quite evident from the verdict of the Supreme Court in ***Sastri Yagnapurushdasji v. Muldas Bhunderdas Vaishya*** [20], which shook the entire nation by bringing about a drastic social change in upholding the validity of the Bombay Hindu Places of Public Worship (Entry-Authorisation) Act, 1956 that prohibited Hindu temples from refusing entry to Harijans. The Court went on to define the term 'Hindu' by referring to several texts on Hinduism and concluded that the 'swaminarayana' sect was a part of "Hindu" religion.

Thus, the Court consciously gave itself the power to adjudge the essentiality of any practice of a particular religion and those that were not essential practices could not avail of the protection of Art.25. However, as will be discussed later in this paper, this approach taken by the Court has come to be considered as interventionist rather than reformist considering the fact that the Courts more often than not end up resorting to scriptural interpretation.

ANALYSING THE LEGITIMACY OF THE TEST

There can be no doubt about the fact that the essential religious practices test has facilitated the remedying of various social evils thereby promoting the interests of the people at

16. AIR 1958 SC 731.
17. AIR 1962 SC 853.
18. *Id. at ¶33.*
19. *Supra note 17 at ¶43.*
20. AIR 1966 SC 1119.

large. However, for a secular state like India, where the Constitution itself does not discriminate between religious practices based on their connotation while providing religious freedom, the legitimacy of the test can very well be challenged. The Supreme Court has time and again used the test to evaluate the importance of religious practice irrespective of its religious significance to the followers. The Apex Court in ***Acharya Jagdishwaranand Avadhuta v. Commr. of Police***[21], once again affirmed that the Courts have the power to determine whether a particular rite or observance is regarded as essential by the tenets of a particular religion. Even though the Court accorded the status of a separate Hindu religious denomination, it did not consider the 'tandava dance' as an essential religious rite, rather made it fall under not 'matters of religion'. The Court relied upon the ratio in ***Lakshmindra Thirtha Swamiar case***[22] where it was observed that *".....the difficult task which a court has to perform in cases of this type where the freedom of religious convictions genuinely entertained by men come into conflict with the proper political attitude which is expected from citizens in matters of unity and solidarity of the State organisation"*[23]. Even though the Court made an attempt to justify its action, to distinguish between the essential and the non-essentials of a religion, the test has been long criticised for giving undue power to the judiciary. The Court's transformation from a constitutional court to that of a theological authority has brought forth issues regarding the competency of the Court in interpreting the essential scriptures of particular religion. Following from the discussion in the previous part, the Supreme Court in order to determine the essentials of Hinduism in *Sri Venkatarama Devaru*[24] , resorted to the interpretation of the Agamas[25] . Subsequently, in ***S.P. Mittal v. Union of India***[26] , while dealing with the validity of the Auroville (Emergency Provisions) Act, 1980, the Court held that the teachings of Sri Aurobindo did not constitute a separate religion but only reflected his philosophy. It thus took upon itself the task of establishing the difference between the definitions of religion and philosophy, which is even difficult for specialized theologians to answer accurately.

The Supreme Court also went on to hold that visiting a mosque is not an essential

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21. (1983) 4 SCC 522.
22. *Supra note 12.*
23. *Id., at ¶21.*
24. *Supra note 13.*
25. The Agamas are a collection of religious scriptures of various Hindu devotional schools. The Supreme Court specifically referred to the text of Agamas to find out the true essence of Hinduism as a religion.
26. (1983) 1 SCC 51.

element of Islam by relying upon the Quran and also opined that if a place of worship had a particular significance in that religion, the same would come within the purview of Article 25[27]. The Court again resorted to the same test in ***State* of *West Bengal v. Ashutosh Lahiri***[28] to deliberate upon whether slaughtering of cows on Bakri-Id constitutes essential religious practice. The Court opined that it is not a part of religious requirement for a Muslim that a cow must be necessarily sacrificed for earning religious merit on Bakri-Id.[29] However, the inherent limitation and danger in this kind of approach was exposed in the case of *Shah Bano*[30] where the question before the Court was regarding the applicability of maintenance provisions to divorced Muslim women, in view of the Muslim Personal (Shariat) Application Act, 1937. The Court resorted to the test and by relying on the interpretation of Quran held that there was nothing in Muslim personal law that conflicted with the statutory provisions for maintenance. Though it was a moment of victory for the Muslim women, the decision came under a lot of criticism as there was a great resentment against the Court empowering itself with the authority to interpret Quran.

The legitimacy of the doctrine can also been challenged on the ground that the interpretation of 'essential religious practice' would be different by every bench owing to the fact that there is no straight jacket formula for deciding as to what is essential and what is not. Also, considering the fact that the courts mainly place paramount reliance upon religious scriptures, there are high chances that the definition of what a religion is might vary from one bench to the other. For instance, the Court's decision in ***S.R.Bommai v. Union of India***[31] was perhaps the most convincing verbalization of the interpretation of secularism and religious freedoms in the Indian context. The Court, in this case, sought to distinguish between what religion ought to be from what it is in practice. However, this again portrays the pro-active role undertaken by the Supreme Court in discarding as non-essentials anything which is not proved to their satisfaction irrespective of the fact that they are not religious leaders or even qualified in such matters. As a matter of fact, the Constitution, which does not say freely to profess, practise and propagate the 'essentials of religion', has come to be construed in that manner. Highlighting the shortcomings of this practice, the Calcutta High Court had rightly observed that the *"if the*

27. Mohd. Ismail Faruqui v. Union of India, (1994) 6 SCC 360.
28. (1995) 1 SCC 189.
29. *Id.,at ¶8.*
30. Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556.
31. (1994) 3 SCC 1.

Courts started enquiring and deciding the rationality of a particular religious practice, then there might be confusion and the religious practice would become what the Courts wished the practice to be."[32] Such a judge-oriented approach to social justice sans an iota of consistency or straight jacket formula should be legitimately challenged. Having said that, the test can also be criticised on the ground that it breaches the religious autonomy of an individual as it empowers the Court to decide upon the essentials of religion which ought or ought not to be followed, thereby going against the idea of secularism. In such a scenario, it can be inferred that the way in which Supreme Court has construed religion is quite different from the American view which strives to define religion from the believer's perspective. However, the Supreme Court once again justified its determination of essentials of religion in ***Adi Saiva Sivachariyargal Nala Sangam & Ors. V. Govt. of Tamil Nadu***[33] ,by stating that determination of whether a particular religious practice or belief forms essential part of religion and hence protected under Articles 25 and 26, even in the absence of a specific ecclesiastical jurisdiction, is not barred on the ground of interference with 'complete autonomy' of religious practice. Consequently, the Court also regarded the determination of such issue as a constitutional necessity which ought to be deliberated upon by them, by virtue of it being arbiter of constitutional rights and principles.

It has been argued by many scholars that, in determining 'essentiality', the relevant community itself must be consulted and thereafter it must be decided whether such practices or matters are considered by the community itself.[34] Instead, the doctrine has allowed the Courts to construct religion as it deems appropriate. What the above examples reveal is that the Supreme Court has, over the course of its adjudication of various cases in order to bring about social reforms, substantially narrowed the scope of religion.

THE PATH LESS TRAVELLED- DEVIATING FROM THE ESSENTIAL PRACTICES TEST?

Following the path of the Supreme Court, the High Courts in India have also consistently applied the essential religious practices test giving a clear picture of the scenario where even practices essential in the eyes of the followers of a religion are not guaranteed constitutional immunity if they obstruct social reform. During recent times, various High Courts in India have taken a pro-active role in bringing about social reform by discarding the so-called

32. Acharya Jagdishwaranand Avadhuta v. Commr. of Police, AIR 1990 Cal 336 ,¶8.
33. AIR 2016 SC 209.
34. Jeffrey A. Redding, Secularism, the Rule of Law, and Shari a Courts: An Ethnographic Examination of a Constitutional Controversy, 57 ST. LOUIS U. L.J. 339 (2013).

non-essential practices, according to their own understanding. For instance, the Bombay High Court in ***Haji Ali Dargah case***[35] deliberated upon the question of exclusion of women from the inner sanctum of the Dargah. The most intriguing aspect of the judgement was that the Court justified its horizontal application of Articles 14, 15 and 25 by holding that the Trust is a 'public charitable trust' and the Dargah is a public place of worship. However, while interpreting Article 25, it invoked the contentious essential religious practices test and held that the exclusion of women from the inner sanctum of the Dargah was not an essential practice of Islam. The Supreme Court also went on to affirm the judgment delivered by the Bombay High Court, thereby ensuring the right of women pilgrims to enter the sanctum sanctorum of Haji Ali Dargah.[36] Similarly, the Punjab and Haryana High Court in ***Dilawar Singh v. State of Haryana***[37] resorted to the interpretation of religious books like the History of the Sikhs and their Religion in order to deliberate upon the issue whether a Sikh could appear in the Court as a witness wearing Kirpan. The Court, relying upon the verdicts of Supreme Court in ***Shirur Mutt*** **and** ***Avadhuta*****,** held that the wearing of Kirpan was an essential element of Sikh religion and thereby, the petitioner being an Amritdhari Sikh was entitled to, at all times, wear a Kirpan.

The Kerala High Court, while dealing with the issue whether wearing a 'hijab' was an essential part of the religion or not and if it forms part of essential religious practice, can it be regulated in light of Article 25, resorted to the interpretation of Quran. Consequently, it opined that the covering the head and wearing long sleeve dress has been considered as an essential part of Islam religion[38] and went on to granting permission to a Muslim woman, wearing hijab, to appear for AIPMT examination.

However, there have been instances where the decisions of the High Courts have highlighted the lack of a straight jacket formula to define an essential religious practice. For instance, the verdict of Rajasthan High Court in the ***Santhara case***[39] has been highly criticised owing to the Court's equating of the practice of 'Santhara[40]' with suicide. The Court not only

35. Noorjehan Safia Niaz v. State of Maharashtra, 2016 SCC OnLine Bom 5394.
36. Haji Ali Dargah Trust v. Noorjehan Safia Niaz, (2016) 16 SCC 788.
37. AIR 2016 P&H 149.
38. LiveLaw News Network, Right of women to have the choice of dress based on religious injunctions is a fundamental Right; Kerala HC allows Muslim Girls to wear Hijab for AIPMT, (April 26, 2016), http://www.livelaw.in/right-women-choice-dress-based-religious-injunctions-fundamental-right-kerala-hc-allows-muslim-girls-wear-hijab-aipmt/.
39. 2015 SCC OnLine Raj 2042.
40. Santhara is a ritual of fasting unto death usually observed by the followers of Jainism in India.

held that the practice was not an essential part of Jain religion to be saved by Article 25 or 26 of the Constitution of India, but it also criminalised the act as suicide and attempt to suicide under Sections 309 and 306 of the Indian Penal Code. By stating that, the Court has essentially dictated to the community what the appropriate means to attain spiritual salvation should be. Considering the hue and cry over this decision, the Supreme Court has stayed the order of the Rajasthan High Court. It is believed that the Court could have taken the approach of horizontal application of the fundamental rights while deliberating upon the issue instead of resorting to the essential practices test. For instance, in ***Danial Latifi case***[41] , the Supreme Court reached the same reformist conclusion as in ***Shah Bano*****,** not by resorting to the essential practices doctrine but by subjecting the Muslim Women (Protection of Rights on Divorce) Act, 1986 to the test of Articles 14, 15 and 21 of the Constitution of India and upholding the constitutional validity of the Act. This proves the possibility of bringing about social reforms without resorting to the essential religious practices test, the path which has seldom been followed by the Courts. The Supreme Court even applied the essential practices test while deliberating upon the contentious issue of instant triple talaq in ***Shayara Bano v. Union of India***[42] . The judgement of Justice Kurian Joseph ventured into the religious texts of Muslims including the Quran to reach the conclusion that Triple Talaq is not an essential practice of Islam. It also opined that *"essential practices mean those practices that are fundamental to follow a religious belief. Test to determine whether a part or practice is essential to religion is to find out whether the nature of the religion will be changed without that part or practice.*[43]*"* The Court did not place the practice of triple talaq on the touchstone of fundamental rights to equality, dignity and life nor did it resort to gender based reasoning. Even though the judgement seems reformist, the approach taken by the Supreme Court seems to be rather interventionist where it could have easily taken the other route. Similarly, in the ***Sabarimala Temple Case***[44] , the Supreme Court while referring the matter to a larger bench, framed the issue whether the practice of excluding menstruating women from offering prayers in the Temple constitutes an essential religious practice under Article 25 and whether a religious institution can assert a claim in that regard

41. Danial Latifi v. Union of India, (2001) 7 SCC 740.
42. *Supra note 3.*
43. *Id., at ¶53.2.*
44. Indian Young Lawyers Association & Ors. v. State of Kerala & Ors., (2017) 10 SCC 689.

under the umbrella of right to manage its own affairs in the matter of religion.[45] It is just a matter of time for us to know the stand taken by a larger bench of the Apex Court. As a matter of fact, this case provides much more than an opportunity to strengthen gender equality in India and would also allow the Apex Court to set a strong precedent in terms of adoption of a better approach rather than simply resorting to the essential practices doctrine. It can only be hoped that the Apex Court considers the horizontal application of fundamental rights and incorporation of constitutional morality in the religious freedom jurisprudence.

Also considering the case of ***Goolrokh Gupta***[46] , where the Gujarat High Court had upheld the decision on part of Valsad Parsi Anjuman Trust to restrain a Parsi woman from participating in the funerary rites of her father at the Fire Temple dedicated to Zoroastrianism on the ground that upon marriage to a Hindu man under the Special Marriage Act, 1954, the woman had ceased to be a Parsi and deemed to have converted to Hinduism, the Supreme Court provided some relief to the aggrieved women by allowing them to perform the last rituals. However, it was just an interim order and the Court is yet to decide on the question of religious identity of the Parsi and whether prohibiting such women from entering the Tower of Silence is an essential part of religion or not. With the change in societal circumstances, it has to be seen whether the Apex Court deviates from the decision taken in ***Saifuddin***. We also need to wait and watch whether the Supreme Court answers the aforesaid question through the lens of gender equality and subjects the practice to the test of fundamental rights under Articles 14, 21 and 25.

ESSENTIAL RELIGIOUS PRACTICES Vs. MARGIN OF APPRECIATION

The essential religious practice test formulated by the Supreme Court, in order to determine as to which practice could be accorded immunity from state intervention, can be compared with the doctrine of 'margin of appreciation' followed by the European Court of Human Rights (ECtHR), a supra-national authority. The doctrine of the 'margin of appreciation' provides the ECtHR with the means, by which to permit States to enjoy the freedom to apply the European Convention on Human Rights (ECHR), in accordance with their own exclusive legal and cultural traditions without infringing the ultimate aim and purpose of the ECHR. However,

45. *Id.,at ¶30.*
46. *Supra note 4.*

the only difference between the usage of these two doctrines are that the latter one is clearly a discretionary power in which the ECtHR chooses to refrain from interfering with a decision made by a State party even though, on the facts, they ought to have interfered with the decision on the basis that it was contrary to the ECHR. The doctrine clearly reflects the idea of judicial self-restraint unlike the doctrine of essential practices test, whereby the Indian Courts have played more of an interventionist role rather than a reformist one. The 'margin of appreciation' doctrine has been used extensively in areas such as religious liberty. It would be noteworthy to mention the case of ***Lautsi v. Italy***[47] , whereby the Grand Chamber of the ECtHR surprised numerous people in reversing a Chamber ruling, which had established unanimously that the Italian regulation which had mandated the presence of a crucifix in public schools, had violated the right of the petitioner to educate her children according to her secular convictions, as well as the religious freedom of her children as per Article 9[48] of ECHR[49]. The Grand Chamber reversed the initial ruling of the Chamber, clarifying its position and incorporating the 'margin of appreciation' doctrine in assessing the said regulation. Firstly, the Court elucidated the ECHR requirements of religious neutrality in the educational sphere. Relying upon its jurisprudence in the case of ***Zengin***[50], it indicated that this requirement consists of a prohibition on proselytizing or indoctrination in the educational framework, which is compatible with establishing mandatory religious education and giving priority to the knowledge of the majority religion.[51] Secondly, the Grand Chamber asserted that the crucifix is a passive religious symbol whose influence cannot be compared with that of education and participation in religious activities.[52] While resorting to the 'margin of appreciation', the Grand Chamber held that as long as there is no intention to indoctrinate, the state enjoys a margin of appreciation in deciding on the presence of the crucifix in classrooms. Similarly in the case of ***Dogru v. France***[53] , the ECtHR dealt with the issue of ban on head scarves in France. Relying on the 'margin of appreciation' doctrine, the Court assumed in the first place that the political choice of state secularism could in itself justify

47. [2011] ECHR 2412.
48. The European Convention on Human Rights, 1950, art.9.
49. Marisa Iglesias Vila, A Margin of Appreciation Doctrine for the European Convention on Human Rights: In Search of a Balance between Democracy and Rights in the International Sphere, https://law.yale.edu/system/files/documents/pdf/sela/SELA13_Iglesias_CV_Eng_20130508.pdf.
50. Zengin v. Turkey, [2008] 46 EHRR 44.
51. Vila, supra note 49 at10.
52. *Id.*
53. [2008] ECHR 1579.

restrictions on religious freedom and could require sacrifices from individuals for the sake of safeguarding tolerance and religious harmony.[54] The Court went on to define the scope of Article 9 of ECHR by stating that it does not protect every act inspired by religion and further opined that the State had the power to limit the freedom to manifest a religion if the exercise of that freedom conflicts with the aim of protecting the rights of others, public order or morality. What is quite evident from the above examples is that the Court, by making expansive use of this doctrine, has in a way jeopardised its role as a protector of rights of the citizens. The doctrine was meant to ensure that the international protection of human rights and sovereign freedom of action are not contradictory, but complementary. However the judicial approach has come to show that the Court has restrained itself a bit too much by providing wider margin of appreciation to the contracting States to restrict religious liberty, which is totally opposite to the stand taken by the Indian Courts. It is clearly visible that the Indian perspective and the ECtHR one are in two different extremes, as the former symbolises more of an interventionist approach while the latter has extensively abided by the scheme of judicial-restraint thereby maintaining its auctoritas vis-à-vis states.

CONCLUSION

Considering the fact that our Constitution is a social reform document, intended to denounce and deter social evils, the provisions regarding religious freedom should be read through this reform lens. However, it totally depends on the how the Judiciary interprets it whenever any legal challenge pertaining to religious liberty comes before it. From the discussion above, it can be inferred that Articles 25 and 26 are intended to guide the community life and ordain every religion to act according to its cultural and social demands for the purpose of establishing an egalitarian social order. Consequently, the inegalitarian social practices ought to be eradicated. Such a process involves the adjudication of issues by the Courts to give effect to the social reform efforts. The approach taken by the Courts in India i.e. resorting to the essential religious practices test might seem to be an interventionist approach therefore ultimately leading to the question of legality of the test itself in a secular country like India. Nonetheless, the path

54. *Supra note 49 at 12.*

resorted to by the ECtHR also doesn't seem to be a feasible one, to be followed in a society like ours owing to the orthodox cultural traditions prevailing in it and also the political conditions, where the political parties use the religious issues as bait for gathering votes. Thus what is primary requirement in such a situation is, on the part of the Courts, to resort to an alternative approach wherever possible by placing the practices to the test of fundamental rights or fundamental constitutional principles which derive their legitimacy from the Constitution itself. As far as the pending cases are concerned, we can only hope that the Supreme Court, in its wisdom, resorts to the best possible approach ,which would be far more acceptable, in order to bring about a social change.

THE CONSTITUTIONALITY OF KHAP PANCHAYATS: A SOCIO-LEGAL CRITIQUE

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"Caste is a notion; it is a state of the mind."

Dr. B.R. Ambedkar[1]

INTRODUCTION

KHAP PANCHAYATS: INCEPTION & JURISDICTION

Khap Panchayats, a.k.a. Kangaroo Courts, are old fashioned local judicial organizations active mainly in Haryana, northern Rajasthan, rural belt of Delhi and western Uttar Pradesh. These panchayats are a part of the rural social set-up and have their roots intruded deep into the past, expected to be in existence since the fourteenth century.[2]

Khaps are socio-political groups, which usually comprise of the upper caste and elderly men from the Jat community, united by geography and caste. They usually help in settling disputes between individuals and villages. However, these bodies are undemocratic in origin, lacking any Constitutional or legal basis. They have unwritten laws and their decisions are clearly illegal and unconstitutional. Without application of law and acting on their whims and wishes, they impose self-created norms backed by sanctions in the name of preserving morals and values of the society.[3]

Their continuous existence could be traced from Medieval period (around 800 years ago) in which the tribe and gotra-based institution of khap is believed to have been started by the upper caste 'Jats' to consolidate their power and position in the community.[4] During the British rule, institutions like Khap Panchayats remained as parallel political authority which also became a means to consolidate the political status of its influential leaders and are still

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1. Dilip Kumar, Ambedkar's Critique of caste system, SN PHILOSOPHERS (Aug. 1, 2018, 2:30 PM), http://snphilosophers2005.tripod.com/dilip.pdf.
2. Vineet Singh, Khap Panchayats: Honor Killings in India, RESEARCH GATE (Aug. 2, 2018, 12:35 PM), https://www.researchgate.net/publication/297346507_Khap_Panchayats_Honor_Killings_in_India.
3. Kavita Kachhwaha, Khap Adjudication in India: Honouring the Culture with Crimes, 6 INT. JOUR. OF CRL. JUS. SC.298, 298 (2011).
4. Utkarsh & Aishwarya, Khap Panchayat- Tradition v/s Modernity,JOURNAL ON CONTEMPORARY ISSUES OF LAW (Aug. 18, 2018, 10:02 AM), http://jcil.lsyndicate.com/wp-content/uploads/2017/01/Utkarsha-Aishwariya.pdf.

continuing today in independent India.

In the ancient era, man was living a spasmodic life, villages were being established and the society was on the path of progress. At such a stage, Khap Panchayats, came into existence as a body regulating the rules in such villages/area, consisting of elderly and well reputed members of the society, who were deemed to be the custodian of such rules and guardians of public morality. The philosophy behind Khap Panchayats is that of *cultural relativism*,[5] wherein members of one caste find themselves superior to others and protect themselves by their own authority.

POLITICAL STRUCTURE OF KHAP PANCHAYATS

Khap Panchayats have a two tier system. They comprise of Khap Panchayat at Village Level and Sarv Khap Panchayat consisting of various Khap Panchayats falling under its adjudicative domain.

1 **Khap Panchayat at Village Level –** It is a relatively smaller body at the village level, giving quick decisions. These panchayats consists of elderly members from the Jat community, often giving harsh punishments for transgression of various social norms and creating a deterrent effect amongst the villagers. It also acts as an executive body when it has to enforce its orders.

2 **Sarv Khap Panchayat –** It is a collective body of various Khap Panchayats, acting like a federal system where for instance, matters related with two or more than two khaps, or any appealed matter from a khap panchayat by any victim is raised in this larger body in its general meetings. In its informal meetings, the sarv-khap mostly functions as an adjudicative body, and the implementation of the decisions is either left to the khaps concerned or to a committee of influential persons constituted with the consent of the khaps to see to their implementation.[6]

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5. *Ibid.*
6. M. C. Pradhan, The Jats of Northern India: Their Traditional Political System - II, THE ECONOMIC WEEKLY, 18th December, 1965.

IDEOLOGY OF KHAP PANCHAYATS

The Khap Panchayats have been declared illegal and unconstitutional bodies by the Supreme Court for their alleged encouragement of honour killings, but they continue to hold sway in parallel with the state machinery and are even more powerful than the elected panchayats. There have been many incidents in the past, which clearly depicts the ideology of the Khap Panchayats. For instance, honour killing, female foeticide, forced marriage and sagotra marriages are those matters where the strict and forceful decisions of Khaps is different from the law.[7]

Khap Panchayats have a stronghold in backward areas where the reach of law is minimum, thus enjoying dominance. They create and enforce norms in the name of preserving the culture, morals & values of the society. Thereby, leaving no choice for the victims but to obey such unlawful decisions or face the wrath of the entire society. Khap Panchayats have been popular due to their efficient justice delivery system, for which an ordinary court would take months or even years to decide upon. Therefore, Khaps are considered a better alternative by some people, rather than being subjected to harassment at the hands of Police in certain cases.[8]

KHAP PANCHAYATS: UNWARRANTED CUSTODIANS OF LAW & ORDER

Belief of People in Khap Panchayats

Apart from being constituted from identical set of people in the community, there are certain characteristics which make the Khap Panchayats widely popular among the masses of Northern India. The people who have firm belief in such organization put forth many arguments in their support:

1. Khaps deliver the verdict in one sitting while the courts drag the cases for years.
2. The members of the Khap Panchayats are usually aged members, often acting as custodians of culture of the community and thus people usually abide by their decisions.
3. Khaps as an institution are ancient in nature, owing to which people have immense confidence over their verdicts.[9]

7. G.S Rajpurohit, & A. Prakash, Khap Panchayats in India: Legitimacy, Reality and Reforms, 2 INTERNATIONAL JOURNAL OF ALLIED PRACTICE, RESEARCH AND REVIEW 81, 81-90 (2015).
8. Vidhya Bhushan Rawat, Haryana's Khap Panchayats Are Unconstitutional, COUNTER CURRENTS (Aug. 20, 2018, 11:00 AM), http://www.countercurrents.org/rawat181012.htm.
9. *Supra note 2.*

Moreover, no money is involved, the procedure is less time consuming; there is a direct negotiated settlement between both parties before a large audience that includes persons of authority in the panchayat; they help to maintain social order among people of different castes; and they act as an important agency of social control. These factors are responsible for its survival over the period of time.[10]

Organization

In Northern India, the caste council generally consists of five elder members of the renowned families, persons of acknowledged qualities of leadership and capable of impartial judgement. These five people are called Panchas. Head of the caste council is called Mukhiya or Pradhan.[11]

Structure of the Khap Panchayats

According to Pradhan,[12] the Khap could be defined as a unit of a number of villages organized into a political council for the purpose of social control. The Khap area was inhabited either by a dominant caste that had control over most of its agricultural land, by a single clan or by more than one clan, each with a number of villages and being predominant in those villages. When a single clan had only few villages—say, four or five—other clans could also join into a common Khap for the purpose of their defence and control over their people. When a Khap was dominated by a single clan, its headship lay within that clan. When the number of clans exceeded one, the headship went to that clan that had more number of villages under its aegis.

CLASSIFICATION OF KHAP PANCHAYATS

Khaps can be classified into the following categories:

1. **Based on Single Caste and Single Gotra:** A particular geographical area is dominated by a single Gotra of a particular caste. The Gotra has a sizable number of villages in that area, e.g. Dahiya Khap, Huda Khap, Malik Khap,

10. Suminder Kaur, Relevancy of Khap Panchayats, INTERNATIONAL JOURNAL OF LAW (Aug. 24, 2018, 2:00 PM), http://www.lawjournals.org/download/201/3-5-13-623.pdf.
11. *Ibid.*
12. M.C PRADHAN, THE POLITICAL SYSTEM OF JATS OF NORTHERN INDIA 97 (Oxford University Press, Delhi 1966).

Sangwan Khap and so on, all of which are located in Sonepat, Rohtak, Jhajjar and Bhiwani districts of Haryana and the Balyan Khap in district Muzzafarnagar of Uttar Pradesh.

2. **Based on Single Caste and Multiple Gotra:** When the entire village(s) and area is dominated by a single caste, with some of the villages dominated by various Gotras, it is considered as Single Caste and Multiple Gotra system. Chaubitii organization of 24 villages of Meham in Rohtak district of Haryana is an example of such Khap.

3. **Based on Multi Caste and Multiple Gotra:** This system is distinguished as one having villages in a particular geographical area, of which some villages are dominated by a particular caste and other villages by other castes but different Gotras. Bawal Khap of Chaurasi in Rewari district of Haryana may be considered as this type of Khap.[13]

UNCONSTITUTIONAL POWERS OF KHAP PANCHAYATS

There is no doubt that Khaps are an undemocratic parallel system flourishing because of social and political reasons. The social reasons are the existence of similar Panchayat in neighbouring villages, feeling of brotherhood among members of the same clan, friendly relations within the villages, whereas the political reasons are conversion of Khaps into vote banks and the failure of the political and local legal authorities to raise the voice against Khaps.[14] The Khaps are the part of the social system in rural India, dominated by the upper castes of the society. But if each caste and community will have their "Judicial Panchayat" then nobody can save our country.[15]

The political parties do not have the courage to speak against these organized gangsters of caste due to vote bank politics. The tragedy with India is that the Indian state and its secular Constitution have virtually become prisoners of these *Khapists* everywhere. A strong political action is only possible when all the political parties agree with the common programme of

13. K.S Sangwan, Khap Panchayat in Haryana, JATLAND (Aug. 25, 2018, 3:40 PM), www.Jatland.com/forum.
14. Suranjita Ray, Khap Panchayats: Reinforcing Caste Hierarchies, MAINSTREAM WEEKLY (Aug. 26, 2018, 8:38 PM), https://www.mainstreamweekly.net/article2205.html.
15. Juhi Gupta, Caste, Culture and Khap: No honour, only Killings, 2 INTERNATIONAL JOURNAL OF RESEARCH IN HUMANITIES, ARTS AND LITERATURE 39, 39-48 (2014).

fighting against injustice.[16] A strong political will to implement the constitution and rule of law, is necessary so that these unconstitutional and parallel structures do not weaken our democracy. Khaps as a unified social unit are the backbone of spreading caste hatred and denying justice to the people. If the powerful social mobilization in the name of Khaps was not there, we would have seen the culprits being brought to book. The Constitutional framework must be strong enough to deal with such undemocratic institutions wanting to create a parallel administrative and judicial process. When the rape cases against Dalit women increased in Haryana, the Khap Panchayats blamed it to the victim themselves stating that the Government must ban fast food, noodles, as it is increasing "libido" among youths which they cannot control and hence commit rape. Can there be a bigger joke than this?

Khaps have successfully isolated people who do not agree with their diktats and in many places have been responsible for killing innocent couples who fell in love. The state apparatus is virtually dysfunctional in the villages. They have successfully halted all the proceedings against criminals and have not come out against them openly. Similarly, we have seen how the Khaps are silent on rapes. Why the Khaps don't bring out a Fatwa against the perpetrators of such crime? The Khaps have voraciously opposed the inter-caste marriages, thus "protecting" their "purity" of "caste" as ascribed by Manu Smriti.

A strong political action is only possible when all the political parties agree to the common agenda of fight against injustice. Spirit of the Constitution and rule of law should be established so that these unconstitutional and parallel structures do not undermine our democracy. It is a wakeup call as caste panchayats are a growing phenomenon everywhere and have got sanctity from those who use caste identity as a card to justify their crime. Secular India needs to dismantle these caste panchayats or isolate them.

POSITIVE SIDE OF KHAP PANCHAYATS

There has been a lot of progress in the society due to certain orders of the Khap Panchayats. In 2013, Khaps Panchayats in a joint meeting at Bibipur village, Jind, decided to take steps for women empowerment in the society and thus an order was passed that a woman has the legal right in her ancestral property. This order played a vital role in shaping women's value in the Khaps. Khaps have also tried to persuade people to stop the practice of dowry which

16. Sunita & Yudhvir, Khap Panchayat: Changing Perspectives, 2 ASIAN JOURNAL OF MULTIDIMENSIONAL RESEARCH 14, 14-20 (2013).

has been prevalent for many years.

In 2014, Kandela Khap Panchayat in Jind District observed that to use mobile phones and wear Jeans are the fundamental rights of girls and no panchayat should put a ban on it.[17]
In 2015, Balyan Khap Panchayat's Chief Naresh Tikait barred an Army jawan from marrying for two years and also imposed a fine of Rs. 81,000 on him after he demanded an Alto Car in dowry from the girl's family at Rasoolpur village in Rewari district.[18]

Further in 2015, a Khap panchayat in Fatehabad District ordered five shoe slaps as punishment to a 23 year old man who had molested a seven year old girl.[19] Another order by Khaps to prevent female foeticide was passed in 2015. Bura Khap's head Rajbir Bura, with the aim to discourage the practices of female foeticide and dowry, ordered that "a married couple should not have the third child after the birth of two daughters and only Re. 1 should be taken by the groom as dowry from the girl's family." The Panchayat members also called for limiting the expenses of a wedding and decided that only 21 people can be part of a baarat (marriage procession). They also decided to honor the boys of the Gotra who do not accept dowry and couples who have two daughters.[20] All these verdicts have helped the society to make progress in the right direction and have strived to eliminate evil practices which have been practiced for many generations.

NEGATIVE SIDE OF KHAP PANCHAYATS

On the contrary, there have been abundant instances where the Khap Panchayats have been criticized for their unconventional and orthodox method of dispute resolution.
In 2014, a case was reported wherein, on the orders of a Khap, a 22 year old victim was kidnapped from Rajasthan and taken to a village in Haryana's Sirsa district by men who owed him money. There, he was kept in a cage for three months, a period during which he was

17. Press Trust of India, Girls' have right to wear jeans, use mobiles,INDIATV NEWS (Aug. 26, 2018, 4:05 PM), https://www.indiatvnews.com/news/india/girls-have-right-to-wear-jeans-use-mobiles-khap-chief-40388.html.
18. Press Trust of India, Khap panchayat comes to bride's rescue, bans army jawan from marriage over dowry demand, INDIAN EXPRESS, (Aug. 28, 2018, 2:45 PM), http://indianexpress.com/article/good-news/khap-panchayat-comes-to-brides-rescue-bans-army-jawan-from-marriage-over-dowry-demand.
19. Press Trust of India, Haryana Khap panchayat orders shoe-slap justice in molestation case, INDIA TODAY (Aug. 28, 2018, 5:00 PM), https://www.indiatoday.in/mail-today/story/haryana-khap-panchayat-orders-shoe-slap-justice-in-molestation-case-263837-2015-09-20.
20. Press Trust of India, Haryana khap does its bit to end female foeticide, THE HINDU (Aug. 29, 2018, 7:00PM), http://www.thehindu.com/news/national/other-states/haryana-khap-does-its-bit-to-end-female-foeticide/article8011152.ece.

sodomized and forced to drink his own urine. The allegations were made after the family rescued him and approached the police.[21]

In 2015, a Khap Panchayat in Hisar district ordered a newly married couple to break their legal relationship and start living as siblings because they belonged to the same Gotra. The Khap Panchayat warned that if the order is not obeyed, the boy's family will be banished from the Gotra and the Khap Panchayat.[22]

In 2016, a 19 year old girl from Haryana was forced to marry her rapist on the intervention of the local Khap Panchayat. Later she committed suicide by hanging herself.[23]

MODUS OPERANDI OF KHAP PANCHAYAT

The de facto schematics of working of Khap Panchayats indicate a barbaric nature coupled with forceful implementation of their illegal agenda. To illustrate a few examples:

1. In the Boling oil in a pot, a coin is placed and the accused has to get it out of the pot. If the accused would perform the task he/she will be declared innocent.
2. Heated hot red iron stick is placed on the palms of the accused. The palms are covered with seven peepal leaves and turmeric. The accused is made to walk seven steps with the stick in his palms. The accused is considered innocent if the palms are not burnt. This exercise is usually followed if there is any doubt on the character of the accused.
3. Usually, on the basis of looks of a poor widow, she is declared demonic.[24]
4. To impose huge fines or penalties, seizure of land of the accused and forcible acquisition of possession of the same are some other verdicts of self proclaimed Judges.[25]

JUDICIARY AS A CHECK ON KHAP PANCHAYATS

21. Zakir Hussain, Man caged, sodomised on orders of Khap Panchayat, HINDUSTAN TIMES (Aug. 29, 2018, 5:05 PM),https://www.hindustantimes.com/india/man-caged-sodomised-on-orders-of-khap-panchayat/story-kvQW30alvaxICYwHRLV0sN.html.
22. Sreejith Vallikunnu, Khap Panchayat in Haryana orders newly married couple to live as siblings, THE AMERICAN BAZAAR (Aug. 30, 2018, 6:45 PM), https://www.americanbazaaronline.com/2015/12/17/khap-panchayat-in-haryana-orders-newly-married-couple-to-live-as-siblings.
23. Ashley Paige, An Indian Teen Was Forced to Marry Her Rapist, Then Died by Suicide, TEENVOGUE (Aug. 30, 2018, 12:05 PM), https://www.teenvogue.com/story/an-indian-teen-was-forced-to-marry-her-rapist-then-died-by-suicide.
24. Sakaar Srivastava, Honor Killing in India, ACADEMIA (Aug. 31, 2018, 5:45 PM), http://www.academia.edu/4806197/Honor_Killing_in_India.
25. Abhinav Bhatt, 80-Year-Old Woman Paraded Naked on Donkey on Khap's Orders, NDTV (Aug. 31, 2018, 10:00 AM), http://www.ndtv.com/india-news/80-year-old-woman-paraded-naked-on-donkey-on-khaps-orders-709581.

The Judiciary has often come to the rescue wherein the decision of Khaps have been against the fundamental spirit of the Constitution. To elucidate a few cases:

In ***Smt. Laxmi Kachhwaha v. State of Rajasthan,***[26] a public interest litigation was filed in the Rajasthan High Court to draw the attention of the Court towards illegal functioning of Caste Panchayats. The Court observed that these Panchayats had no jurisdiction whatsoever to pass social boycott order, or to impose fine on anyone and to violate the basic rights of an individual.

The Allahabad High Court, in ***Sujit Kumar v. State of Uttar Pradesh & Others,***[27] noted that "In our secular and liberal country, honour killings have been taking place from time to time, and what is deeply disturbing is that Police and other authorities do not seem to take steps to check these disgraceful and barbaric acts. In fact, such honour killings far from being honourable, are nothing but pre-mediated murders and must be treated accordingly."

The court further directed the Police in the State to prevent any such 'honour killings' or harassment of people who love each other and want to get married. The Police must also see that the persons entering into inter-caste or inter-community marriages are not harassed by their relatives and are free to live at any place and with whomsoever they like. If a person who is a major, wants to get married to a person of another caste or community, the parents cannot legally stop him/her. That being so, the Administration must ensure that nobody harasses, ill-treats or kills such people for marrying outside the caste, community or class.

In ***Lata Singh v. State of Uttar Pradesh,***[28] the Supreme Court opined that "the caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news is coming from several parts of the country that young men and women, who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage, the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of

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26. Kavita Kachhwaha, Khap Adjudication in India: Honouring the Culture with Crimes, 6 INT. JOUR. OF CRL. JUS. SC.298, 298 (2011); AIR. 1999 Raj 254.
27. (2002) 2 AWC 1758.
28. AIR 2006 SC 2522.

violence and cannot harass the person who opts for such inter-caste or inter-religious marriage." "We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major, undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the Police against such persons and further stern action is taken against such persons as provided by law."

In ***State of Uttar Pradesh v. Krishna Master & Others,***[29] the Apex Court made an extraordinary move by awarding life sentence to the three accused of honour killing who murdered six persons of a family. The Bench further observed that "wiping out almost the whole family on the flimsy ground of saving the honour of the family would fall within the rarest of rare cases." The Principle evolved in this case was reiterated in ***Bhagwan Das v. State (NCT) of Delhi,***[30] where the Apex Court opined that "there is nothing honourable in honour killings, and they are nothing but barbaric and brutal murders by bigoted persons with feudal mind. In our opinion, honour killings, for whatever reason, come within the category of rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilized behaviour. All persons who are planning to perpetrate honour killings should know that the gallows await them."

Similarly, in ***Arumugam Servai v. State of Tamil Nadu,***[31] the Apex Court observed that "Khap panchayats (known as kata panchayat in Tamil Nadu) often decree or encourage honour killings or other atrocities in an institutionalized way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. Other atrocities in respect of personal lives of people committed by brutal, feudal minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, by these acts, the leades of Khap Panchayats take the law into their own hands. Khap Panchayats amount to kangaroo courts, which are wholly illegal. Hence, this Court directs the administrative and Police officials to take strong measures to

29. AIR 2010 SC 3071.
30. (2011) 6 SCC 396.
31. (2011) 6 SCC 405.

prevent such atrocious acts. If any such incidents happens, apart from instituting criminal proceedings against those responsible for such atrocities, the State Government has been directed to immediately suspend the District Magistrate/Collector and SSP/SPs of the district as well as other officials concerned and charge sheet them and proceed against them departmentally if they do not:

(1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or

(2) if it has occurred, they do not promptly apprehend the culprits and others involved and institute criminal proceedings against them, as in our opinion they will be deemed to be directly or indirectly accountable in this connection."

In ***Chandrapati v. State of Haryana and Others (Manoj Babli Honour Killing Case),***[32] the Punjab and Haryana High Court observed that "Khap Panchayats have functioned contrary to the Constitution, ridiculed it and have become a law unto themselves. There is an ugly nexus between khap leaders, the Police, and local politicians that needs to be exposed."

In ***Sunil Kumar and Others v. State Of Haryana And Others,***[33] Punjab and Haryana High Court directed the Home Secretary, Haryana and the Director General of Police, Haryana, to take effective and preventive measures to thwart protests at the behest of the Khap Panchayats in order to prevent damage to public and private property and the lives of innocent persons.

In ***Shakti Vahini v. Union of India and Others,***[34] the Supreme Court remarked that "The Khap Panchayat as a collective body cannot summon adult girls or boys on their choice of marriage. Whenever there is a collective attack on girls and boys who have attained majority, it is absolutely illegal." Justice Dipak Misra, the CJI, observed that "what we are concerned with is the freedom of an adult girl or boy to pick his or her spouse. If the government does not enact a law to protect couples opting for inter-caste marriage, the court will evolve a principle and lay down guidelines. But the changes cannot be expected to come in a regressive society."[35]

Therefore, Khap Panchayats are playing a powerful role today though they are not legally elected bodies. Their decisions are not enforceable but still their terror continues. Unless these bodies realize the lack of basic moral values in their functioning, they cannot be permitted to

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32. AIR 2011 P&H HC.
33. CWP No. 12689 of 2015.
34. Writ Petition (Civil) No. 231 of 2010. Judgement Delivered on 27th March 2018.
35. Mehal Jain, Khap Panchayats Can't Question Adult's Choice of Marriage: SC, LIVE LAW (Sept. 8, 2018, 9:25 PM), http://www.livelaw.in/khap-panchayats-cant-question-adults-choice-marriage-sc/.

exist. It is also necessary that the illegal activities of Khaps should be strictly and promptly checked by police and other authorities responsible for the maintenance of law and order.

PARLIAMENT'S EFFORTS TO CHECK THE MISUSE OF POWERS BY KHAPS

Various legislative efforts have been taken by the Parliament of India to check the misuse of power and authority by the Khap Panchayats.

Article 19 of the Constitution of India guarantees to all citizens the right to assemble peaceably and without arms; as well as the right to form associations and unions.[36] Therefore, Khap Panchayats cannot be per se deemed to be illegal. However, at the same time, it is humbly submitted that honor crimes can only be checked by prohibiting such assembly for the purpose of condemning the marriage and harassing the newly married couples.

To serve this purpose, the Union Government came up with draft legislation named ***"Prohibition of Unlawful Assembly (Interference with Freedom of Matrimonial Alliances) Bill, 2011."*** This Bill has been the only serious attempt towards a legislative framework to curb the evil of honor crimes. But unfortunately, this Bill lapsed with the dissolution of the 15th Lok Sabha in 2014. At present, there is no special law and honor killing is treated as murder under Section 300 read with Section 302 of the IPC. However, this severely restricts the ring of the crime and many co-accused present in the Khap Panchayat are often let off due to the absence of evidence for their direct involvement. Therefore, the existing homicide law is insufficient to directly punish a gathering for such purpose.

The Prohibition of Unlawful Assembly (Interference with the Freedom of Matrimonial Alliance) Bill, 2011

The Law Commission of India had drafted a Bill to prevent interference of any person in the matrimonial alliance in the name of honour and tradition. The draft bill also intended to declare such panchayats unlawful. The draft legislation proposed that "no person or any group of persons shall gather, assemble or congregate at any time with the view or intention to deliberate on, or condemn any marriage, not prohibited by law, on the basis that such marriage has dishonoured the caste or community tradition or brought disrepute to all or any of the persons forming part of the assembly or the family or the people of the locality concerned. Such gathering or assembly or congregation shall be treated as an unlawful assembly and every

36. INDIA CONST. art. 19, cl. 1. Article 19(1) provides that all citizens shall have the right (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions.

person convening or organizing such assembly and every member thereof participating therein shall be punishable with imprisonment for a term of not less than six months but which may extend to one year and shall also be liable to fine up to ten thousand rupees."[37]

The Endangerment of life and Liberty (Protection, Prosecution and other measures) Bill, 2011

Shocked by the growing cult of honour killings and swiftly dispersing roots of Khap Panchayats across the country, the Law Commission of India had also proposed another legislation namely, ***The Endangerment of Life and Liberty (Protection, Prosecution and Other Measures) Act, 2011,*** to prosecute persons or a group involved in such endangering conduct and activities. Under the proposed law, the act of endangerment of life and liberty shall mean and include "any manner of acts of threat, encouragement, commending, exhorting and creating an environment whereby loss of life and liberty is imminent or threatened and shall include: (a) enforcement of measures such as social boycott, deprivation of the means of livelihood, denial of facilities and services which are otherwise generally available to the people of the locality concerned and, (b) directly or indirectly compelling the persons concerned to leave or abandon their homestead in the locality."[38]

Further, it also provided that "it shall be unlawful for any group of persons to gather, assemble or congregate with the intention to deliberate, declare on or condemn any marriage or relationship such as marriage between two person of majority age in the locality concerned on the basis that such conduct or relationship has dishonored the caste or community or religion of all or some of the persons forming part of the assembly or the family or the people of the locality concerned." The draft legislation also stated that "any person or persons instrumental in gathering of such an assembly or who takes an active part in the execution of the assembly shall also be subjected to civil sanctions, viz., they will not be eligible to contest any election to any local authority and will be treated as a disqualified candidate." [39]

CONCLUDING REMARKS

37. Aarti Dhar, Law Commission's new draft wants khap panchayats on marriages declared illegal, THE HINDU (Sept. 9, 2018, 4:00 PM), http://www.thehindu.com/news/national/Law-Commissions-new-draft-wants-khap-panchayats-on-marriages-declared-illegal/article13379525.ece.
38. J. Venkatesan, Law Commission proposes legislation to curb honour killings, THE HINDU (Sept. 10, 2018, 4:10 PM), http://www.thehindu.com/news/national/law-commission-proposes-legislation-to-curb-honour-killings/article2085349.ece.
39. *Ibid.*

The authors do not suggest a blanket ban on the working of Khap Panchayats altogether. In the past few years, the Khaps have been actively involved in empowering women and rising above unorthodox social practices, ensuring that the women of the present century play a vital role in development of the country and are treated at par with men. Some Khaps have also started accepting inter caste marriages. However, sagotra marriages are still a taboo for all the Khaps.

Politics and Khaps go hand in hand. Their illegal and unconstitutional methods are not adequate to survive in the twenty first century. Hence they constantly seek the support of political brass. Entering in direct politics can make them more powerful. On the contrary, we have politicians who are afraid to lose their vote bank, if any stern action is taken against the Khap Panchayats within their constituency as it enjoys the support of the masses. As a result, Khaps cannot be seen as disappearing from the society in the near future.

It is the need of the hour that the state intervenes and realizes its responsibility and manages to come out of petty "vote bank politics". It is pertinent for the state to curb the extrajudicial powers of Khaps. There is a need to create an environment of dialogue, freedom and gender space to protect individual interests. For this, civil society organizations, academia, activists and media together should take the lead.

SUGGESTIONS BY THE AUTHORS

According to the authors, the following steps will further contribute a great deal in keeping a check on the working of Khap Panchayats:

1. It is suggested that both Bills of 2011 should be reintroduced in the Parliament and should be passed as soon as possible in order to check the misuse of power by Khap Panchayats and in order to prevent the harassment of newly married couples in the name of honor. Khap Panchayats should continue to exist but they should not be allowed to operate as a "Parallel Parliament."
2. Honour Killing should be made a separate offence under the Indian Penal Code by inserting Section 300-A (Definition of Honour Killing) and Section 302-A (Punishment for Honour Killing). Section 300-A can be framed in the following words:

"Whoever kills a person for marrying against the wishes of his or her family or for

having a pre-marital or post marital love affair, commits the offence of honour killing."

Section 302-A can be drafted in the following words:

"Whoever commits honour killing shall be punished with death or with rigorous imprisonment for a term which shall not be less than 20 years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine, which shall be paid to the victim's family."

Honour Killing should be classified as a Cognizable, Non Bailable and Non Compoundable Offence under Section 302-A.

3. Section 167(2) of CrPC should be amended so as to increase the police remand from 15 days to 30 days in cases where there is direct evidence against the accused colluding with Khaps in order to give effect to a crime.
4. Constitution of a Body in every District of Haryana, Rajasthan and Western Uttar Pradesh under the chairmanship of the Senior Superintendent of Police to check the misuse of power and authority by the Khaps.
5. It shall be the duty of the District Education Officer (DEO) along with 4 eminent serving or retired Professors of social sciences to conduct monthly awareness programs in rural areas dominated by Khaps, wherein the community at large could be sensitized about the acceptance of inter caste, inter religious and sagotra marriages.
6. The State/Central Govt. should annually recognize & honor the efforts of Khap Panchayats who have worked in furtherance of elimination of social evils like honor killings, female foeticide, etc., in their respective districts.
7. In order to promote inter caste marriages, the amount of shagun (gift) money provided by the Government in inter caste marriages where one spouse belongs to General category and the other belongs to SC, ST or OBC category, should be increased to one lakh rupees.

WHY HAS INDIA'S PUNJAB FALLEN INTO THE GRIP OF DRUG ABUSE?

Dr. Amit Kashyap*

INTRODUCTION

Punjab is a strategically and economically significant state for India. It yields a border with both Pakistan, a traditional opponent, and with the state of Kashmir, which is at the center of India's dispute with Pakistan. Punjab is also the breadbasket of India and provides some recruits for the military, both of which are necessary for food and physical security for an economically rising country. In the 1980s, Punjab underwent a decade-long violent insurgency caused by grievances arising from the unequal distribution of benefits from the Green Revolution. The state's economy held to be in decline for the past decade, which, along with a rise in drug use and trade, outlines grounds for a crisis that threatens its post-insurgency stability. The unaddressed drug epidemic recognizes the emerging drug-crime-terror nexus to grow. Furthermore, national and state-level elites and politicians remain to work identity as a mobilization tool for battling with the population, mirroring the setting that led to the previous insurgency. Specifically, this research provides an insight into the growing possibility of instability in Punjab. This study derives implications for stability in a border state with porous borders experiencing increased drug use.

Soon it's time for our Indian Police to act like Aardwolf to destroy these termites and make India as addiction free nation. Evidence concerning the effectiveness of drug education, role plays, awareness campaigns, motivational workshops and extra-curricular activities are considered as nullifiers to obliterate drug abuse. Laws regarding the drug prevention, counseling programs and their adaptability by the society have also analyzed. This paper derives implications for stability in a border state with porous borders experiencing increased drug use.
Punjab has been defined as the "Granary of India" and is likewise commonly regarded to be as India's breadbasket because of an effect of the Green Revolution, and which did consider "a model province" and "an object of envy" for another state in India.[1] Historically, Punjab also experienced a continued period of an insurgency that persisted of the late 1970s to early 1990s.

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1. J. S. Grewal, The Sikhs of the Punjab (Cambridge, UK: Cambridge University Press, 1990), 209.

The state became at the backdrop of a partisan battle between the central government and the Sikh radical groups in Punjab. The ultimate look of the insurgency did point since the state shared a boundary with Pakistan. Contemporary reports highlighted a new element of concern; that may create instability again in that critical region of India. A notable rise in the number of drug users and addicts in the state steers to a continuing crisis that is a threat to the state's economy, stability, and external relations.[2] An increase in illegal drug seizures by the Indian governments from 2012–2014 shows the acceleration of the drug trade overall in the country and especially in Punjab, which estimates for most of the heroin seized in India arising from Afghanistan.[3] The important question that emerges from these conditions is: could raising drug use and trade in Punjab if left inadequately addressed that will create conditions similar to the ones leading up to the Khalistan insurgency? Widespread drug use, in particular among the youth, in Punjab may result in internal instability in the state, especially "the Indian authorities are currently failing to address well the issue of drug use within their borders." [4]

The drug menace further allows extremist factors or non-state actors to give oxygen to fuel the population's dissidence within Punjab resulting from the state's slow economic decline compared to other states in the country.[5]

Though Punjab is considered to be stable since the mid-1990s, an economic decline linked with the growing drug economy may create an environment favorable for regional instability. Punjab's stability has regional implications; as it is a neighboring state with both

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2. See for example, Jaiveer Shergill, "It's Time to End Punjab's Drug Epidemic," Daily Mail India, November 26, 2014, http://www.dailymail.co.uk/indiahome/indianews/article-2850879/It-s-time-end-Punjab-s-drug-epidemic.html; Jim Yardley, "Indian State Finds Itself in Tight Grip of Addiction," The New York Times, April 18, 2012, http://www.nytimes.com/2012/04/19/world/asia/drug-addiction-is-a-growing problem-in-punjab.html; Deeptiman Tiwary, "Use of Synthetic Drugs on the Rise in India-Times of India," The Times of India, November 25, 2013, http://timesofindia.indiatimes.com/india/Use-of-syntheticdrugs-on-the-rise-in-India/articleshow/26334302.cms; Swati Mahajan, "Drug Use Rising Among Adolescents in Chandigarh," The Indian Express, April 17, 2016, http://indianexpress.com/article/cities/chandigarh/drug-dealers-punjab-drug-use-rising-among-adolescents-in-chandigarh/; Simon Denyer, "Drug Epidemic Grips India's Punjab State," Washington Post, January 1, 2013, https://www.washingtonpost.com/world/drug-epidemic-grips-indias-punjab-state/2012/12/31/092719a2-48f6-11e2-b6f0-e851e741d196_story.html.
3. United Nations, International Narcotics Control Board Report 2015, 74, accessed June 1, 2016,https://www.incb.org/incb/en/publications/annual-reports/annual-report-2015.html.
4. Molly Charles, Dave Bewley-Taylor, and Amanda Neidpath, "Drug Policy in India: Compounding Harm" (The Beckley Foundation, October 2005), 7, http://reformdrugpolicy.com/wp-content/uploads/2011/10/Drug-Policy-in-India-Compounding-Harm.pdf.
5. Swaminathan S. Anklesaria Aiyar, "Why Punjab Has Suffered Long, Steady Decline," in Economic Freedom of the States of India 2012, by Bibek Debroy et al. (New Delhi: Academic Foundation, 2013), 33–65, https://object.cato.org/economic-freedom-india/Economic-Freedom-States-of-India-2012.pdf.

Pakistan and Kashmir. At the corresponding point, Punjab is the breadbasket of India, whichever is vital for the nation's food security. The Indian government was capable of ending the Sikh separatist insurgency in the 1990s.

Punjab has and will continue to play a central role in Indian politics. Thus, the Punjab is of particular importance not only because of India's border security but for the nation's stability as well.[6] The Indian authorities may not be well equipped to deal with an additional insurgency as it could encourage the already active movements in Kashmir and the northeast and at the same time give a chance to external actors to work more active role in destabilizing the country. Unrest in a region also provides opportunities for criminals "to exploit instability caused by conflicts," and permits them to thrive in situations where the government cannot ensure the safety.[7] Furthermore, volatility in Punjab, having the distinction of being India's breadbasket, can have dire results for India's food security. Punjab's share of wheat and rice got by the Indian government for food safety schemes estimated as 40.6 percent and 26.1 percent, respectively, for the 2014–2015 fiscal year.[8] Punjab also has the distinction of being over-represented in the armed forces, comprising "as much as 8 percent at independence to as high as 10–13 percent in the 1980s" of the service, while the total Sikh population according to 2011 census in the country is about 2.29 percent.[9] While the Khalistan insurgency in the 1980s, the Indian government had to contend with some resistance in the Sikh troops of the Indian Army—this can reoccur if an insurgency appears in the state.

Ultimately,[10] as is the case with Kashmir, Punjab also serves the goals of India's secular policy. If the Indian government wants to assure stability for the nation, it needs to place a premium on addressing the current "Punjab Problem." To that extent, this paper discusses the likelihood of widespread instability and mobilization estimating for the complex interaction

6. Christopher Shay, "Expansion of Mining Risks a Naxalite Resurgence in India's Red Corridor," IISS Voices, May 4, 2016, https://www.iiss.org/en/iiss%20voices/blogsections/iiss-voices-2016-9143/may-12f3/mining-and-naxalites-b551; Vinay Kaura, "India's Challenge: Containing Kashmir's Insurgency," The Diplomat, July 14, 2016, http://thediplomat.com/2016/07/indias-challenge-containing-kashmirsinsurgency/.
7. United Nations, Crime, and Instability: Case Studies of Transnational Threats (United Nations Office on Drugs and Crime, February 2010), iii,https://www.unodc.org/documents/frontpage/Crime_and_instability_2010_final_low_res.pdf.
8. India Brand Equity Foundation, "Industrial Development & Economic Growth in Punjab," February 2016, http://www.ibef.org/states/punjab-presentation.
9. Omar Khalidi, "Ethnic Group Recruitment in the Indian Army: The Contrasting Cases of Sikhs, Muslims, Gurkhas and Others," Pacific Affairs 74, no. 4 (Winter 2002): 536.
10. Sumit Ganguly, "Explaining the Kashmir Insurgency: Political Mobilization and Institutional Decay," International Security 21, no. 2 (1996): 79, doi: 10.2307/2539071.

between economic slump, drug-crime-terror nexus, and social repercussions of drug addiction. More frequently, this paper stems implications of prolonged drug use amongst a group in a border state amidst porous borders for the domestic and regional stability. The causes of instability are (economic deprivation, religious differences, state violence, discrimination, etc.) extensively, but there exists a gap in explaining how growing drug addiction in a region can contribute to group mobilization and subsequent instability. This paper will make contributions towards this literature as well.

HOW DRUGS IMPACT ECONOMIES:

Illegal drug abuse is a menace to society on many various aspects—its effects are primarily sensed in the fields of health, public safety, crime, productivity, and governance—and places a tremendous burden on the "peaceful growth and smooth functioning of many societies."[11] The International Narcotics Control Board (INCB) removes the misperception that "income made from the illegal drug trade automatically fosters economic development" due to lack of proof.[12] The INCB found evidence of short-term economic gains from illegal drugs sales, but there is no direct evidence that the economic benefits can last sustained over the long-term.[13] On the other hand, the illicit drug trade requires costs on the taxpayers into expenditures on the healthcare practice to treat addiction and extra burden laid on the criminal justice system to counter the threat and associated values with setting up social programs.[14] For instance, the Colombian government has recognized its price to combat drug trafficking rise from $1 billion to $12 billion yearly from 1991 to 2011[15]. Gathering quantifiable data on the impacts of the illegal drug trade and indirect damage on the region's economy is difficult to ascertain. But, a recent report evaluated that cost to be $193 billion for the United States in 2013 alone.[16] Developing countries like India remain especially prone to the effects of the illicit drug trade and addiction.

DRUGS IN INDIA:

India stands fixed between two of the world's most famous regions known for the illegal drug trade, i.e. The Golden Crescent, and The Golden Triangle. The acceptable borders in the

11. Singh, "Understanding the 'Punjab Problem,'" 1274.
12. Kartha, "Terror Roll Back: Militancy in Punjab," 167.
13. *Ibid.*
14. *Ibid., 167–168.*
15. *Ibid.*
16. *Ibid., 168.*

northwest and northeast present themselves as ideal routes for smuggling illicit drugs. Adequate to its shared border with Pakistan—through which drugs do smuggle into India—Punjab has seen a dramatic rise in drug use. The subsequent discussion highlights the growing drug trade's implications for instability in the region. N. S. Jamwal claims that narco- terrorism—"the nexus between narcotics and terrorism"—is considered "the oldest and most dependable source of terrorist financing.[17]" According to him, effects of narco-terrorism did appear in the Kashmir in India and where Pakistan did use narcotics deal to back radical groups to fight on Indian rule within the state. The estimates place drug trafficking's contribution to terrorism funding for groups in Jammu and Kashmir at 15 percent.[18] Subsequentially, Sikh militant groups in Punjab and insurgent groups in the northeast also rely on drug trafficking to fund their operations.[19] Arun Kumar seconds Jamwal's claims by pointing, so drug profits were used to finance terrorism in India in the south, northeast, Punjab, and Kashmir regions.[20] S. P. Sinha points to the illegal narcotics trade as the primary source of funding insurgencies in India's northeast.[21] The distressing element, according to Arun Kumar, is that only one percent of the total drug trafficking and money laundering exercises seem to have been detected by law enforcement.[22] Illegal drug trafficking's role in helping established crime and the terrorism remains recognized by the United Nations Security Council and which called for "redoubling efforts to prevent terrorists from benefiting from transnational organized crime."[23] The Complicating subject is a conversion of some drug trafficking groups such as Dawood Ibrahim's gang. That has, at best, asserted themselves into "the business/logistics end of terrorism," and at worst, resorted to carrying out terrorist acts themselves.[24] With the rising population now using drugs, from rich, poor, and middle-class families, in Punjab's landscape should likely see an increase in narco-terrorism as well.

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17. *Ibid.*
18. Vikram Chadha, "Unemployed Educated Rural Workforce in Punjab: A Cause for Concern," Economic and Political Weekly 50, no. 3 (January 17, 2015), http://www.epw.in/journal/2015/3/webexclusives/unemployed-educated-rural-workforce-punjab.html.
19. *Ibid.*
20. Sukhpal Singh, review of Economic Development in Punjab, by Inderjeet Singh, Sukhwinder Singh, and Lakhwinder Singh, Economic and Political Weekly, 7, accessed September 7, 2016, http://www.epw.in/journal/2015/26-27/book-reviews/economic-development-punjab.html.
21. N. S. Jamwal, "Terrorist Financing and Support Structures in Jammu and Kashmir," Strategic Analysis 26, no. 1 (April 3, 2008): 145, doi: 10.1080/09700160208450030.
22. *Ibid., 143–145.*
23. Pushpita Das, "Drug Trafficking in India: A Case for Border Security," IDSA Occasional Paper (Institute for Defence Studies and Analyses, May 2012), 5, http://www.idsa.in/occasionalpapers/DrugTraffickinginIndia.
24. Arun Kumar, The Black Economy in India (New Delhi: Penguin Books India, 2002), 27.

With varying degrees of explanations, including geography, religion, and economics for the rise of the insurgency in Punjab in the 1980s, it is evident, as Moore argues, that the causes of uprisings are much more complicated than they look at the surface. Some critics held and highlighted the urgency for India to discuss the drug problem in the context of threats to national security, and today the drug trade is indeed amongst the biggest funding sources for militant groups.[25] Those seeming at the origins of the insurgency and forecasting its reemergence believe that the Khalistan movement—aside from some diaspora support—is unlikely to reemerge. But do not take into account the impacts of the growing drug problem in the state.[26] While there are reports that point to the social implications of the drug use within Punjab resulting from lack of economic opportunities.[27] However, a very few relate these issues. To that extent, this paper is an honest attempt to restrict the possibility for the reemergence of separatist movements and its impacts to stability through a declining economy with the rising drug abuse and addiction serving as the catalyst.

Punjab currently suffers economic and social issues. That underlies the drug menace facing the state. These underlying conditions are similar to the ones faced by Punjab in the 1970s, which then drove to militancy in the 1980s. The unequal division of the Green Revolution pointing to breaks in diverse classes of Jat Sikhs enabled by Bhindranwale to place political pressures on the Akali Dal in an agitation against the central government.[28] Bhindranwale dragged support mainly from woman and children who witnessed the males in the household succumb to alcohol and drug addiction.[29] Besides, rural Sikhs continued the purpose because they needed to block the consequences of "degenerative forms of capitalist modernization," and which they viewed as affecting the Sikh way of life and an attack on their distinct identity.[30]

POLICY RECOMMENDATIONS:

This paper illustrated Punjab's importance to India and its role in maintaining regional

25. S. P. Sinha, "Northeast: The Role of Narcotics and Arms Trafficking," in Lost Opportunities: 50 Years of Insurgency in the North-East and India's Response (New Delhi: Lancer Publishers LLC, 2012), 234.
26. Kumar, The Black Economy in India, 285.
27. United Nations, United Nations Office on Drugs and Crime - World Drug Report 2015, preface, accessed June 1, 2016, https://www.unodc.org/documents/wdr2015/World_Drug_Report_2015.pdf.
28. Das, "Drug Trafficking in India: A Case for Border Security," 6.
29. Telford, "The Political Economy of Punjab," 970.
30. Singh and Purewal, "The Resurgence of Bhindranwale's Image in Contemporary Punjab," 136.

stability in some ways. For determining stability, the central and state governments require understanding the harsh impacts of the growing drug problem which may pose in the region. Bhindranwale's rise to power which occurred by the state government's lack of effort, to address growing grievances in the state, and through the process, Punjab's politicians were forced to join his cause. If the current politicians want to stay in power, they need to put forth a genuine effort to address the growing drug problem rather than to deflect responsibility. In a quest to hold onto power, the SAD party continued to forgo opportunities to appease its constituency through concerted efforts to grow the economy and address the drug epidemic, and the people held them accountable by voting for INC.

The political elite needs to take the allegations of the politician-drug nexus menacingly and dedicate drive and resources to thwart corruption which is destroying the state's youth. Learning from Mexico, the state should concentrate on reducing drug demand and fighting crime, rather than becoming trapped in a war on drugs and focusing more on conviction rates which are using drugs. The state government should realize that addressing essence economic grievances and giving employment to the educated youth will reduce drug demand. At the same time, it will render an increase in the economy. For reaching this goal, the government must move away from focusing its energy on the traditional agriculture sector rather than promoting non-agricultural trades.

Some economists suggest that universal subsidies last restored in favor of targeted ones with are the aim of raising capabilities in deprived sections of society.[31] Lakhwinder Singh points to the need to transition to agro-processing and high-value crops "with a focus on skillful labour-intensive and knowledge-based industries" as catalysts for positive change.[32] Subsequently, due to the negative impacts attached with agriculture, mainly "declining groundwater quality, depleting soil fertility, growing incidents of pests and pesticide residues in various food products and environmental pollution," G.S. Romana presents a case for organic farming as a substitute for traditional methods.[33] For driving Punjab from an agriculture-based economy to an industrial economy, Punjab state should increase research and development investment to one percent of the SDP with the goal of increasing it to 2.5% by 2020.[34] These

31. "Rejuvenation of Punjab Economy: A Policy Document," 1–2.
32. Sukhpal Singh, "Economic Development in Punjab," 2.
33. *Ibid.*
34. "Rejuvenation of Punjab Economy: A Policy Document," 3.

recommendations do not suggest that Punjab shifts apart from agriculture since India remains to stay on Punjab for food security. Presently, the state experiences significant crop losses "during the process of harvesting, threshing, transportation, and storage of food grains."[35] That is very concerning, given that demands placed on Punjab will certainly increase with the increase in India's population. To become more efficient, or to accommodate the state's agriculture output, and to help distressed farmers. The state needs to focus more on developing better infrastructure, such as storage facilities and transportation mediums.[36] This new support will reduce the percentage of precious food grains from rotting before reaching to the consumer. The state government cannot mark this food security issue alone as it already lacks grant/funding. Therefore, the central government also plays a pivotal role in ensuring stability in the region, through fixed investment in research and development. To make Punjab's agriculture output more secure, and to develop industrial sector employment opportunities by creating new jobs.

The Indian government must see the growing drug problem in Punjab as a serious threat to its regional stability. For instance, The Mumbai and Pathankot Air Force Base attacks underline the close relationship between criminal syndicates involved in the drug trade and terrorist organizations as illustrated in this paper. This relationship in Punjab may indeed deepen as more of the state's population dependent more on drugs nowadays, and even some on the drug trade for generating income to provide food for their families lost fair employment opportunities. There are similar interdependencies between either sides of the India-Pakistan border which enable the drug trade. The center needs to make a joint attempt to overcome corruption in the Border Security Force (BSF). Since it serves as the first line of defense against traffickers and it is also the center's duty to equip the state with the resources necessary to reduce drug demand. Invest more in the health care sector to tackle addiction. Besides, the center needs to devise a plan to include Punjab into the nation's economic prosperity run. That can only transpire if the center backs the state government push off from an agriculture-focused business model which India relies on for food security. Two additional factors necessitate that the Indian government addresses are the drugs problem in Punjab with the gravity.

The growing Chinese investment in Punjab, Pakistan and India's foreign policy approach towards Baluchistan, Pakistan also influence instability in Punjab, India. First, the $51

35. D. K. Grover and J. M. Singh, "Post-Harvest Losses in Wheat Crop in Punjab: Past and Present," Agricultural Economics Research Review 26, no. 2 (July 2013): 293.
36. "Rejuvenation of Punjab Economy: A Policy Document," 4–5.

billion China-Pakistan Economic Corridor (CPEC) will aid Pakistan's economic aspirations[37]. Though more importantly, it is expected to bring new trade and economic prosperity to Punjab. As of on September 2016, of the planned 330 projects, 176 CPEC projects did assign to Punjab, and its government is creating a welcoming environment to attract internal and external investment.[38] This fact is crucial because as with Punjab in India and agriculture is also the largest sector in Punjab. Similarly, the economic benefits of CPEC trickle into its agrarian neighbour. The population in Punjab in India may certainly feel a lack of investment and economic development in their state because of the further discrimination. This perception is already present as Punjab envies the relative economic prosperity in other Indian states i.e. Gujarat. Secondly, Pakistan has accused India of using its intelligence agency, Research and Analysis Wing (RAW), to support the Baluchistan insurgency in Pakistan; India denies this claim, but Indian Prime Minister Narendra Modi has openly shared his concern for the plight of the Balochi people.[39] Dissatisfaction in Punjab, India presents Pakistan with another opportunity besides Kashmir to counter India's involvement in Baluchistan. Pakistan may not face many difficulties in encouraging anti-India sentiment in Punjab because of a large segment of the population which does already offended by that inaction of both of center and the state governments. The drug systems, in the meantime, paves the ways and resources for aiding the dissatisfaction. Moreover, the former Khalistan insurgency's aftermath stands still of a part in the mind of the common Sikh memories. That gave an advantage to the external actors to play for their vices. These advancements highlight the urgency in addressing the increasing drug scourge and decline in the economy in Punjab, as they form the setting which led to the former insurgency.

Sequentially, a productive economy in Punjab is in the best interest of the national growth and development, because of its contributions to India's food security and its strategic

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37. Khaleeq Kiani, "With a New Chinese Loan, CPEC Is Now Worth $51.5bn," Dawn, September 30, 2016, https://www.dawn.com/news/1287040.
38. Qadeer Tanoli, "Punjab Gets Lion's Share in Chinese Projects," The Express Tribune, September 3, 2016, https://tribune.com.pk/story/1175160/economic-corridor-punjab-gets-lions-share-cpec-projects/; Staff Report, "Upcoming International Investment Seminar Vital to CPEC Success: Shehbaz," Pakistan Today, accessed March 10, 2017,http://www.pakistantoday.com.pk/2017/02/06/upcoming-internationalinvestment-seminar-vital-to-cpec-success-shehbaz/.
39. Shamil Shams, "Indian PM Modi's Baluchistan Comments Upset Pakistan," Deutsche Welle (DW), August 15, 2016, http://www.dw.com/en/indian-pm-modis-balochistan-comments-upset-pakistan/a-19475682; Manu Balachandran, "Baluchistan Is Now Officially an Arrow in India's Quiver against Pakistan," Quartz India, September 16, 2016, https://qz.com/782147/narendra-modis-message-to-the-unbalochistan-is-now-officially-an-arrow-in-indias-quiver-against-pakistan/.

location in ensuring national security. The inability of the central and state governments to mark the drug menace and the economic crisis in the state which can have dire consequences for both aspects of Indian growth and security. Getting deeply committed to resolving these critical concerns, now it will prevent the circumstances in which the Indian government gets itself involved in another continued battle to restore law and order in Punjab. The Indian government is already fighting a violent separatist insurgency in Kashmir, adding Punjab to this list once again may have severe consequences for Indian and regional stability.

EMERGING TRENDS IN GREEN MARKETING IN INDIA AND THE INTERFACE WITH PATENT REGIME

Ankit Singh*

INTRODUCTION

The global business industry is marching towards environment friendly products and services. Proprietors have an instrumental role to play in realizing the climatic goals of the world community. Many global players in diverse businesses are now successfully implementing green marketing practices. Various studies by environmentalists indicate that people are concerned about the environment and are changing their behavioural pattern.

There have been several attempts on global level to come down to the actual meaning of the term "green marketing" but it was found that it has an extremely wide connotation from both environmental and commercial perspective. However, businesses, according to their own interpretation, have adopted green marketing as a strategy to do business which is environmentally sound and efficient.

Green marketing is a phenomenon which has developed particular important in the modern market and has emerged as an important concept in India as in other parts of the developing and developed world, and is seen as an important strategy of facilitating sustainable development. The American Marketing Association defines green marketing as the marketing of products which are presumed to be environmentally safe.

"Green Marketing" refers to holistic marketing concept wherein the production, marketing consumption an disposal of products and services happen in a manner that is less detrimental to the environment with growing awareness about the implications of global warming, non-biodegradable solid waste, harmful impact of pollutants etc., both marketers and consumers are becoming increasingly sensitive to the need for switch in to green products and services.

To add to the strategic dimension to the term "green marketing", Charter of 1992 defines it in the following words: *"...greener marketing is a holistic and responsible strategic management process that identifies, anticipates, satisfies and fulfils stakeholder needs, for reasonable reward, that does not adversely affect human or natural environmental well being."*

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According to Polonski, green or Environmental Marketing consists of all activities designed to generate and facilitate any exchanges intended to satisfy human needs or wants, such that the satisfaction of these needs and wants occurs, with minimal detrimental impact on the natural environment.

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GENESIS OF GREEN MARKETING

The concept of green marketing came into existence way back in 1980's in United States and European country and the development goes on. Green marketing concept is gaining its popularity across the world as environment is an international issue now days. It came into being due to the consistently depleting environmental quality owing to the rapidly increasing industrialization across the world. Industrial outfits throughout the world have taken steps to contribute to the global objective of environmental sustainability.

Green marketing helps in reducing the impact of environmental consequences with the help of fulfilling the demand of the consumer's green need and also creates the demand for the green product. It is also one of the facts that changing consumer's perception towards green products leads to the genesis of green market.[1]

Green marketing concept not only fulfils the needs of the consumer but it also participates in the sustainable development in long run. Due to the increasing growth and development of the green market, there are various opportunities are also coming for entrepreneurs around the world. Innovations and new product development are among the important ingredients of the entrepreneurship and can be seen in the green marketing concept.

Green marketing was given dominance after the proceedings of the first workshop on Ecological marketing held in Austin, Texas (US), in 1975. The workshop released the first book on green marketing entitled "Ecological Marketing".

Academicians and scholars across the globe became active in the field of sustainable development and green marketing. An array of quality publications in the area emerged. Books

1. Emerging Green Market as an Opportunity for Green Entrepreneurs and Sustainable Development in India by NK Sharma and GS Kushwaha; available at https://www.omicsonline.org/open-access/emerging-green-market.

were published by many authors like Ken Peattie (1992) in the United Kingdom, Jacquelyn Ottman (1993) in the United States of America. The similar terms used in connection with green marketing are ecological marketing (Fisk, 1974; Henion and Kinnear, 1976), environmental marketing (Coddington, 1993), green marketing (Peattie, 1995; Ottman, 1992), sustainable marketing (Fuller, 1999) and greener marketing (Charter and Polonsky, 1999).

Phases of Green Marketing

According to Peattie (2001), the evolution of green marketing has three phases:

1. First phase "Ecological" green marketing in which, all marketing activities were concerned to help environment problems and provide remedies for environmental problems.
2. Second phase "Environmental" green marketing and the focus shifted on clean technology that involved designing of innovative new products, which take care of pollution and waste issues.
3. Third phase was "Sustainable" green marketing. It came into prominence in the late 1990s and early 2000.

Origin of Green Companies and Green Business

With the proactive approach of governments of various countries, national and international companies have taken many initiatives in the same direction.

The most common measures taken by green companies are as follows:

1. Producing environmental friendly products
2. Conservation of energy, water and natural resources
3. Climate protection
4. Providing assistance for the development of underprivileged

Salient features of Green Companies

1. Electricity generation from hydroelectric plants
2. Use of natural gas for boiler fuel
3. Reduce toxic effluents and emissions
4. Use of renewable sources of energy
5. Recycling of biodegradable waste

Reasons behind increased Green Activities

There are several reasons in the increased activity in commercial industry in the area of green marketing. They can be summed up as follows:

1. Perception of companies that green marketing can help achieve their objectives;
2. Companies find themselves morally obligated and socially responsible;
3. Government is encouraging business industry to become more accountable;
4. Environmental activities among competitor ensures green competition in the market; and
5. Cost factors involved in waste management forces companies to modify their strategies.

Green Entrepreneurs

Green or environmental entrepreneurs are the those who are engaged in start-ups which contribute to the betterment of environment and are in line with the global goal of sustainable development. The term 'green entrepreneur' was coined by Terry Clark from Goizueta Business School, Emory University.[2]

Sustainable entrepreneurs aim to introduce environmentally and socially friendly innovations to a large group of stakeholders. Sustainable entrepreneurship gained force in recent years as a global movement that aims to promote business to pay close consideration to their social and environment.[3]

The concept of green entrepreneurs starts from the environmental concerns such as pollutions, global warming, climate change, scarcity of natural resources and other havoc caused by disturbance in the ecosystem. Due to increasing awareness may be with the help of environmental knowledge and education people are becoming more responsive towards the environment. These factors are also responsible for the changing consumer behaviour towards green product or eco-friendly product.[4]

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2. Menon A, Menon A (1997) Enviropreneurial Marketing Strategy: The Emergence of Corporate Environmentalism as Market Strategy. Journal of Marketing 61: 51-67.
3. Farinelli F, Bottini M, Akkoyunlu S, Aern P (2011) Green entrepreneurship: the missing link towards a greener economy.ATDF J.8:42-48.
4. Emerging Green Market as an Opportunity for Green Entrepreneurs and Sustainable Development in India by NK Sharma and GS Kushwaha; available at https://www.omicsonline.org/open-access/emerging-green-market-as-an-opportunity-for-green-entrepreneurs-and-sustainable-development-in-india-2169-026X-1000134.php?aid=56407.

The evolution of green entrepreneurs has been a boon for the society as they work on innovation in a manner which is socially beneficial, sustainable and inspiring.

Green Products

A product is green when it is climate and energy efficient and capable of being marketed in a green market. These products are manufactured in a way so that they leave minimum impact on the environment and still remaining with recyclable content after they have been put to use by the consumers.

There are certain characteristics which we can attribute to green products:

1. Energy efficient, durable and often have low maintenance requirements.
2. Free of Ozone depleting chemicals, toxic compounds and don't produce toxic by-products.
3. Often made of recycled materials or content or from renewable and sustainable sources.
4. Obtained from local manufacturers or resources.
5. Biodegradable or easily reused either in part or as a whole.

For a loyal green consumer, locating an authentic green product is quite a difficult task due to excessive piracy in the market. There are several renowned and trustworthy international certification agencies that assure the green nature of a product through their certification. Some of these agencies are Energy Star, Green Seal, Forest Stewardship Council, Leadership in Energy and Environmental Design (LEED), United States Department of Agriculture (USDA) Product, etc.

Green products are now mainstream, whether you are looking for a new home, automobile or even just some vegetables for a salad, there is a green product alternative available. It is up to us to weigh our options and identify what attributes of a green product is important to us. One should make sure to be fully informed and aware prior to making the purchase.[5]

5. Matthew Speer, What is a Green Product, available at http://www.isustainableearth.com/green-products/what-is-a-green-product.

GREEN MARKETING: CURRENT TRENDS IN INDIA

India, in recent times, has become a prominent market for the rapid development of green business and green marketing. The progressive evolution of the relationship between government and corporate houses has made it possible for the Indian market to compete in the leagues of global sustainable development paradigm.

The Bureau of Energy Efficiency in India has identified the retail industry as an energy-intensive industry. The central government has stricter plans to curb the demand for energy by enforcing stricter laws on the Corporate making the self dependent on future requirements.[6]

According to Shubhadra Saini, In India, the dominant unorganized retailers don't prioritize environment sustainability factors, even though it is possible to reduce the cost by 20-25% by adapting green practices at their stores.[7]

There are some lucrative and eco-friendly business ideas that have attracted the attention of Indian business proprietors:

1. Organic Food Products: The budding start-ups can help connect the famers with the customers and recycle the lifecycle. Bridging the gap of customer and farmers has been exploited enough by the middlemen, FDI and Make in India has brought on the business revolution in the country.[8]
2. Green Waste Management: Through green waste management, the wastes can be formulated to make manure, fertilizer and plastics can be reused through different products.[9]
3. Organic Fashion and Style: The budding fashion designers are using the recycled products in making costumes, which earlier used to be thrown away after one use. The easily degradable organic wastes are further used in making different types of fashion accessories, without losing the organic value of the product.[10]
4. Handmade Organic Products: Many small scale businesses can get started with minimum investment on labour, raw material and equipments if the process is thought out well. There is huge demand of organic products, making organic

6. Start-ups are Ready to Rock with Their Eco-friendly Business, available at https://retail.franchiseindia.com/article/whats-hot/trends/Startups-are-Ready-to-Rock-with-Their-Eco-friendly-Business.a5849.
7. *Ibid.*
8. *Ibid.*
9. *Ibid.*
10. *Ibid.*

soaps, cosmetics, toiletries and other household products, thus investing in labour and raw material a bit will later bear juicy and profitable fruits for all.[11]

Marketers have the responsibility to make the consumers understand the need for and benefits of green products to maintain a cleaner and greener environment. Finally, consumers, industrial buyers and suppliers need to pressurize effects on minimize the negative effects on the environment-friendly. Green marketing assumes even more importance and relevance in developing countries like India.[12]

Steps taken by Indian Companies in the field of Green Marketing

In a rapidly developing economy where industrialization is happening at a quick pace, various Indian companies and multi-national companies operating from India have taken environmentally responsible initiatives which are innovative and praiseworthy.

In the contemporary scenario of green marketing and green competition in India, companies are coming up with new products to contribute their part in the international goal of sustainable development.

These measures not only are beneficial for the continuously depleting environmental condition but also generate employment and help in uplifting the rural and underprivileged sections of the country.

Some notable initiatives are listed below:

1. New Surf Excel that produces lesser froth but is as effective as before, thus reducing water consumption.
2. Badarpur Thermal Power station of NTPC in Delhi is devising ways to utilize coal-ash that has been a major source of air and water pollution.
3. The refrigerator industry has shifted from chlorofluorocarbon (CFC) gases to environmental friendly gases.

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11. *Ibid.*
12. Nadaf, Yasmin & Nadaf, Shamshuddin, Green Marketing: Challenges and Strategies for Indian Companies in 21st Century, IMPACT: International Journal of Research in Business Management (IMPACT: IJRBM) ISSN(E): 2321-886X; ISSN(P): 2347-4572 Vol. 2, Issue 5, May 2014, 91-104.

4. Supreme Court of India forced a change to alternative fuels. In 2002, a directive was issued to completely adopt CNG in all public transport systems to curb pollution.

5. Tata Steel, HLL, Jindal Vijaynagar Steel, Essar Power and Gujarat Flurochemicals Ltd. etc have got clearance to undertake specifically designed projects in order to gain benefits from carbon trading (Kyoto Protocol).

6. The Hewlett-Packard Company announced plans to deliver energy-efficient products and services and institute energy-efficient operating practices in its facilities worldwide.

7. Atlas Copco in India claims to use safer compressor condensate disposal practices including a step that removes oil from the water that is discharged into rivers.

8. E-commerce business and office supply company Shoplet which offers a web tool that allows you to replace similar items in your shopping cart with greener products.

Indian Tobacco Company (ITC): The Pioneer of Green Development in India

The measures taken by ITC in various areas of the business industry are laudable. They have emerged as a major proponent of green marketing in India while exhibiting global standards in their activities. Some of these efforts are as follows:[13]

1. ITC's Social and Farm Forestry initiative has greened over 80,000 hectares creating an estimated 35 million person days of employment among the disadvantaged.
2. ITC's Watershed Development Initiative brings precious water to nearly 35,000 hectares of drylands and moisture-stressed areas.
3. ITC's Sustainable Community Development initiatives include women empowerment, supplementary education, integrated animal husbandry programmes.
4. ITC's Bhadrachalam paper unit has invested in a Rs. 500 crore on technology that makes the unit chlorine free.
5. All Environment, Health and Safety Management Systems in ITC conform to the best international standards.

13. http://www.itcportal.com/sab-saath-badhein/default.html .

PATENT LAW, TECHNOLOGY TRANSFER AND GREEN MARKETING

Technology lies at the centre of the climate change debate and plays a pivotal role in addressing the global challenge of climate change and sustainable development in today's economy. The role of the patent system became the subject of increased attention in climate change discussions on technology transfer. The core technology that should be disseminated with the patent is not easily accessible in practice or has little technical value. New mechanisms for collaborative innovation have been introduced to the green technology sector. Access and timely diffusion of green technologies required for adaptation and mitigation constitute one of the major challenges faced by the international community.[14]

With innovations coming to the fore rapidly, patent law has a major role to play as green entrepreneurs are equally diligent about their business monopoly.

Opening the market for green technology and green innovation is a giant step that Indian government has taken. Many big companies have entered the competition of rendering environment friendly technologies which has given a considerable boost to the green economy.

Green technology innovation and its transfer are a key component of the fight against climate change and adaptation to and mitigation of its harmful effects.[15] Since the United Nations Framework Convention on Climate Change (UNFCCC) Bali meeting in 2007, the role of the patent system has been the subject of increased attention in climate change discussions on technology transfer. In particular, how the patent system can foster green innovation and promote dissemination of clean technologies on both national and international stage. The patent system is essentially based on preserving the balance between the public welfare and private incentives.

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14. Awad, Bassam., Patent Pledges in Green Technology.
15. Mitigation is about slowing down global warming by reducing the level of greenhouse gases in the atmosphere. Among the many mitigation technologies already on the market are renewable energy sources, such as biofuels, biomass, wind, solar and hydro power; low carbon building materials; and emerging technologies which aim to capture carbon out of the atmosphere and lock it away. Adaptation involves dealing with the existing or anticipated effects of climate change, particularly in the developing, least developed and small island countries, which are most severely affected. In addition to "soft" technologies, such as crop rotation, hard technologies for adaptation include improved irrigation techniques to cope with drought, and new plant varieties which are resistant to drought or to salt water. See World Intellectual Property Organization, Climate Change: The technology challenge, 2 WIPO Magazine (April 2009), online: WIPO <http://www.wipo.int/wipo_magazine/en/2009/02/article_0003.html>.

Indian Patent Regime and Green Marketing

India's strict patent regime gives rise to the argument that it acts as a barrier in the way of mobilization of green marketing and green technology. In India, obtaining a patent for an invention is a very lengthy process which subsequently makes the proprietors use the monopoly granted to them in a limited manner at high cost. Therefore, the companies entering India with their environmentally sound technologies (ESTs) are reluctant to relinquish their monopoly over their innovation.

On the other hand, it is also considered that a sane and strong IPR protection of technology boosts innovation and works as a powerful incentive.

The task of reconciling these two viewpoints depends on the demand of the economy and when we are talking about green technology it very much depends on the climatic needs of a nation.

Agenda 21 has chalked out a very efficient plan for the transfer and diffusion of green technology for developing countries like India. Chapter 34 of Agenda 21 provides for the following:

'34.9: A large body of useful technological knowledge lies in the public domain. There is a need for the access of developing countries to such technologies as are not covered by patents or lie in the public domain. Developing countries would also need to have access to the know-how and expertise required for the effective utilization of the aforesaid technologies.'[16]

'34.10: Consideration must be given to the role of patent protection and intellectual property rights along with an examination of their impact on the access to and transfer of EST, in particular to developing countries, as well as to further exploring efficiently the concept of assured access for developing countries to EST in its relation to proprietary rights with a view to developing effective responses to the needs of developing countries in this area.'[17]

16. Intellectual Property Rights and Green Technologies from Rio to Rio: An Impossible Dialogue?; Policy Brief No. 14 by Ahmed Abdal Latif (ICTSD Programme on Innovation, Technology and Intellectual Property), July, 2012.
17. *Ibid.*

'34.18. Governments and international organizations should promote, and encourage the private sector to promote, effective modalities for the access and transfer, in particular to developing countries, of ESTs by means of activities, including the following:[18]

1. In the case of privately owned technologies, the adoption of the following measures, in particular for developing countries:
2. Enhancement of the access to and transfer of patent protected ESTs in particular to developing countries;
3. Purchase of patents and licences on commercial terms for their transfer to developing countries on non-commercial terms as part of development cooperation for sustainable development, taking into account the need to protect intellectual property rights;
4. In compliance with and under the specific circumstances recognized by the relevant international conventions adhered to by States, the undertaking of measures to prevent the abuse of intellectual property rights, including rules with respect to their acquisition through compulsory licensing, with the provision of equitable and adequate compensation.'

India and Technology Transfer

The creation or absorption of new technology has become a vital component for companies to improve or maintain their competitive position in the market place.

Foreign companies are also showing an avid interest in India for trade in technologies and services as a result of which intellectual property rights issues have gained significant importance. The ongoing integration of domestic and international markets through continuing deregulation and liberalization of markets has enhanced competitive pressure for all firms, and especially increased the technological needs of small enterprises worldwide while also improving their access to new technologies and capital goods.

While investing in technology creation may be expensive and risky, as there are many uncertainties linked to the innovation process, it has the advantage of preventing technological dependence on other companies and enables the company to enhance its technological capability and to innovate according to its own specific needs. Companies have to decide whether to develop technology in-house or to obtain it from others.

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18. *Ibid.*

Striking a balance between the intellectual property rights of green entrepreneurs and environmental sustainability is quite a challenge. Green marketers across the globe spend a considerable amount on research and development. It is fair that they receive a commensurate reward for creating environment friendly technology. On the other hand, it is also important that developing and least developed countries moving towards greener markets get economically feasible access to such technologies.

The correlation between technology transfer and Indian patent regime can be summarized as follows:

1. Under the Patents Act, the creation of any interest in a patent, including an assignment or license is not valid unless it is reduced to writing in a document embodying all the terms and conditions governing the rights and obligations between the parties and an application for registration of such document is filed with the Controller of the Patents.
2. Stronger patent enforcement encourages patenting in general, although it is not clear that the increase in patenting reflects increased underlying innovation or the increased use of patents as a strategic tool. IPR protection may also redirect research to applied and patentable research with potential negative effects for the generation of fundamental drastic innovation.[19]
3. Stronger patent enforcement encourages imports and FDI but has little effect on technology transfer in low income countries.

Cross-border licensing and marketing of green technology still has to find way in India pertaining to its strong patent enforcement regime. However, given the current economic development of India and its resolute dedication towards green development, diffusion of clean technology doesn't seem to be an extremely difficult task.

Patenting and Green Market Strategy in India

It is to be understood that green marketers are mobilizing their trade at a rapid pace and green competition in the Indian market is increasing consistently. At the same time, innovators of green technology and green products, especially in anatmosphere of intense competition, are vying for patents in order to exercise monopoly in the market.

19. Hall, Bronwyn H. & Helmers, Christian, The Role of Patent Protection in (Clean/Green) Technology Transfer

Companies with green technology at this stage are typically focused on their patent filing strategy, building a strong patent portfolio, and using their patent position to reserve access to technology aimed at serving a particular market. Since many aspects of the technology are still new and relatively unproven, there is a substantially higher degree of risk, including financial, political, and regulatory risks, involved than with investments in mature technologies. [20]

Indeed, substantial innovation in green technologies takes place in young, start-up companies, which are often characterized by large intangible assets, negative cash flow, technological uncertainty, and low liquidation value.

While the Indian government can play an important role in encouraging green technology growth, the flow of non-government capital into green technology is critical to the success of the industry. In addition to providing subsidies, tax credits, and legislation that encourage investment in greentech, the government can encourage the growth of and public access to green technology through the patent system. Robust patent protection for greentech will lead to increased private investment, the creation of green jobs, and the ongoing progress of green technology.[21]

CONCLUSION

It is evident that there are numerous ways in which green marketing and green growth can be promoted. The core issue is the dedication of stakeholders towards environmental protection and sustainability. The new turn in commercial activities that are focused on mitigating the environmental impact has indeed brought in a wave of innovation among the market players. Hence, green patenting has also come to the forefront in current times.

Increasing competition among the firms to produce green products in response to green consumerism has accelerated the "green-shift", which in the short-run, appears expensive, but, in the long-run, is definitely anticipated to have considerably beneficial implications on both climate and economy.

It is worth mentioning that India's commitment towards green growth has motivated Indian

20. Gattari, Patrick, The Role of Patent Law in Incentivizing Green Technology in the Northwestern Journal of Technology and Intellectual Property (Volume 11, Issue 2).
21. *Ibid.*

companies to invest more capital in green development. At the same time, it is important for us to fine tune our patent regime to facilitate diffusion and transfer of green technology.

The concept of green marketing is at a very infant stage in India. A well-conceived partnership between the policy-makers and green marketers is essential to serve the consumers in an efficient manner and contribute to the global goal of sustainable development.

A STUDY ANALYSING RECOGNITION OF FOOD SECURITY AND FOOD JUSTICE IN A GLOBALISING WORLD

Ayush Johri*

THE CONCEPTS OF RIGHT TO FOOD, FOOD JUSTICE AND FOOD ETHICS AND THEIR RECOGNITION IN THE INTERNATIONAL LEGAL FRAMEWORK

FOOD SECURITY: A MULTIVARIATE COMPLEX CONCEPT

The concept of food security and food justice has invited a lot comments from various stakeholders. It has undergone a sea change since its inception. The 1960s and 1970s witnessed a great era of famine in various parts of the country. Gradually, the problem of famine started plaguing certain countries on a regular basis. They started looking for assistance from developed nations such as Canada, United States etc where there was sufficiency of food grains.

The term "food security" is interpreted by various organizations.

"Food security means that food is available at all times; that all persons have means of access to it; that it is nutritionally adequate in terms of quantity, quality and variety; and that it is acceptable within the given culture. Only when all these conditions are in place can a population be considered food secure."[1]

"All people at all times have physical and economic access to sufficient, safe and nutritious foods to meet their dietary needs and food preferences for an active healthy life."[2]

Noteworthy it is to see that the definitions have also been subject to a lot of criticism. The definitions have often been criticized on the parameters of a) Universality: It should be available to everybody b) Stability: There should be a sustained access c) Dignity: This can be ensured by normal food channels not by way of any emergency program me. D) Quantity: Minimalistic approach should be given as it the only practical solution for the same e) Quality: It resorts to hygiene.[3] From the above discussion we observe that "food security is a complex and multivariate concept which is very difficult to achieve".

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1. FAO (Food and Agricultural Organization) of United Nations. It is an inclusive definition.
2. Rome Declaration on World Food Security (World Food Summit, 1996) adopted by: United Nations, Government of Canada, World Health Organization.
3. FAO prescribes more parameters in terms such as vulnerability and shocks as well. Vulnerability would mean the cereal import ration, percentage of arable land equipped for irrigation etc. Shocks would mean food price volatility etc.

After having talked about "food security", it exists at all three levels first being individual level. Then it should also be at household level and thereafter at the community level. Unless, food security is ensured at all three levels, food justice cannot be ensured. The food security is gauged by way of a standardized tool called the Global Food Security Index.[4]

FOOD JUSTICE AND FOOD ETHICS

"Food justice" is a concept which should include both concepts of distribution and production. The most basic basis of same must be that in order to deal with food insecurity, the governments have a non-negotiable duty. It is also required to cater to the structural factors which are threat to the insecurity. However, it has been observed that many governments have been either unable or even willing to deliver food justice.

INTERNATIONAL LEGAL FRAMEWORK ENCAPSULATING THE RIGHT TO FOOD

Legal framework at international level has encapsulated the right to food to reflect the fact that the world order has been conscious of the fact that right to food has to be regarded as one of the fundamental goals. These have also been mentioned in the Sustainable Development Goals as will be discussed in this project.

"Article 25, paragraph 1 of the UN (United Nations) Declaration on Human Rights refers to the "Right to Food" as one aspect of the "Right to a standard of living" adequate to ensure the health and wellbeing of each person. The right to food is thus inextricably linked to individuals' health and wellbeing.""

"Article 11, paragraph 1 of the ICESCR (International Council for Economic, Social, Civil and Political Rights) stipulates the right to adequate food whereas paragraph 2 of the ICESCR stipulates the right to be free from hunger thus emphasizing upon the right to an adequate standard of living going beyond the issues of availability and accesses. Article 11 further obligates State Parties to the Covenant to take specific measures individually and

4. The food production index is the sum of price-weighted volume of net food production (i.e., production minus the amount used for feed and seed) excluding coffee and tea, relative to the same value in a base year, multiplied by 100. The price weights used are the international prices prevailing in the base year. The food production index shows amount of food produced and available for consumption relative to the base year. Values greater than 100 indicate an increase in domestic food production relative to the base year, while those less than 100 show a decrease.

through international co-operation to ensure the right to adequate food and to eliminate hunger."

"Article 11 of the ICESCR" deals with the modalities and following policy measures to fulfill these rights of adequacy of food and Right to freedom from hunger as enshrined in paragraph 2a and 2b:

1. rising food availability both nationally as well as internationally by "the rise in production, specifically by converging and distributing technical and scientific knowledge to improve methods of production, conservation and distribution of food"
2. "Improving access to food at the national level by "ensuring an equitable distribution of world food supplies in relation to need"
3. Focussing over food utilization by "identifying good nutrition as a crucial link between food access and health outcomes at the individual level." [5]

It helps the countries to share, and disseminate the related production and nutrition related knowledge with individuals, improve production, reduce wastage, ensure equitable distribution and improvement in access reflected through health outcomes.

THE JURISPRUDENTIAL ANALYSIS OF THE RIGHT BASED APPROACH TOWARDS FOOD SECURITY

In the present day context of higher consumption regimes and global scarcity and poor access to resources, the rights-based move towards development begins from the "signal for all global actors of the need to ensure the human right to water and sanitation, and the human right to food". [6]

There can be nature focused or society focuses approaches to the problem of right to food. The nature focused approach would mean enhancing the resources of the nature so as to generate the capacity to improvise food production. On the other hand, the society focus approach leads to the external factors such as taking care of hunger, calamity, price volatility etc. The "Human security" concept focuses upon a canvas consisting of various standardising frames for global policy making which prove to be the litmus experiment of least requirements. The speed of execution of policies may be varied but these defined bare minimum requirements

5. Article 11 of the ICESCR.
6. United Nations (UN) (2010a). UN Resolution A/RES/64/292. UN General Assembly, NY, USA.

demand their incremental progression and ultimate realization. These objectives are reflected in global, regional or local policies namely "the Sustainable Development Goals", National Missions, programmes for universal access. The defined minimum requirements highlight that all the stakeholders need to have their right to secure and safe environment, water, sanitation and food. The large chunk of stakeholders consists of poor individuals who are highly required to be protected and secured by respect towards human rights.

AMARTYA SEN'S ENTITLEMENT THEORY AND ITS RELEVANCE IN PRESENT DAY CONTEXT

Amartya Sen by his words that "there is no such thing as an apolitical food problem"[7] ever reverberates. It implies that the food related problems are not completely free from political influence. Before talking about Amartya Sen, it will be interesting to know about the Malthus theory on food security. His theory revolves around the idea that food security has to be gauged only by the parameter of per head availability of food grains. This theory excluded other factors such as calamity, price volatility, political forces etc. This theory fails in practical sense."[8]

Theory laid emphasis on population explosion which is the primary cause of per head availability of food grains. Thereafter, a better theory emerged by Amartya Sen which is known as entitlement theory.

The entitlement theory propounded by him also endorses the rights based approach. "Entitlements" means "the set of alternative commodity bundles that a person can command in a society using the totality of rights and opportunities that he or she faces". Said definition can be understood as descriptive and not normative in approach as opportunities pose a vast vacuum in the empowerment and accesses to the poor and vulnerable. These "Entitlements" derive their value from legal rights bestowed on individuals/groups "rather than morality or human rights". Amartya Sen has well said in his book namely *"Poverty and Famines"* observing: "The law stands between food availability and food entitlement."

"First, there can be ambiguities in the specification of entitlements". "Second, while entitlement relations concentrate on rights within the given legal structure in that society, some

7. Amartya Sen, The Food Problem: Theory and Policy. 4(3), THIRD WORLD QUARTERLY 447–459 (1982).
8. Amartya Sen, Food and freedom, Sir John Crawford Memorial Lecture Washington, D.C., (October 29, 1987).

transfers involve violations of these rights, such as looting or brigandage". "Third, people's actual food consumption may fall below their entitlements for a variety of other reasons, such as ignorance, changed food habits, or apathy". "Finally, the entitlement approach focuses on starvation, which has to be distinguished from famine mortality, since many of the famine deaths—in some case most of them—are caused by epidemics". Thus "rights based approach to development" through entitlement may also be subjected to distortions. Thus, the right to food based on entitlements may not deliver the intended benefits if the distortions in implementation are allowed to creep in.[9]

ANALYSIS OF THE GOVERNANCE REGIME FOR THE FOOD SECURITY VIS' A VIS GLOBALISATION

UN Sustainable Development Goals 2017

1. *Hunger*

These are few facts stated by the said document on Sustainable Development Goals of 2017. Few of them relevant to our study are as such:

ll over the world, children at least one out of four suffers from stunted growth. This figure can also increase to 1 out of 3 in coming time. A figure of sixty six million children of primary-school age over the developing nations, attend classes hungry, ut of which Africa alone contributes to a figure of twenty three million.

Count of about 66 percent of the hungriest people exists in Asia. The children under age of 5, about 3.1 million every year, die due to poor nutrition. In Southern Asia the percentage is falling and in western Asia there is an increase. With about 281 milion undernourished people, the Southern Asia faces a hunger burden.

2. *Food security*

There are few facts we must be aware of: That there about 1.4 billion people, majority of them living, have no access to electricity. The problem of "energy poverty"' isone of the major barriers in reducing hunger in the world.

Another issue is access of resources. If women farmers have equal access as male farmers, figure would reduce 150 million.

It can be observed since 1990s that about 3/4h of the "crop diversity have been lost from

9. Amartya Sen, Jean Dreze, and Athar Hussain, THE POLITICAL ECONOMY OF HUNGER, Oxford India, 2009.

farmers fields" If the "agricultural biodiversity" is put better use, it can result to improved livelihoods of farming communities, more sustainable farming systems and more nutritious diets.

It is also a fact that about 1/4hof the world population derive its livelihood from agriculture. For poor rural households, it is a major source of employment. In a major part of the developing world, the contribution of about 500 million small farms is made towards 80% of food consumed. An investment towards these small farm-land holders is necessary.

3. *Future Goals*

Chief goal is *"to end hunger, achieve food security and improved nutrition and promote sustainable agriculture."*

1. One of the inter alia goals is that by 2030 the incomes of small scale food producers and agricultural productivity should double, especially family farmers, women, fishers, pastoralists and indigenous people. It can be done through ensuring secure and equl access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment.
2. Another goal by 2030, is to ensure resilient agricultural practices, sustainable food production system, that help maintain ecosystems, that strengthen capacity for adaption to extreme weather, flooding, climate change and other disasters. That also result into betterment of the soil and land quality.
3. Another goal is to ensure by 2020 that genetic diversity of seeds, cultivated plants and farmed and domesticated animal and related wild species is maintained. It would cover well managed and diversified seed and plant banks at the regional, national and iternational levels and promotes access to fair and equitable sharing of benefits arising from the utilisation of traditional knowledge and genetic resources.
4. To take such measures which ensure functioning of proper food commodity markets and facilitate timely access to market information on points such as food reserves, which would reduce food price volatility.
5. To prevent and rectify the trade restrictions and distortions in world agricultural market, which would cover parallel removing of gricultural export subsidies nd

export measures as per the Doha Development Round.

6. In the areas of plant and livestock gene banks, agricultural research, extension services, technology development, rural infrastructure, increase investment through international cooperation. This would result into increase in the gricultural productive capacity s well of the developing nations.

7. A short term goal till 2025 being to reduce stunting and wasting in children below age of 5 years, address the nutritional needs of older persons, lactating women, pregnant and adolescent girls. A goal to eliminate all forms of malnutrition till 2030.

4. ***Issues concerning Food Hunger-*** first issue arises is that if there is enough food on earth for survival of everyone, why still so many people are hungry? A conjunctive issue arises is that why we should care about it?

The reason for same is poor harvesting practise and food wastage They have contributed to the problem of food scarcity. Another reason is wars. Wars had a drastic effect on the environment such that now it is critical to grow food.

e should care about it because if everybody has access to safe and nutritious food, then it would result into better health, education, economies, equality, social development and overall development for a better future. Moreover, with hunger limiting humn development, other goals would not be achieved.

Another issue which arises is that how much would it cost to achieve zero hunger? What are the ways in which it can be done?

An estimate of an addition 267 billion dollars would be required each year to put an end to world hunger by 2030. This would require investment in social protection of people in urban and rural areas so that they have access to food and a better livelihood Ways in which we can do it is by making changes at home level, at work level, and community level—y helping the local farmers or markets, reducing food wastage, improving good nutrition for everyone, and make sustainable food choices. We can use power as a consumer and voter, requiring the governments and businesses to make the choices, and changes to make zero hunger a reality.[10]

5. ***Importance of an Effective Food Security Regime***

10. The United Nations Suatainable Development Goals 2017, available at http://www.un.org/sustainabledevelopment/wp-content/uploads/2016/08/2_Why-it-Matters_ZeroHunger_2p.pdf (Last visited on August 28, 2018).

It must be well understood that a functional food system is one of the necessary pillar of an economy which is stable, which is basically able to reproduce itself. The situation of ocial unrest rises when there is no proper ollective food security governance

It can be seen that the imponderable'-array has been enlarged by the Act of God, being drought, flood, etc which have been in from existence of human race to the working of globalised economic forces. The developments at local or global level, both affect the capacity of a single household t make sure sufficient supply of food for its members. Therefore, ood governance s a gradually becoming a more intricate job in this globalising world where exist various layers for decision-making.[11]

6. *Social Organization and Food Security*

It meant by expression Social organization efers to onnectedness and functioning of institutional property in a nation state Reciprocal causation relates social organization and hunger. The reason why widespread hunger causes drastic effects over the social organisation is that the social organisation chip away at food security. "Food security" and "institutional functioning" s at risk when there is disorder or corruption.[12]

Talking about Africa, it is one of the continents which have failed in increasing the food production on per capita basis. There are various factors responsible for same, such as: ow level of input use, poor mechanization, weak research base, and lack of incentives to producers, poor infrastructure, and poor access to markets.[13] Social organisation and Culture are core features of many such problems.[14]

THE LEGAL ANALYSIS OF THE RIGHT TO FOOD IN INDIA AND RECENT DEVELOPMENTS AROUND THE WORLD

Globalization and Food Security

Currently, there is a lot more happening across national borders, not limited to only interactions or relations amongst the governments. It is well known, that various additional imp.

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11. IFAD, Nora McKeon, Global Governance for World Food Security: A Scorecard Four Years After the Eruption of the Food Crisis",(2010).
12. United Nations Food and Agriculture Organization. The Rome Declaration on World Food Security and the World Food Summit Plan of Action. (1999), available at http:/ /www.fao.org/WFS/ policy/policy.htm (Last visited on December 20, 2013).
13. W.W. Murdoch, THE POVERTY OF NATIONS: THE POLITICAL ECONOMY OF HUNGER AND POPULATION, (1980).
14. Joseph J. Molnar, Sound Policies for Food Security: The Role of Culture and Social Organization, Review of Agricultural Economics, Vol. 21, No. 2 (Autumn - Winter, 1999).

players also do exist, such as:

The relations & interactions have been structured among new actors and various states through very intricate system of practices, rules, with some having related djudication and mechanisms or proper enforcement. There are nternational agencies namely the United Nations (UN), the European Union (EU), the World Trade Organization (WTO), the World Bank (WB), and the International Monetary Fund (IMF), as well as multinational corporations and international non-governmental orgnizations (NGOs)[15]

In global food supplies, the conditions of rise are generally seen as important although not sufficient condition for reducing the problems of ood insecurity and malnutrition vailability, stability, accessibility, sufficiency, autonomy, reliability, equitability and sustainability re considered to be inter alia elementary for ood security issues In various ways such key factors imply that globalisation has had some basic effects over ood security n following ways:[16]

1. agricultural trade regulations(2) measuring food security based on supply availability and nutritional security, as determined by household and individual needsand (3) the explosive growth in biotechnology By reaching out to those marginal lands in nations that at present are still unable to produce sufficient eatables for survival of their own population, the second part could advance yields'potential and rise of productivity.[17]

Understanding that the connection between ood security and globalisation s more so bi-functional such that they do affect each other, they fall undersized of interpreting. Scenario where the developing nations reap the benefits will be a far sighted scenario in likelihood.[18]

RECENT DEVELOPMENTS:

The Food Security Act, 2013:[19]

The Preamble states *"An Act to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matters connected therewith or incidental thereto"*[20]

15. Thomas Pogge, POLITICS AS USUAL: WHAT LIES BEHIND THE PRO-POOR RHETORIC, (2010).
16. Handy Williamson, Jr., Globalization and Poverty: Lessons from the Theory and Practice of Food Security, presented at ASSA winter meetings (New Orleans, LA, January 2001).
17. Pinstrup-Andersen, P. Designing Long-Term Scenarios: Prospects for Global Agriculture, presented at Globalization and Linkages to 2020: Challenges and Opportunities for OECD Countries, (Organization for Economic Cooperation and Development, Paris, June 1996).
18. *Id.*
19. This Act may be called National Food Security Act, 2013.
20. Preamble, National Food Security Act, 2013.

Some of the key features of the said Act include–he Public Distribution System is to be reformed. The eldest woman in the household, 18 years or above is the head of the household for the issuance of the ration card. There will be state- and district-level redress mechanismsand State Food Commissions will be formed for implementation and monitoring of the provisions of the Act. Every person belonging to identified eligible households is entitled to receive 5 kg of foodgrains per person per month at subsidized prices under TPS. The existing Antyodaya Anna Yojana (AAY) households, which constitute the poorest of the poor, will continue to receive 35 kg of foodgrains per household per month.[21] However, Central Government has exempted its liability in acute conditions like draught, which is a loophole in the draught- prone country. Parliament has a social justice obligation, which is yet to be paid its due by proper implementation of the existin law. So far till July 2017, the State Food Commissions have not been appointed in some states such as Madhya Pradesh, Andhra Pradesh and Haryana.[22]

Ministry of Consumer Affairs, Food & Public Distribution: In a Press release was stated that *"A significant step towards better targeting and leakage-free distribution of foodgrains, direct benefit transfer is carried out in two different modes." In the first mode, food subsidy is being transferred in cash into the bank account of beneficiaries, whothen have the choice to buy foodgrains from the open market. This has been started in UTs of Chandigarh, Puducherry and urban areas of Dadra & Nagar Haveli. The second mode involves automation of fair price shops, for distribution of foodgrains through anelectronic point of sale (e-PoS) device which authenticates beneficiaries at the time of distribution and also electronically captures the quantum of foodgrains distributed to the family.*[23]

National Nutrition Strategy 2017:

On 5hSeptember 2017, this initiative was inaugurated by Dr. M.S Swaminathan, Leader of the Green Revolution and Padma Shri Dr. H Sudarshan. [24]

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21. The food Security Act 2013 Available at www.prslegislative.org (Last visited on September 2, 2018).
22. Available at http://economictimes.indiatimes.com/news/politics-and-nation/national-food-security-act-not-implemented-as-it-should-be-supreme-court/articleshow/59702676.cms (Last visited on September 10, 2018).
23. Press release dated 3.11.2016, "Entire Country gets National Food Security Act coverage" , Available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=153217 (Last visited on September 10, 2018).
24. Press Release dated 5.9.2017, NITI Aayog calls renewed focus on Nutrition, launches the National Nutrition Strategy", Available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=170549 (Last visited on September 11, 2018).

The nutrition strategy envisages a framework wherein the four proximate determinants of nutrition –uptake of health services, food, drinking water & sanitation and income & livelihoods –work together to accelerate decline of under nutrition in India. Currently, there is also a lack of real time measurement of these determinants, which reduces our capacity for targeted action among the most vulnerable mothers and children.[25]

Supply side challenges often overshadow the need to address behavioural change efforts to generate demand for nutrition services. This strategy, therefore, gives prominence to demand and community mobilisation as a key determinant to address India's nutritonal needs.[26]

"The Nutrition Strategy framework envisages a *Kuposhan Mukt Bharat (Free from malnutrition, across the life cycle) - linked to Swachh Bharat and Swasth Bharat* The aim is to ensure that States create customized State/ District Action Plans to address local needs and challenges. This is especially relevant in view of enhanced resources available with the States, to prioritise focussed interventions with a greate role for panchayats and urban local bodies. he strategy enables states to make strategic choices, through decentralized planning and local innovation, with accountability for nutrition outcomes.[27]

RELEVANT CASE LAWS:

The Hon'le Supreme Court of India has time and again through its judgments protected the vulnerable poor and distress class of the society.[28]

In a case, he Supreme Court observed that right to life guaranteed in any civilised society implies the right to food, water, good environment, education, medical care and shelter.[29] Under ambit of fundamental rights, the struggle to get "right to food" recognised was in issue in a case initiated by two social workers (by way of letter) and the Indian People' Front (by way of a writ petition) in the context of the increasing starvation deaths and famine in Kalahandi and Koraput in Odisha in a case decided by the Hon'le Supreme Court. It was pointed out that selling their labour by the landless labourers even under exploitative conditions was considered to be the only way to escape starvation deaths. On being directed to submit a report on the implementation of socialwelfare measures and the incidence of starvation death in the district,

25. National Nutrition Strategy 2017, Niti Ayog, Government of India.
26. *Ibid.*
27. *Ibid.*
28. Garima Yadav, Right to Food in Global and National Perspective, (2017) PL March 66, SCC Online.
29. Chameli Singh v State of UP (1996) 2 SCC 549.

the District Judge (Kalahandi district) outright denied any such occurrence and that was challenged by the petitioners. However, the effect was futile as the right to food was not awaded the claimed recognitioninstead the State Governments were directed to implement the social welfare measures.[30]

The Hon'le Supreme Court in April 2001[31] 1has decided public interest litigation filed by PUCL, as a part of campaign, or helping the families that were starving in the drought struck States, to ensure exercise of their right to food here were directions to the State Governments and Union of India to implement eight different Centrally sponsored schemes.[32] One of the most important directions was given to the State Governments to provide in the government schools, to provide children hot cooked mid day meals in all government schools. Currently, this initiative of mid day meal scheme is one of the largest mi day meal programme in the world. ather, this led to the passing of National Food Security Act 2013.

In another case filed by PUCL, the Hon'le Supreme Court passed an orderdirecting the distribution of food grains to the poor at free or vastly reduced rates, to stop the corruption in ood Corporation of India The Court further made it clear that the directive issued was in the nature of an order and not a mere suggestion after the Union Agriculture Ministry considered it to be the latter.[33]

The right to food and nutrition as is well known to be a human right, and is increasingly recognised worldwide, here is also a legal obligation to assure people that the people are adequately nourished. The Supreme Court having been guided by the national law, it could also have drawn attention to the understanding at global level.[34]

CONCLUSION AND SUGGESTIONS

It can be seen that the basis for right to food has to be minimalistic in approach wherein certain basics requirements are met for everybody. The egalitarian approach is not practically

30. Kishen Pattnayak v. State of Orissa 1989 Supp (1) SCC 258.
31. Unreported Order passed by the Supreme Court, available at http://www.righttofoodindia.org/orders/nov28.html (Last visited on September 12, 2017) .
32. These schemes included food distribution schemes and schemes guaranteeing income support in order to gain access to food such as the National Old Age Pension Scheme, the National Maternity Benefit Scheme and the National Family Benefit Scheme.
33. PUCL (PDS Matters) v. Union of India, (2013) 2 SCC 663.
34. G Kent, The Human Right to Food in India, (2002), University of Hawaii, available at http://www.earthwindow.com/grc2.foodrights.

feasible in such a scenario. Equal food grains to everybody cannot be nsured as many states suffer from a variety of problems. These problems include fatal weather conditions, accessibility issues etc. In short we can say that food security cannot be ensured only by increasing the per head availability of food grains. Malthsian theory on famine and poverty is very restricted. It has a very myopic view which only talks about the per head food availability.

Secondly, coming to the utilitarian and Kantian debate, it can be seen that that no common consensus can be reached. The developed nations are driven by the Kantian approach whereas the developing nations are trying to ask for food assistance etc by using he utilitarian approach.

He definition aspect of the right to food is all differently defined by various organizations. It is to be understood, that a definition all inclusive has to be referred which consists of factors like accessibility, sustain ability etc.

The current scenario requires a macro-economic outlook towards food security measures like the following: ntegrity and competence in public administration.[35] "Corruption in government undermines economic progress Incompetence and corruption are such evils in the society which may not be completely removed but can be reduced to a great extent. To analyse laws and administer justice, a judicial system is required for the rule of law and maintenance of order. In order to have an institutional environment the Government is required to strive for same.[36]

"Because an ounce of competition often is more effective than a pound of regulation, open foreign trade to countervail concentrated economic power of domestic firms is an effective option. Although the private sector acting alone will not properly supply pulic goods, often the appropriate role of government is not to produce such goods, but to take bids for private firms to supply them.[37]

The main components of an appropriate trade policy cover: penness to trade in

35. Performance of civil servants and political officeholders is enhanced by merit hiring, proper training, competitive salaries, a free press to expose corruption, checks and balances between branches of government, and minimizing government interventions that create economic rents, bribes, and kickbacks, security, stability, order.
36. "T.W. Schultz, THE ECONOMICS OF BEING POOR (1993)." The investors have an incentive to invest in something when they are able to reap benefits of same. So, for example, property is one investment by which they get payoff and are also able to use same as collateral for debts. A investor friendly scenario raises foreign direct investment.
37. Handy Williamson, Jr., Globalization and Poverty: Lessons from the Theory and Practice of Food Security, presented at ASSA winter meetings (New Orleans, LA, January 2001).

investment, goods, and services with allowances for infant industry, national security, and sanitary phytosanitary protections as permitted by World Trade Organization rules. flourishing developing economy makes use of foreign markets.[38]

By proper infrastructure it is meant that proper investment is required n all weather roads to ensure food security and to sustain commercial activity regular with regional and international relative benefit."[39]

Human resource investments:[40] The human resource investments frequently have positive externalities and are vital for broad based development for men and women, as well as minorities. As the return rate with respect to lementary schooling investment s particularly high, niversal elementary schooling s a main concern for food security and broad based sustainable development. anitation for food security Concentration over water and waste is required in such services. There is an interference with the digestion of food and sap vitality due to bacteria and parasites.[41]

So when the economic base of a developing country is not adequate to provide even the minimum developed tools such as improved agricultural technology, then foreign assistance becomes important. For such countries, evelopment assistancecan be a determinant factor in order to break the poverty cycle of too little income to support public infrastructure and services necessary to raise income.[42]

The issues pertaining to ood security iffer by length of run, which can be short,

38. Schuh, G.E., The New Macroeconomics of Agriculture, 58(5) AMER. J. AGR. ECON., 802-11 (1976)." A proper foreign exchange rate achieved by the market (flexible rate) and sound monetary fiscal policy. Overvalued currencies are ubiquitous and are especially pernicious because they tax agriculture and deprive poor countries of foreign exchange to purchase food and other imports. In cases where the exchange rate of a developing country is pegged to a hard currency such as the American dollar, regular exchange rate devaluation and occasional market floats may be necessary to correct for high inflation relative to trading partners. Such devaluation avoids the macroeconomic degradation process.
39. *Id.*
40. Schultz, T.W, TRANSFORMING TRADITIONAL AGRICULTURE, (1964).
41. Handy Williamson, Jr., Globalization and Poverty: Lessons from the Theory and Practice of Food Security, presented at ASSA winter meetings (New Orleans, LA, January 2001).
42. Handy Williamson, Jr., Globalization and Poverty: Lessons from the Theory and Practice of Food Security, presented at ASSA winter meetings (New Orleans, LA, January 2001). But the most important contribution of developed countries to many developing countries is open markets. Many African countries, for example, will not be able to prosper on agriculture alone. They will need to shift to manufacturing products for export after advancements in agriculture first provide the economic base to improve human capital essential for competing globally in nonfarm industries and attracting foreign investment. That development process will function best if international markets are open.

intermediate and long. For the ZPG, developed countries are mainly close to or below fertility rates required for ZPG.[43]

We can also conclude from the research that "Political failure" s inseparable from broader nstitutional failure ood insecurity and economic stagnation are not the outcome of limited natural resources, environmental degradation, or ignorant people.[44] "Rather, they are the result of misguided public policies, which in turn are the product of weak institutions and corrupt governments serving special interests. Institutional change is required to adopt the standard model.[45]

The UN Sustainable Development Goals 2017- Goal 2 addresses a fundamental human need—ccess to nutritious, healthy food, and the means by which it can be sustainably secured for everyone. Tackling hunger cannot be addressed by increasing food production alone. Well-functioning markets, increased incomes for smallholder farmers, equal acces to technology and land, and additional investments all play a role in creating a vibrant and productive agricultural sector that builds food security.[46]

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43. *Id.*
44. Handy Williamson, Jr., Globalization and Poverty: Lessons from the Theory and Practice of Food Security, presented at ASSA winter meetings (New Orleans, LA, January 2001). Poorly structured, inadequate institutions often trace to cultural factors such as tolerance of the public for unrepresentative, corrupt, incompetent government. Government leaders often view their position as an opportunity for personal aggrandizement rather than to be a servant of the public interest. Socio-institutional change and hence standard model adoption are blocked by cultural characteristics such as caste and ethnic animosities, which provide a fertile climate for governments not representing the public interest to play one group against another.
45. *Id.*
46. The United Nations Sustainable Development Goals 2017, available at http://www.un.org/sustainabledevelopment/wp-content/uploads/2016/08/2_Why-it-Matters_ZeroHunger_2p.pdf (Last visited on August 28, 2018).

RIGHTS OF OLDER PEOPLE IN INDIA: AN INTROSPECT

Babu Sarkar*
Pritam Banerjee **

matridevo bhava |pitridevo bhava |
acharyadebo bhava|
athithidevo bhava | yanyana vadyani karmani |
tani sevi-tavyani | no itarani | yanyasamakagm sucharitani |

-Taittiriya Upanishad, 1.11.2

INTRODUCTION

Let your mother be a Goddess to you. Let your father be a God to you. Let your teacher be a God to you. Let your guest be a God to you. The works that are not blameworthy are to be resorted to, not the others. Those actions of ours that are commendable are to be followed by you, not the others.[1]

Every individual has to face the advanced age i.e. old age. So, legal mechanism should be so effective in order to combat the problem of elder abuse. In other words, elder abuse is nothing rather non fulfillment of the needs of an elderly person. India is facing all the problems endemic to a developing country with population ageing, in the absence of parallel developments in socio-economic and health spheres. In many Asian cultures, old age was admired; children were considered as insurance for old age. There was a strong and implicit belief that parents would bring up the young and in return they would be looked after in old age by the adult children. One of the duties of householder in Hinduism was shelter, which is provided to old and weak. Joint family system provided a safety net for older people.[2] When there is occurrence of crime within the society, problem oriented safety net is provided by the legislature in order to control the emerging problem.

Family, the primary unit of a society has also changed in its form and function. The traditional moorings of the family are fast fading away under the pressure of the fast paced

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1. Swami Atmashraddhananda, Upanishads for Students, 45 (1st ed. 2013).
2. H. Kaur, National Laws and Policies on Elderly, available at: http://shodhganga.inflibnet .ac.in/bitstream/10603/160643/10/10_chapter%203.pdf. (Accessed on 07-08-2019).

modern lifestyle. The elderly who have been an important component and had the protection under the traditional family setup are the worst affected in this changed scenario. The situation is becoming more alarming with the phenomenon of population ageing auguring greater life expectancy of citizens at birth and the life expectancy beyond the age of sixty is also increasing.

INTERNATIONAL SCENARIO

The United Nations is concerned not only with the quality of the life of human beings, but it is also equally concerned with the longevity of the human beings. As a result of the gradual decline in death rates and rising life expectancy, it is expected that all countries of the world during the next two decades will witness an increase in the proportion of their population aged 60 years or over. The United Nations is committed to help those countries which are facing the challenges for the needs of elderly persons and using effectively their contribution to development.

1. Development:

The question of ageing was first debated at the United Nations in 1948 at the initiative of Argentina. The issue was again raised by Malta in 1969. In 1971 the General Assembly asked the Secretary-General to prepare a comprehensive report on the elderly and to suggest guidelines for national and international action. In 1978, Assembly decided to hold a World Conference on the Ageing. Accordingly, the World Assembly on Ageing was in Vienna from July 26 to August 6, 1982 wherein an International Plan of Action on Ageing was adopted. The Plan made 62 recommendations for action in many areas including health and nutrition, protection of elderly consumers, housing and environment, family, social welfare, income security and employment and education. The Assembly in subsequent years called on governments to continue to implement its principles and recommendations. The Assembly urged the Secretary-General to continue his efforts to ensure that follow-up action to the Plan is carried out effectively.[3]

In 1990, the General Assembly designated October 1 as the International Day for Elderly, later renamed the International Day for Older Persons.

3. Dr. H.O. Agarwal, International Law and Human Rights, 888-89 (21st ed. 2016).

2. Principles:

The United NationsGeneral Assembly on December 16, 1991 adopted 18 principles which are organized into 5 clusters, viz. independence, participation, care, self-fulfillment, and dignity of the older persons.[4]

1. Older Persons should have the opportunity to work and determine when to leave the work force.
2. Older Persons should remain integrated in society and participate actively in the formulation of policies affecting their well-being.
3. Older Persons should have access to health care to help them maintain the optimum level of physical, mental and emotional well-being.
4. Older Persons should be able to pursue opportunities for full development of their potential and have access to educational, cultural, spiritual and recreational resources of society.
5. Older Persons should be able to live in dignity and security and should be free from exploitation and mental and physical abuse.

3. Second World Assembly

The Second World Assembly on Ageing was held in Madrid in April, 2002. It adopted the International Plan of Action and a Political Declaration which stressed the crucial importance of incorporating ageing issues into all development plans. In the plan of action three priorities were laid down for older persons, i.e., older persons and development, advancing health and well-bring into old age and enabling the supportive environments.

The first priority-older persons and development focused on eight issues which included for urgent action to ensure the continuing integration and empowerment of older person, thus, enabling them to participate actively in society, development and the labour force. Governments should focus on involving older persons decision making, creating employment opportunities for those who wish to work and improving living conditions and infrastructure in rural areas. They should also alleviate poverty in rural areas, integrated older migrants within

4. Dr. Shashi Nath Mandal, Protection of Rights of Oldage Person in India: A Challenging Facet of Human Rights, 11 GJHSS 23, 26 (2011).

new communities and create equal opportunities for education and training.

Under the second priority advancing health and well-bring into old age-governments should reduce the effects of factors increasing disease and dependence in older age, develop polices to prevent ill health and provide access to food and adequate nutrition. The needs and perceptions of older persons should be integrated into the shaping of health policy.

The third priority-ensuring enabling and supportive environment urged recommendations for improving housing and living environments of older persons, promoting a positive view of ageing and enhancing public awareness of the important contributions of older persons. It also stated the availability of accessible and affordable transport for older persons, providing a continuum of care and service for older persons and supporting the care-giving role of older persons. Till noted that a vital first step towards implementation would be to mainstream ageing and the concerns of older persons into national development frameworks and poverty eradication and strategies.[5]

POSITION IN INDIA

In India older generations are not aware of their human rights due to high prevalence of illiteracy and lack of awareness. On the other hand, due to comparatively high physical as well as psychological vulnerability their cries for help remain within four-walls that is why only a few cases of violation of human rights of elderly come out. Everincreasing numbers of distress calls from older people clearly indicate disturbing condition of Human Rights of Older people in India.

1. Constitutional Safeguardes

The Constitution of India guarantees the right of life and liberty of every individual under Article 21. This has been interpreted to include the right to live with dignity and would encompass the right to live with dignity of senior citizens.[6] Article 41 of the Indian Constitution lays down that the Stateshall, within the limits of economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases

5. *Supra Note 3, at 889.*
6. NALSA (Legal Services to Senior Citizens) Scheme, 2016, available at: . http://kelsa.gov.in/downloads/seniorcitizens.pdf. (Accessed on 15-10-2018).

of unemployment, old age, sickness and disablement, and in other cases of undeserved want. Article 46 also imposes a positive obligation on the State to promote withspecial care the economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation.Weaker Section Includes women, children, old age people and to promote the educational and economic interest of the weaker sections. Article 41 and 46 are included underPart IV i.e., the Directive Principles of State Policy and as stated under Article 37 of the Indian Constitutionboth are not enforceable in any court of law nevertheless, they impose positive obligations on the State and are fundamental in the governance of the country and the state has been placed under an obligation to apply them in making laws the courts however cannot enforce a directive Principle as it does not create any justifiable right in favour of any individual.

Entry 9 in the State List and entries 20,23 and 24 of the concurrent List in the Seventh Schedule to the Constitution relate to old age pension, social security and social insurance and economic and social planning. Entry 24 in the Concurrent List specifically deals with the "Welfare of labour, including conditions of work, provident funds, liability for workmen's compensation, invalidity and old age pension and maternity benefits." Thus, there are several constitutional entries relating to old age.

2. Legislative Protection

Hindu Laws

The statutory provision for maintenance of parents under Hindu personal law is contained in Section 20 of the Hindu Adoption and Maintenance Act, 1956. This Act is the first personal law statute in India, which imposes an obligation on the children to maintain their parent. The obligation to maintain aged or infirm parents is a personal obligation arising out of the parent-child relationship. However, under the old Hindu law, the obligation was imposed on the son alone. Daughters had no such obligation. But modern Hindu law makes it an obligation of sons and daughters.[7] It is important to note that only those parents who are financially unable to maintain themselves from any source are entitled to seek maintenance under this Act.

7. Dr. Paras Diwan, Modern Hindu Law, 463 (22nd Ed. 2014).

Maintenance is a term of wide connotation and as explained under sub-section 3 of section 20 of The Hindu Adoption and Maintenance Act, 1956. It says if the income from the own earnings and other property of the parents falls short to meet these requirements, the son and the daughter cannot escape their liability by pleading that the parents are able to maintain themselves out of their own earnings and other property. Under the concern Act includes a childless stepmother in the expression 'parent' but the childless stepfather is still excluded from the purview of the expression 'parent'.[8]

Muslim Laws

Mohammaden Law says that the parents have the next position in the right of maintenance after the children. The liability to maintain parents rests only on the children and is not shared by anyone else. As between parents the mother is entitled to preference over the father.

There is a difference of opinion as to the extent of the liability of different children to maintain the parents. Ameer Ali states that the liability is in proportion to the shares of inheritance. Another opinion is that if there is considerable difference in the means, maintenance is to be provided in proportion to the means. But the better opinion seems to be that the duty to support is equal. The right is equally incumbent upon a son and a daughter according to Zahi Rawayatand this is approved.

Shia Law: The liability is apportioned according to the individual means of the different persons who are bound to maintain.

Shafei Law: There is a difference of opinion as to whether the heirs are jointly liable for maintenance or only in proportion to their respective shares.

According to Mulla,Children in easy circumstances are bound to maintain their poor parents although the latter may be able to earn something for themselves, if the mother is poor, though she may not be infirm. A son, who though poor is earning something, is bound to support his father who earns nothing. Both sons and daughters, have a duty to maintain their parents under the Muslim law. [9]

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8. Mayne's Treaties on Hindu Law & Usage, 1195 (1998).
9. *Supra Note 2.*

The grand-children of a person would not be liable to maintain if there is a husband, children or parents who would be under duty to maintain, even though they may be entitled to inherit. Thus, if a man has a daughter or father and a son`son, the daughter or the father must maintain. The son`s son would not be bound to maintain even though he is entitled to inherit. As in the case of sons, the liability of all grand-children would be equal.

But where there are both grand-parents and grand-children, the liability would be of both proportionately to the extent of their shares in inheritance. Thus, if there is a father`s father and a son'son they must provide maintenance in proportion of one-sixth and five sixth.[10]

Sikh, Christian and Parsi Laws

Sikhs do not have any personal law, beneath that they will claim profit. They can take benefit under Hindu law. The Christians and Parsis have no personal laws providing maintenance for the parents. Parents who wish to seek maintenance have to apply under provisions of the Criminal Procedure Code.[11]

Code of Criminal Procedure, 1973

Sections 125 to 128 of the Code of Criminal Procedure, 1973 enable the father or mother, who is unable to maintain himself or herself to claim maintenance from his/her major son/daughter, if they neglect or refuse to maintain the parents. This is a secular law and applies across all religions. If the person against whom the order has been passed fails to pay the amount of maintenance without any sufficient reason, execution proceedings can be filed and the court may even issue a warrant imposing fines for the breach of the order and the person may be imprisoned.

Protection Of Women From Domestic Violence Act, 2005

Under this Act only mother as a parent can file a petition against her son or male relative, if she is subjected to domestic violence and can claim various reliefs as specified under this Act.

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10. *Supra Note 6.*
11. Amita Sharma & Dr. Neeraj Singh, Protection of right to maintenance and welfare of old age persons in India, 2 IJAER 315, 318 (2017).

This Act seeks to cover those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or though a relationship in the nature of marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the proposed legislation. But it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female relative.[12] Section 2(f) of this Act defines the expression "domestic violence" to conclude actual abuse or the threat or abuse that is physical, sexual, verbal, emotional or economic. Section 19 further provides for the rights of women to secure housing.

The Maintenance And Welfare of Parents and Senior Citizens Act, 2007

This Act consists of seven chapters and thirty twosections. The first Chapter is the preliminary chapter consisting of sections 1-3 anddeals with the preliminary definitions, Chapter II of the Act consisting of sections4-18 deals with the Maintenance of Parents and Senior Citizens, Chapter IIIconsisting of section19 deals with the establishment of old age homes, Chapter IVconsisting section 20 deals with the provisions for medical care of senior citizens,Chapter V consisting of sections 21-23 deals with protection of life and property ofsenior citizens, Chapter VI consisting of sections 24 and 25 deals with offences andprocedure for trial and Chapter VII consisting of sections 26-32 deals withmiscellaneous details.

The objective of the legislation is to provide for more effective provisions for the maintenance and welfare of parents and senior citizens guaranteed and recognised under the Constitution. The underlying intent is to provide a statutory backing to ensure the aged are maintained by their family. It is an established fact that family is the most desired environment for senior citizens / parents to lead a life of security, care and dignity. In view of this fact and to ensure that the children perform their moral obligation towards their parents, the legislation aims to create an enabling mechanism for the older persons to claim need based maintenance from their children. It also provides for an appropriate mechanism to be set up to make provision for better medical facilities to senior citizens, for institutionalization of a suitable mechanism for

12. A. G. Gupta (ed.), Law of Maintenance, 840-41, (2007).

protection of life and property of older persons and for setting up of old age homes in every district". [13]

The Employees Insurance Act, 1948

The Employees Insurance Act, 1948, which covers factories and establishments with 10 or more employees and provide for comprehensive medical care to the employees, who are at the age of superannuation or at the age of retirement and their families as well as cash benefits during sickness and maternity and monthly payments in case of death or disablement.

The Workmen's Compensation Act, 1923

Which requires payment of compensation to the workman or his family in cases of employment related injuries resulting in death or disability. Disablement can be full or partial. This benefit can be given to senior citizen employees

Payment Of Gratuity Act, 1972

The object of providing a gratuity scheme is to provide a retiring benefit to the workmen who have rendered long and unblemished service to the employer and thereby contributed to the prosperity of the employer.

Social Security to Senior Citizens Bill, 2010

This is a private members bill which is introduced by Sri J.P. Agrawal and discussed in the parliament on 22ndFeb. 2013. Priviously, this bill was also attempted to be introduced in 2010 and 2012. This bill seeks to provide social security to the senior citizens. For the welfare and protection of rights of senior citizens, several state legislatures have also passed legislations/rules namely :[14]

1. Himachal Pradesh Maintenance of Parents and Dependants Act, 2001.
2. Delhi Maintenance and Welfare of Parents and Senior Citizens (Amendment

13. Standing Committee on Social Justice and Empowerment (2007-2008), Ministry of Social Justice and Empowerment The Maintenance And Welfare Of Parents And Senior Citizens Bill, 2007, 28thReport, Lok Sabha Secretariat, New Delhi August, 2007, available at: http://www.prsindia.org/uploads/media/1182337322/scr1193026940_Senior_Citizen.pdf. (Accessed on 30-03-2016).
14. Dr. Shashank Shekhar, Existing Legal Protection Available to Senior Citizens: An Indian Context, 03 IRA-IJEMS, 485, 494 (2016).

Rules), 2010.

3. Bihar Maintenance and Welfare of Parents and Senior Citizen Rules, 2012

JUDICIAL INTERVENTION

Before 1965, there were no proper laws for providing maintenance to elder parents or widow of the deceased property holder.[15]

1. In ***Narayano Ramchandra Pant Vs. Ramabai*** [16] , The Privy Council at the outset identified the right to maintenance of the old widow of the deceased whereas there was no such provision made by the testator and also passed the decree which indwelt the old mother back in here husband's property.

Thereafter, in 1956, the Hindu Adoption and Maintenance Act,1956 was passed and by section 20(1) of the Act, every Hindu son or daughter is under obligation to maintain aged and infirm parents. Parents are entitled to maintenance if they are unable to maintain themselves. The amount is determined by the court taking into consideration the position and status of the parties.

2. In ***K.M. Adam Vs. Gopalkrishnan***[17] , Supreme Court opined inter alia, if the child is a Hindu, irrespective of whether the father or the mother is a Hindu, is entitled to claim maintenance against him or her.

Section 125(1)(d) of The Code of Criminal Procedure, 1973, makes a person having sufficient means to maintain his parents if they are unable to maintain themselves. Such petition is filed in criminal court as it is given in Code of Criminal Procedure, this makes the process of mitigation comparatively faster compared to civil procedures.

3. In the case of ***Dr. Vijaya ManohorArbat Vs. Kashi Rao Rajaram Sawai and Anr.***[18] , the apex court rightly observed that a married daughter who is self sufficient has to provide maintenance to the father or mother who do not have any other son. Also, the step mother is equally entitled for maintenance as the father.

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15. Niharika Sharma, Judicial Approach towards the Rights of Elderly, Legal Service India Com., available at: http://www.legalservicesindia.com/article/2506/Judicial-Approach-towards-the-Rights-of-Elderly-Persons.html. (Accessed on 19-10-2018).
16. I.L.R. (1879) 3 Bom. 415.
17. AIR 1974 Mad 232.
18. AIR 1987 SC 1100; 1987 SCR (2) 331.

4. According to the opinion given in ***Baban @ Madhav Dagadu Dange Vs. Parvatibai Dagadu Dange Anr.***[19] , the expression 'mother' includes 'adoptive mother' as well.

Persons who did not have any children were still out of the ambit of maintenance and were not covered by any legislation till 2007. Thereafter in the year 2007, the maintenance and welfare of parents and senior citizens act was passed to provide maintenance support to elderly parents and senior citizens. The Act establishes the Maintenance Tribunal to provide speedy and effective relief to elderly persons. Section 19 of the Act also mandates the establishment of an old age home in every district and provides for the protection of life and property of the elderly.

5. The High Court of Jharkhand in ***Senior Citizen Advocates Service Sansthan and Anr. Vs. State of Jharkhand*** [20], has directed the State Old Age Homes in each district of the State with the immediate effect along with directing state government to arrange different queues in hospitals and other steps for easement for elderly people while taking medical treatment.

6. In ***Reju & Ors. Vs. The Maintenance Tribunal, Thiruvananthapuram & Ors***.[21] , the High Court of Kerala has upheld the order of the tribunal for providing welfare means to the relative even if there is no successor interests arising from the senior citizen's property as to the petitioner.

GOVERNMENTAL SCHEMES

Different Ministries under the Central Government have come up with different Schemes for senior citizens. The National Policy on Senior Citizens focuses on mainstreaming senior citizens, specially older women, promoting the concept of 'ageing in place' or ageing in own home, housing, income security and homecare services, old age pension and access to healthcare insurance schemes and other programmes and services to facilitate and sustain dignity in old age.[22] The schemes for Senior Citizens include:

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19. 1978 Cr.L.J. 1436.
20. J.L.J.R. 2016(2) 137.
21. AIR 2016 Ker 97.
22. National Policy on Senior Citizens, 2011, Ministry of Social Justice, Govt. of India,available at: http://socialjustice.nic.in/writereaddata/UploadFile/dnpsc.pdf. (Accessed on 18-10-2018).

1. Integrated Programme for Older Persons under which financial assistance upto 90% of the project cost is provided to NGOs for establishing and maintaining Old Age Homes, Day care Centers, Mobile Medicare Units and to provide non-institutional services to older persons.
2. Rebate in income tax, deduction in respect of medical insurance premium upto Rs.30,000/- under section 80D of Income Tax Act, 1961, deduction under section 80DDB for treatment of specified aliment is Rs.60,000/- for senior citizens, separate counters for senior citizens at the time of filing the income tax returns and on the spot assessment facility.
3. 'Senior Citizens Saving Scheme' under which the citizens of 60 years and above can deposit Rs.1000/- or its multiples in post offices doing saving bank work which carries an interest of 9% per annum and the maturity period of the deposit is five years, extendable by another three years. For senior citizens i.e. those having the age of 65 years and above, higher rates of interest on saving schemes are available.
4. Under the Indira Gandhi National Old Age Pension Scheme, central assistance is given towards pension at the rate of Rs.200/-per month to person above 60 years and at the rate of Rs.500/-per month to senior citizens of 80 years and above belonging to a household below the poverty line and the same is expected to be supplemented by at least an equal contribution by the States.[23]
5. Discount on basic fare for domestic flights in economy class and priority in boarding the flights.
6. Concession for senior citizens in all classes and trains, priority for lower berths, separate counters for senior citizens for purchase/booking or cancellation of tickets, wheel chairs for use of senior citizens are available at all junctions, District Headquarters and other important stations.
7. Reservation of two seats in the front rows of buses of State Road Transport Undertakings for senior citizens and even fare concession.
8. Separate queues for older persons in hospitals for registration and clinical

23. *Supra Note 13.*

examination and concession to senior citizens in treatment of diseases like kidney problem, cardiac problem, diabetes and eye problem.

9. Life Insurance Corporation of India(LIC) has also been providing several scheme for the benefit of aged persons, i.e., Jeevan Dhara Yojana, Jeeevan Akshay Yojana, Senior Citizen Unit Yojana, Medical Insurance Yojana.[24]

10. Under the Annapoorna Scheme being implemented by the States/UT Administration, 10 kgs of food grains per beneficiary per month are provided free of cost to those senior citizens who remain uncovered under the old age pension scheme.

11. Priority in issuance of ration to ration card holders who are over 60 years of age in Fair Price Shops.

12. Priority is giving telephone connections by the Ministry of Telecommunications and priority to faults/complaints of senior citizens by registering them under senior citizens category with a VIP flag which is a priority category.

13. Priority is also given to cases of senior citizens in the courts with a view to expeditious disposal. Under the Right to Information Act, 2005, second appeals filed by the senior citizens are taken on a high priority basis.

14. NALSA (Legal Services to Senior Citizens) Scheme, 2016

In this Scheme, the persons above the age of 60 years would be regarded as senior citizens. The main objects of the Scheme are:

- To outline the basic rights and benefits that should be accorded to senior citizens;
- To strengthen legal aid and representation at the national, state, district and taluka levels for senior citizen who are entitled under section 12 of the Legal Service Authorities Act, 1987 in availing the benefits of the various legal provisions which exist;

24. Dr. Rakesh Kumar Singh, Rights of Senior Citizen: Need of the Hour, Legal Service India.Com., available at: http://www.legalserviceindia.com/article/l170-Rights-Of-Senior-Citizen.html. (Accessed on 19-10-2018).

- To ensure access to various Governmental Schemes and prograsmmes to the senior citizens;
- To ensure that the authorities and institutions such as the Tribunals and the Appellate tribunals under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, old age homes for senior citizens have been established;
- To create and spread awareness about the rights and entitlements of the senior citizens under the various laws and Governmental Schemes and programmes through the District Legal Services Authorities, Taluka Legal Committees, panel lawyers. Para-legal volunteers, students and legal services clinic ;[25]
- To enhance capacities at all levels of panel lawyers, para-legal volunteers, volunteers in legal services clinics, government officers tasked with the implementation of the various schemes, service providers, police personnel, non-governmental organizations by organizing training, orientation and sensitization programmes; and
- To undertake research and documentation to study the various schemes, laws etc. to find out the gaps, the needs and to make suggestions to appropriate authorities.

The ultimate objective of the Scheme is to ensure that the senior citizens live a life of dignity and enjoy all the benefits and facilities which are due to them. [26]

CONCLUSION

The Fifth Commandment directs: *Honour your father and your mother* (Exodus 32:19). In the Mahabharata, Bhishma tells Yudhisthira: *The worship of mother, father and teacher is most important according to me.*[27]

There is a visible change in elder care due to rapid change in the social, cultural and economical structure. Now elder parents are living on the mercy of their adult children. Social security is provided by the Government to the employees of organized sector but still in unorganized sector, small farmers workman, landless labourers, small traders, shopkeepers are not secured by the Government. Government should provide social security to the elderly who

25. *Supra Note 6.*
26. *Id.*
27. *Supra Note 4.*

still beneath from such privileges. Though there are number of laws and government policies made for the protection of senior citizens but nothing much have been achieved so far. Since our Indian society has always been duty oriented and culture of India has been such that senior citizens do not want to drag their children in the court. Thus, for the proper implementation of law, awareness among senior citizens is required in an effective way. Finally, it may be conclude by saying that the problem of the Oldage must be addressed to urgently but and with utmost care. There is urgent need to amend the Constitution for the special provision for the protection of aged person and bring it under the periphery of fundamental right. With the degeneration of joint family system, dislocation of familiar bonds with arrival of nuclear family concept and loss of respect for the aged person in the family, in modern times should not be considered to be a secure place for them. Thus, it should be made the Constitutional duty of the State to take effective steps for the welfare and extra protection of the senior citizen including palliative care. Apart from this some more specific suggestions for betterment the condition of elder in the society are:

- Senior citizens cells should be established withspecial trained police personnel in every district.
- There should be an elderly helpline in which elderly may register their problems for effective redressed. There should also be a follow up monitoring.
- In every Police station should be provided training for sensitizing them with the needs of elders.
- Awareness programs should be run by the Government with the help of NGOs not only among elders or police personnel but also among the children and young generation as a preventive measure.

We would like to conclude this paper with the words of Pearl S. Buck : [28]

"Our society must make it right and possible for old people not to fear the young or be deserted by them, for the test of a civilization is the way that it cares for its helpless members".

28. An American writer and novelist.

THE ROLE OF INTELLIGENCE AGENCIES IN GOVERNANCE

Ms. Deepinder Kaur*

INTRODUCTION:

Security is a fundamental goal of all states in the contemporary world affairs. To support that search for security, all states collect intelligence- some merely devote more resources to the process than others. The significance of intelligence has been recognized for centuries. In one of the earliest recorded uses of spies, Moses ordered spies into Canaan to 'spy out the land' to see whether or not the Israelites could occupy it.[1] The Chinese general Sun Tzu (ca. 500 BC) devoted the last chapter of his widely read book, *The Art of War,* to the role of spies. As per Sun Tzu, what enables the wise sovereign and the good general to strike and conquer, and achieve things beyond the reach of ordinary men, is foreknowledge. Knowledge of the enemy's dispositions can only be obtained from other men. Therefore, historically, enlightened rulers and good generals who are able to obtain intelligence agents, as spies are certain for great achievements.[2]

In a world wrought with dangers at every corner, ranging from terrorist attacks, cyber security threats, and sexual predators to organized crimes, the citizens of the world need some semblance of safety. The mandate of protection of citizens often falls to the police and armed forces of every country. They carry out this mandate by snuffing out any potential threats and acting as the first responders in case a threat is actually carried out. This has created a scenario where these armed forces are swamped with work and short in manpower. They need help and specialized support to deal with ever evolving threats. That is where, the role of 'spies' or nowadays known as 'intelligence agencies' comes into the picture. Each country maintains these, which comprise of officer agents of exceptional caliber who are ubiquitous and help in effective governance of the country. The purpose of these agencies, which form a part of the criminal justice system, is to keep the society civilized and away from anarchy.

India has a well set-up structure with the police at its heart. Assisting the State Police

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1. Stan A. Taylor, "The Role of Intelligence in National Security", Chapter 14, Pg. 249, available at http://people.exeter.ac.uk/mm394/Intelligence/Collins%202007%20Intelligence%20(Taylor).pdf (last visited on 22nd October, 2018).
2. Sun Tzu, 'The Art of War", translated by Lionel Giles; 13:006 in the shonsi system, Chapter 13 'On Spies'.

there are other agencies and organizations responsible for the smooth functioning of the state, e.g. Intelligence Bureau, Research and Analysis Wing, NIA and the Central Bureau of Investigation. They gather their structure and mandate from the legislation, which forms their foundation stone.

WHAT IS AN INTELLIGENCE AGENCY?

Intelligence is defined as "The obtaining or dispensing of information, particularly secret information; also, the persons engaged in obtaining information; secret service."

An intelligence agency is a government agency, which is mainly responsible for gathering, analyzing, and passing the valuable information to the Government in support of national security, military, and foreign policy objectives.The Intelligence agents protect sensitive information secrets, i.e. their own secrets as well as the secrets of their own country. They give early warning of impending crises.

There is a difference between *"security intelligence"* and *"foreign intelligence"*. Security intelligence pertains to domestic threats (left wing extremism, drug and human trafficking etc.). Foreign intelligence involves information collection relating to the political, or economic activities of foreign states.[3]

FUNCTIONS OF INTELLIGENCE AGENCIES:

From dealing with innumerable blast incidents, to terrorist activities, insurgencies, situations resulting into political upheavals, countless gang rapes, economical and fiscal frauds, to prodigious causalities due to communalviolence, or beginning of a new reformatory campaign, the intelligence agencies of any country have to forever be vigilant and wary of every possible menace and the collateral damage it would bring along. As their job and operations are not elementary, but they perform the tasks with vigor and dexterity making solutions to such issues seem like carrying out everyday errands. Mossad of Israel, Central Intelligence Agency of the US, MI6 of the UK, Ministry of State Security of China and Main Intelligence Agency of Russia are a few examples of the most exemplary intelligence agencies of the world. As there might be different policies of each nation, the working of each agency varies in accordance with

3. Wikipedia, 'Intelligence Agency', available at https://en.wikipedia.org/wiki/Intelligence_agency (last visited on 22nd October, 2018).

the policy. Nevertheless, the primary functions of all intelligence agencies of the world are relatively similar.

The primary functions of intelligence agencies of any country is:

1. Planning and Collection- Planning by identifying the core issues of the specified problem and collecting all the information of the impending crisis against the nation and identify the loopholes in the information so collected.
2. Analysis and Processing- Breaking down the various pieces of information, processing it and serving the national and international crisis management by helping to discern the intentions of current or potential opponents;Inform national defense planning and military operations and protecting sensitive information secrets, both of their own sources and activities, and those of other state agencies.
3. Dissemination- Circulation of the analyzed information to the reliable secret agents in the field of the agency at work.
4. Covert action- acts covertly to influence the outcome of events in favor of national interests, or influence international security.
5. Counterintelligence- defends against the efforts of other national intelligence agencies.

INTELLIGENCE AGENCIES OF INDIA

The national security threats that India confronts today are much more diverse and complex than ever before. These threats range from nuclear-armed adversaries like China and Pakistan, to Maoists, and militancy and terrorism arising from within its borders and beyond. The question that we must ask is whether the country has a strategic measure of these challenges and the willingness and ability to confront them and, if required, pre-empt them. The tasks before India's intelligence community are similar to those that are confronted by their counterparts across the world: they relate to strategic intelligence, anticipatory intelligence, current operations, cyber intelligence, counterterrorism, counter proliferation and counter intelligence.[4] Therefore, India has a number of intelligence agencies of which the best known are

4. Manoj Joshi, "India's Intelligence Agencies: In Need of Reform and Oversight", 15th July, 2015, Observer Research Foundation Issue Briefs and Special Reports, available at https://www.orfonline.org/research/indias-intelligence-agencies-in-need-of-reform-and-oversight/ (last visited on 23rd October, 2018).

the Research and Analysis Wing, India's external and internal intelligence agencies play a vital role in maintaining the security of the country. A list of the intelligence agencies that support the Indian Government, in addition to its police and armed forces are as follows:

1. All India Radio Monitoring Service
2. Aviation Research Centre
3. Central Bureau of Investigation
4. Central Economic Intelligence Bureau
5. Combined Services Detailed Interrogation Centre (India)
6. Directorate of Enforcement
7. Defence Intelligence Agency
8. Department of Criminal Intelligence
9. Directorate of Air Intelligence
10. Directorate of Military Intelligence
11. Directorate of Naval Intelligence
12. Directorate General of Income Tax Investigation
13. Defence Intelligence Agency
14. Directorate of Air Intelligence
15. Directorate of Income Tax (Intelligence and Criminal Investigation)
16. Directorate of Revenue Intelligence
17. Economic Intelligence Council
18. Indian Political Intelligence Office
19. Intelligence Bureau
20. Investigation Division of the Central Board of Direct Taxes
21. Joint Cipher Bureau
22. Narcotics Control Bureau
23. National Investigation Agency
24. National Technical Research Organization
25. Radio Research Centre
26. Regional Economic Intelligence Committee

27. Research and Analysis Wing
28. Serious Fraud Investigation Office
29. Signals Intelligence Directorate
30. Thuggee and Dacoity Department
31. Wildlife Crime Control Bureau[5]

As each agency performs certain functions in protecting the nation from cyber bugs tosecurity threats to tax-evading conspiracies to condemning anti-national activities within the country, there are a few top agencies among these who play the lead role in maximizing the support they render in investigating and eliminating the root causes to such security crisis. The Government of India has not only provided legal status to many of these agencies, but the Indian Judiciary as well relies upon the reports and compendiums submitted by these agencies during the proceedings of the high-profile cases involving national security. During the busting of the recent case of self-styled god-man Ram Rahim Insan, it was the CBI, which assisted the police forces in extracting out valid evidences and witnesses against the accused.[6] A detailed look at some of the primary intelligence agencies of India is as follows:

CENTRAL BUREAU OF INVESTIGATION (CBI):

The CBI, came into being on 1stApril, 1963 despite the existence of Special Police Establishment, but it derives its power to investigate from the Delhi Special Police Establishment Act, 1946. After many amendments over the years, the CBI comprises of seven wings as on date, that are: (a) *Anti Corruption Division*- To deal with cases of corruption and fraud committed by public servants of all Central Government Departments, Central Public Sector Undertakings and Central Financial Institutions. (b) *Economic Crimes Division*- To deal with bank frauds, financial frauds, Import Export & Foreign Exchange Violations, large-scale smuggling of narcotics, antiques, cultural property and smuggling of other contraband items etc. (c) Special Crimes Division- To deal with cases of terrorism, bomb blasts, sensational homicides, kidnapping for ransom and crimes committed by the mafia/underworld.

5. Wikipedia, 'List of Intelligence Agencies in India", available at. https://en.wikipedia.org/wiki/List_of_Indian_intelligence_agencies (last visited on 23rd October, 2018)
6. Outlook Web Bureau, "CBI Court convicts Dera Sacha Sauda Ram Rahim for rape" 25th August, 2017, available at https://www.outlookindia.com/website/story/cbi-court-convicts-dera-sacha-sauda-chief-gurmeet-ram-rahim-singh-for-rape/300764 (last visited on 23rd October, 2018).

Furthermore, there is the *Directorate of Prosecution, Administrative Wing, Policy and Coordination Division*, and *Central Forensic Science Laboratory.*[7] In the words of the Director of CBI, it is the premier investigative agency in the country today, with a dual responsibility to investigate grievous cases and provide leadership and direction in fighting corruption to the Police force across the country.[8] The CBI, however, has been responsible for success in solving many high profile cases. From ***Bhagalpur Blindings***[9]***, Bhopal Gas Tragedy Case***[10]***, to the Satyam Scam***[11]***, Aarushi Talwar Murder Case***[12]***, Bhanwari Devi Murder case***[13] ***to Jessica Lal murder case***[14] ***and the latest in 2018, the Kathua gang rape case***[15] and following up on the ***Aircel-Maxis case after the 2G Spectrum Scam case***[16] , these are some of the humble examples of the exceptional performance done by the officers of CBI in not just solving the mysteries behind the cases, but, also, enabling the judiciary to set guidelines and make amendments in the legislations, like the *2013 Criminal Law Amendment*[17] came in after the ghastly ***Nirbhaya Gang Rape case of 2012***[18] .The CBI also acts as the "National Central Bureau" of Interpol in India. The Interpol Wing of the CBI coordinates requests for investigation-related activities originating from Indian law enforcement agencies and the member countries of the Interpol. For the purpose of rendering speedy justice, in matters involving voluminous evidence, separate CBI Courts have also been established. Thus, the ambit of CBI is enormously widespread as it plays a major role in ensuring the nation's safety from all ends.

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7. Overview, About Us, Central Bureau of Investigation, available at http://cbi.gov.in/aboutus/aboutus.php, (last visited on 23rd October, 2018).
8. Alok Verma, 'Director's Message', available at http://cbi.gov.in/dcbi_message.php (last visited on 22nd October, 2018).
9. Anil Yadav & ORs. v. State of Bihar & Anr. 1982 SCR(3) 533.
10. Union Carbide Corporation v. Union of India 1989 SCC (2) 540.
11. Byrraju Raman Raju v. State through Central Bureau of Investigation 2011 STPL (Web) 1001 SC.
12. Dr. Rajesh Talwar & Anr. V. Central Bureau of Investigation 2013 (82) ACC 303.
13. Vishakha v. State of Rajasthan (1997) 6 SCC 241.
14. Manu Sharma v. State(NCT) of Delhi, (2010) 6 SCC 1.
15. Sofi Ahsan, The Indian Express, "Kathua Gang Rape Case: 7 accused charged with criminal conspiracy of gang-rape, murder" 8th June, 2018, available https://indianexpress.com/article/india/kathua-rape-murder-case-charges-framed-against-7-accused-5208755/ (last visited on 23rd October, 2018) .
16. Subramanium Swamy v. A.Raja [2012] 11 S.C.R. 873t.
17. Gazette of India, Criminal Law (Amendment) Act, 2013 available at. http://harsamay.gov.in/PDF/The_Criminal_Law_(Amendment)_ACT_2013.pdf, (last visited on 23rd October, 2018) .
18. Mukesh v. State of NCT, (2013)2 SCC 587.

INTELLIGENCE BUREAU (IB):

Recognized by the *Intelligence Organizations (Restriction of Rights) Act,* 1985[19], and an important department of the Ministry of Home Affairs, the Intelligence Bureau (IB), is considered as the oldest surviving intelligence organization in the world and serves as India's internal security agency responsible for mitigating domestic threats. However, the IB Director is part of the Strategic Policy Group as well as the Joint Intelligence Committee (JIC) of the National Security Council, and can report directly to the Prime Minister.[20] This agency does not recruit personnel on its own, the ones recruited come directly from the other law enforcement agencies of the country, especially from the Indian Police Services. The main functions of the agency revolve around counter terrorism, counter intelligence and intelligence collection in border areas, infrastructure protection, VIP security and anti-secession activities. It works with other Indian intelligence and law enforcement organizations, particularly R&AW[21] (Research and Analysis Wing, India's external intelligence agency) and the newly created Defense Intelligence Agency. Recently, National Technical Research Organization (NTRO) also found place under the Act of 1985, with the IB and R&AW . The agency also maintains partnerships with foreign agencies, including security agencies in the U.K., U.S., and Israel[22] .

RESEARCH AND ANALYSIS WING (R&AW):

Another equivalent organization under the Act of 1985 is the R&AW. It came into existence in 1968 after the poor performance and pitiful defeat of India due to intelligence failure in theSino-Indian war, which persuaded the Government of India to create a specialized, independent agency dedicated to foreign intelligence gathering; as previously, both domestic and foreign intelligence had been the purview of the Intelligence Bureau.Formed on the lines of Central Intelligence Agency, the R&AW, however, directly reports to the Prime Minister's office. R&AW monitors the activities of certain organizations abroad only insofar as they relate

19. Act No. 58 of 1985, available at http://www.legislative.gov.in/sites/default/files/A1985-58.pdf, (last visited on 24th October, 2018).
20. Overview, Intelligence Bureau, Department of Ministry of Home Affairs, available at http://www.allgov.com/india/departments/ministry-of-home-affairs/intelligence-bureau?agencyid=7590 (last visited on 24th October, 2018).
21. Rahul Tripathi, The Indian Express, "National Technical Research Organization to have same powers as IB and R&AW", 18th May, 2017, New Delhi, available at https://indianexpress.com/article/india/national-technical-research-organisation-to-have-same-powers-as-ib-raw-4661388/ (last visited on 24th October, 2018).
22. *Supra note 20.*

to their involvement with narco terrorist elements and smuggling arms, ammunition, explosives, etc. into India.[23] It does not monitor the activities of criminal elements abroad, which are mainly confined to normal smuggling without any links to terrorist elements. The primary mission of R&AW includes aggressive intelligence collection via espionage, psychological warfare, subversion, sabotage and assassinations.R&AW maintains active collaboration with other secret services in various countries[24] . It obtains information critical to Indian strategic interests both by overt and covert means. Thus, R&AW has helped in formation of Bangladesh, in training members of LTTE in restricting Sri Lanka, contributed majorly during the Kargil War, and the 2008 Mumbai blasts case.

NATIONAL INTELLIGENCE AGENCY (NIA):

Post the horrific 2008 Mumbai blasts, India was shaken to its core as it lacked the intelligence to combat terrorism within time and efficiently. This led to the creation of the National Intelligence Agency in 2008, which has not failed in performing its important function, even in the slightest. The personnel of this agency are primarily recruited from the Indian Police Services as well as Indian Revenue Services. The major vision of this agency, with its jurisdiction covering each part of India, et the standards of excellence in counter terrorism and other national security related investigations at the national level by developing into a highly trained, partnership oriented workforce. It also aims at creating deterrence for existing and potential terrorist groups/individuals[25]. It aims to develop as a storehouse of all terrorist related information.Separate NIA Courts have been established for conducting trial of the terrorists and militants. Ever since its inception, the NIA has shaken the roots of popular and intimidating terrorist organization *Lashkar-e-Taiba,* like catching the bull by its horns.

NATIONAL TECHNICAL RESEARCH ORGANISATION (NTRO):

It is a technical intelligence Agency under the National Security Advisor in the Prime Minister's Office, and was set up in 2004. It also includes National Institute of Cryptology

23. Wikipedia, "Research and Analysis Wing", available at. https://en.wikipedia.org/wiki/Research_and_Analysis_Wing (last visited on 24th October, 2018)
24. Rajshree Bajoria, "RAW: India's External Intelligence Agency" 7th November, 2008, Council on Foreign Relations, available at https://www.cfr.org/backgrounder/raw-indias-external-intelligence-agency (last visited on 24th October, 2018).
25. Wikipedia, "National Intelligence Agency", available at. https://en.wikipedia.org/wiki/National_Investigation_Agency, (last visited on 24th October, 2018).

Research and Development (NICRD), which is first of its kind in Asia. NTRO will now have the same "norms of conduct" as the Intelligence Bureau (IB) and the Research and Analysis Wing (R&AW) and thus, will be included in the Intelligence Organizations (Restrictions of Rights) Act, 1985 by the 2017 amendment[26] . However, the personnel of the NTRO will continue to be governed by the Official Secrets Act, 1923[27] .As a highly specialized technical intelligence gathering agency, it does not affect the working of technical wings of various intelligence agencies, including those of the Indian Armed Forces, but acts as a super-feeder agency for providing technical intelligence to other agencies on internal and external security. The agency develops technology capabilities in aviation and remote sensing, data gathering and processing, cyber security, cryptology systems, strategic hardware and software development and strategic monitoring[28] .

Thus, India has created many such agencies, which help in firmly securing the nation from many such damages, menaces and threats of all kinds. Each agency has proved its efficiency by out-performing itself and has aided the Government of India in shaping up the criminal justice system of the country. Nevertheless, as the rule of nature as well as of law, nothing is absolute; similarly, the performance of each of the agencies has shown lacunas and shortcomings at several occasions. In times of turmoil, when the security and surety of the entire nation falls as a responsibility on the shoulders of these agencies, they have failed at certain times due to lack of infrastructure, misleading information, external factors or more-so, inefficiency and corruption of the personnel within. As the CBI makes headlines in the newspapers daily nowadays, for officers of the CBI being charged for corruption, it is a pitiable situation that India has been put in. Since the welfare and protection of the 1.2 billion citizens of the country depends upon these intelligence agencies, it is incumbent upon them to not paralyze themselves from within and bring in reform in their working and functioning. It has been debated since times immemorial of putting the information available to these agencies to be put

26. *Supra note 21.*
27. Act 19 of 1923, available at http://www.fia.gov.pk/en/law/Offences/3.pdf (last visited on 24th October, 2018)
28. Wikipedia, "National Technical Research Organization" available on https://en.wikipedia.org/wiki/National_Technical_Research_Organisation (last visited on 24th October, 2018).

in the public eye, but the idea is condemned in the same breath, as it would be equally accessible to the anti-national elements for exploitation.

NEED FOR REFORM OF INTELLIGENCE AGENCIES

The years from2016-2018, have been action-packed for the intelligence agencies of the country, as there have been multiple situations, which needed their undivided attention. From the surgical strike[29], to implementation of Goods and Services Tax[30], murder of Gauri Lankesh[31], military standoffs with China and Pakistan[32], and the latest being the Kathua gang rape case and many Mob-Lynching cases[33] resulting in communal violence, and the Bhima Koregaon case[34] running concurrently with the #MeToo campaign[35], there have been many such incidents which have demanded all-encompassing attention of the agencies. They work singularly or in collaboration with each other for assisting and guiding the Government and Judiciary towards analytical and justifiable solutions.As they have continued to perform remarkably, however, regardless, it has been endured that some important reforms could enhance the coherence in the working of these agencies. Some of these, in my recommendations, could be:

1. Starting early: These agencies must recruit younger personnel in addition to the officers who are civil servants. With them being updated with technology, they could mature within two decades to be polished and impeccable officers of the agency.

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29. Nitin A. Gokhale, The Diplomat, "The Inside Story of India's 2016 Surgical Strikes", available on https://thediplomat.com/2017/09/the-inside-story-of-indias-2016-surgical-strikes/ (last visited on 25th October, 2018).
30. Ernst & Young "GST Implementation in India" , available at https://www.ey.com/in/en/services/ey-goods-and-services-tax-gst (last visited on 25th October, 2018).
31. K.V. Aditya Bharadwaj, The Hindu "Unravelling the Gauri Lankesh Murder Case", 16th June, 2018 available at https://www.thehindu.com/news/national/unravelling-the-gauri-lankesh-murder-case/article24182177.ece (last visited on 25th October, 2018).
32. Independent, UK, "India Prepared to go to war with China and Pakistan simultaneously, says top general" 7th September, 2018, available at https://www.independent.co.uk/news/world/asia/india-prepared-war-china-pakistan-general-bipin-rawat-army-military-doklam-plateau-himalayas-a7933646.html (last visited on 25th October, 2018).
33. Alison Sandhalna, Pranav Rajput, Jay Hazare, Firstpost, "24 persons killed in mob attacks in 2018; analysis shows incidents rose 4.5-fold since 2017" 27th July, 2018, available at https://www.firstpost.com/india/24-persons-killed-in-mob-attacks-in-2018-analysis-shows-such-incidents-rose-by-4-5-times-since-2017-4698181.html (last visited on 25th October, 2018).
34. Prabodhan Pol, The Hindu "Understanding Bhima Koregaon" 4th January, 2018, available at https://www.thehindu.com/opinion/op-ed/understanding-bhima-koregaon/article22361017.ece (last visited on 25th October, 2018).
35. Indian Express, "What is the MeToo movement?" 14th October, 2018, available on https://indianexpress.com/article/india/metoo-movement-india-5396200/ (last visited on 25th October, 2018).

2. Improve, not merely control: Even though the intelligence agencies work tirelessly in controlling and combating various threats to the country, but, unfortunately, not much has been done to improve the existing security conditions of the country. Although, the agencies have worked efficiently in eradicating the foreseeable threat, but precautions for future have not been taken seriously. Therefore, reasonable measures need to be taken to improve the conditions.

3. Accountability and empowerment: In a democratic system, the Government relies upon the internal and external security agencies with the only motive of national security and not in magnifying their powers. But, however, all of the intelligence agencies need to be given a legalized character in order for their empowerment, definiteness and to hold them accountable at the same time for any misappropriation done by them. The legalization would not be an impediment as much as it would be an aid.

The private member's bill, *'The Intelligence Services (Powers and Regulation) Bill, 2011'*[36], did not make any progress in the Lok Sabha as it was far too stifling in its endeavor to provide accountability without flexibility and empowerment. All the various extensive controls suggested would have killed any intelligence organization.

As a principle, external controls by those with little or no knowledge of intelligence functioning have to be minimized as they only lead to bottlenecks. At the same time, internal controls have to be made stricter.

4. Recruitment patterns need to change: This would mean evaluating the talent required in the future, and creating an organizational structure that would draw in talent or outsource some aspects and recruit from the open market. Personnel to be recruited should be fluent in various linguistics and IT skills, eloquent financial marketing skills and well-built mathematical and analytical skills along with better stress-coping mechanisms by rendering proper physical and mental training to them. These requirements are bound to grow as the country's interests grow.

5. Better pay scales: The personnel,who get recruited in the intelligence agencies, have to undergo intense physical, mental and psychological constraint for endless phases of time. Not only that, they have to deal with many tormenting situations which are in addition to their already existing duties which they serve as civil servants. Thus, Officers on deputation these

36. Bill No. 23 of 2011 available on http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/7185LS.pdf (last visited on 25th October, 2018).

days come with additional baggage – most are politicized or unwanted in the states. It is, therefore, a fallacy to assume that the salvation of intelligence organizations lies in greater induction from existing services. It is of immense importance that the officers serving in these agencies are given better pay. Similarly, the fresh expertise recruits of such intelligence organizations, in order for them to serve in dedicated manner and for long-term, they are provided with better facilities and monetary benefits.

6. Selection of the heads of organizations:. Intelligence agencies are complicated secret organizations where functioning is compartmentalized on the basis of the need-to-know principle and very few ever get to see the entire working of the organization throughout their careers. However, the heads of these organizations have to work proactively and sometimes have to take crucial decision with or without prior approval from the concerned Ministry. It is desirable for these heads to be administratively sound, mentally and physically fit and especially politically neutral without aiming for personal gains.

7. Designing a structure for oversight: A structure for covering the oversight of legislature, executive and financial domains would heighten the competency and operational capability of the agencies.

8. Effective co-ordination between the agencies: Since each agency has its own field of expertise, they all facilitate each other in effectively tackling certain affairs and tricky circumstances. A proper laid down legislation or set of rules that would determine their activities of collaborating and coordinating, it would benefit all of the intelligence agencies.

CONCLUSION

The criminal justice system of the nation has failed in securing the country from many seen and unseen threats at several occasions. It has failed in crime prevention, law enforcement, and certainty of punishment as well as equity. This rocked the roots of the country, displacing absolute rule of law, and causing irrevocable damages. The role of Intelligence Agencies comes into play when the agencies according to the designed model of the criminal justice system cease to safeguard the nation from every possible threat.

The intelligence agencies like CBI, IB, NIA, NTRO, R&AW, etc. work tirelessly in rendering absolute safety to the nation's public, infrastructure and resources. Nevertheless, as discussed above, there is a call of cry for reforms in these agencies. More systemization and

organization would not only maximize their efficiency level, but, also ensure safeguarding of the country. Since the Indian experience of reform and restructuring of intelligence agencies has revealed only limited success till now, there has been a lack of guidance and resources.

It would be in the benefit of the country that firm leadership of these agencies is established, avoiding the bureaucratic maze and enhance development in both, internal and external intelligence agencies. There exists a necessity to co-opt the private sector in intelligence work to make up for the shortfall. India has in recent years become more adept at gathering and using IMINT gathered through satellites and aircraft. The Defence Image Processing & Analysis Centre (DIPAC) has acquired the capability to transfer imagery real-time over secure networks. The recent launch of the GSAT-7 satellite for the Indian Navy was another step in the same direction. A second satellite, GSAT-7A, is already in the pipeline. There has been, over the years, a duplication of resources and capabilities, mainly because of ineffective coordination. The R&AW and the Aviation Research Centre (ARC) both are gathering electronic intelligence on China albeit on different platforms[37].

Thus, an initiative from the political leadership for restructuring the intelligence apparatus could bring about countless moments of joy in the lives of ordinary civilians who are targeted by anti-national elements. The phenomenal and unexpected challenges would succumb to the strategies if adopted in national interest and good governance.

37. Manoj Joshi and Puran Das , ORF Issue Brief, "India's Intelligence Agencies: In Need of Reform and Oversight", July 2015, available at https://www.orfonline.org/wp-content/uploads/2015/07/IssueBrief_98.pdf (last visited on 25th October, 2018).

LIVE-IN-RELATIONSHIP : SOCIO LEGAL ASPECT

Dr. Gurpreet Pannu*

INTRODUCTION

Marriage is the basis of social foundation. The social institution of marriage is the biggest strength of this diversified country. Irrespective of faith, marriage is an integral part of the lives of the people in India and they believe that marriage is a sacrament,[1] so moral values and traditions are to be followed and preserved for a healthy society. In the earlier times marriages were decided and fixed by the elders and parents of the families. Today the families are nuclear as most of the people have migrated to urban areas for education or to earn their livelihood.[2] Due to urbanization, migration, liberalization and globalization there are number of socio-economic changes in our society. Though it has strengthened economic position of the people but it has weakened the social system of marriage and people in big cities are shifting to live-in-relationships. Now a days it has become a fashion as it is a non-committed relationship. But it has further led to number of problems of social recognition and acceptance of such relations, problems relating to children out of such relationship etc.[3] There is a rising tendency to enter into live-in-relationship instead of marriage.

Live-in-relationship is a living arrangement in which unmarried couple lives together in a long term relationship that resembles a marriage. According to Oxford English Dictionary, in everyday parlance, it is cohabitation.[4] Cohabitation sometimes called consensual union or defacto marriage, and refers to unmarried heterosexual couples living together in an intimate relationship.[5] Cohabitation is defined as a situation in which opposite-sex couples live together outside the bond of marriage.[6] In some jurisdictions cohabitations is viewed as legal as common law marriage, either for a specified period, or after the birth of the child, or if the couple holds them selves out to society as being akin to supposes.[7]

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1. Satyajeet Atul Desai, Sir Dinesh Fardunj Mullah, Principles of Hindu Law, Vol. 1 (2007).
2. Dr. Rabbiraj. C. "Socio-Legal Dimensions of Live-In-Relationships in India" IOSR Journal of Humanities And Social Sciences (IOSR-JHSS) at 25, Vol. 19 Issue 7, Ver. VI (July 2014).
3. *Ibid.*
4. Oxford English Dictionary, 2007.
5. International Encyclopedia of Marriage and Family, 2003.
6. International Encyclopedia of Social Sciences, 2008. Available at http://www.encyclopedia.com/topic/cohabitation. aspx, visited on February 02, 2016.
7. Shoharam Sharma, "Live-in-Relationship : An Individualistic Approach", Naya Deep 69 (2014).

RELIGION AND LIVE-IN-RELATIONSHIP

In India the marriages take place either following the personal law of the religion to which a party belongs or following the provisions of the Special Marriage Act.[8] Marriage is deeply influenced by religion in India. Religion plays major role in a person's life and death, especially with regard to marriage since time immorial. The institution of marriage is also influenced by the religion.

Hinduism, Islam and Christianity are main faiths practiced throughout the country. Hinduism regard marriage as an important event in the life of a man because without a wife he cannot enter the *Grihastha ashrama.* Without marriage there can be no offspring and without a son, no release from the chain of birth-death-rebirth. Hindu religion declares marriage as a sacrament i.e. a religious rite or *sanskar.* Hindu marriage is more than a religious duty and is a social institution by which family is created.[9]

Christian marriage is also woven around a lot of religious beliefs and ideas. According to Christianity, marriages is one of the sacraments and is considered as very necessary and important. It is not established for providing sexual satisfaction but for other purposes also. Marriage is a permanent and exclusive contract of love between a man and a woman. Marriage is a covenant of love. Love and trust is the foundation of marriage. God is the author of matrimony, endowed as it is with various benefits and purposes.[10]

Marriage in Islam is intended to cater to multiple purpose which includes spiritual tranquility, peace, co-operation and partnership in fulfilling the divine mandate. Islam aims at rearing a righteous individual, being the cornerstone in the social structure of the nation. It seeks to establish a sound family, the prime and essential factor in building a good society. Marriage is a bonding that unites man and a woman. It gives rise to a family and believe that there is no way a real or proper family can exist out of wedlock.[11]

All the religions believe that marriage is essential to bear and rear the children. It gives rise to various obligations and duties out of marital relationship.

CONCEPT OF LIVE-IN-RELATIONSHIP UNDER INDIAN LEGAL SYSTEM

Live-in-relationship is very common in the western countries, but it is unrecognized

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8. Indra Sharma v. V.K. V. Sharma, Criminal Appeal No. 2009 of 2013, decided on November 26, 2013, Para 24.
9. *Supra note 2.*
10. *Id., at 25-26.*
11. *Ibid.*

and unacceptable in our society. These are the open societies and instresed couples want to check their compatibility for each other before getting in marriage, so they start living together. It is non-marital relationship. In India such relations are now being practiced in metropolitan cities by some couples. It is due to social change that the concept of marriage has been changed from sacrament to love marriage and now to live-in-relationship.

This relationship is neither recognized by Hindu Marriage Act, 1955, the Indian Succession Act 1925, the Code of Criminal Procedure, 1973 etc. But the term 'relationship in the nature of marriage' has been included with the definition of domestic relationship in the Protection of Women from Domestic Violence Act, 2005, which is as:

Aggried person means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. [12]

Domestic relationship means a relationship between two person who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.[13]

From the above definitions it is clear that a woman must be in domestic relationship with the respondent. Such female must be living in a relationship in the nature of marriage. Such relationship is not marriage. A mere understanding by the parties that they are married to each other may be sufficient. It means relationship which has some inherent or essential characteristics of marriage though not a marriage legally recognized.

In the 21st century the urban singles seem to have no trust in the institution of marriage. They donot need social security due to their well-paid jobs and number of friends. They believe in live-in-relationship for companionship. If these two live-in-partners are compatible to each other they can enter into serious relationship or marriage. Distinction between relationship in the nature of marriage and marital relationship is that relationship of marriage continues though there are differences of opinions, marital unrest etc. even if they are not sharing a shared household. But live-in-relationship is purely an arrangement between the parties unlike, a legal marriage. Once a party determines that he/she does not wise to live in such a relationship, that relation comes to an end.

12. The Protection of Women from Domestic Violence Act, 2005, section 2(a).
13. *Id., section 2 (f).*

IV. JUDICIAL ATTITUDE TOWARDS LIVE-IN-RELATIONSHIP

Judiciary is one of the chief pillars of our democratic edifice. The judiciary ensures the rule of law and interprets law and decides many controversies. The Constitutional provision for judicial review empowers it to review any law or rule made by legislature, executive or any other body. As far as Indian judiciary is concerned, the understanding of marriage and notion of live-in-relationship has gradually moved from traditional view to modern view of changing society.

The Supreme Court's observation on pre-marital sex and live-in-relationships are progressive and egalitarian, and reflects the winds of change in the corridors of judiciary. In ***S.Khushboo v. Kanniammal,***[14] the Supreme Court has given a new interpretation to live-in-relationship. Court observed that, "When two adult people want to live together what is the offence? Does it amount to an offence? Living together is not an offence. Living together is a right to live guaranteed under Article 21 of Constitution. Thus Court held that live-in-relationship is permissible. The same stand was taken by the Privy Council in A. ***Dinohamy v. W.L. Blahamy***.[15] It was held that where a man and a woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage.

The same principle was adopted in ***Mohahbat Ali v. Mohammad Ibrahim Khan.***[16] In this case again Privy Council stuck to their position that when a man and a woman cohabitated continuously for a number of years, the law presumes that they are a married couple and are to be treated a couple and the relationship is of legal origin.

Live-in-relationship is a relationship which has not been socially accepted in India, unlike many other countries. In ***Lata Singh v. State of U.P.***[17] it was observed that a live-in-relationship between two consenting adults of heterosexual sex does not amount to any offence even though it may be perceived as immoral. Court said that this is a free and democratic country and once a person becomes major he or she can marry whosoever he/she likes.

If the parents of boy or girl do not like such relationship the maximum they can do is that they can cut off social relationship with the son or daughter.

Delhi High Court in ***Alok Kumar v. State,***[18] observed that live in relationship is a walk

14. (2010) 5 SCC 600.
15. AIR 1927 PC 185.
16. AIR 1929 PC 135.
17. AIR 2006 SC 2522.
18. Cr. M.C. No. 299/2009, decided on August 9, 2010.

in and walk out relationship. There is no legal strings attached to this relationship nor does this relationship create any legal bond between the partners. The Court further said, "People who choose to have live-in-relationship cannot complain of infidelity or immorality as such relations are also known to have been between a married man and unmarried woman or vice-versa." [19]

The Supreme Court examined the definitions of aggrieved person and domestic relationship and opined that expression relationship the nature of marriage has not been clearly defined in the Act of 2005. The Supreme Court in *D. **Velusamy v. D. Patchaimmat***[20] has put some embargo in this regard. Court held that though, there was no formal marriage, it is akin to Common Law marriage, which require that although not being formally married:

1. The couple must hold themselves out to society as being akin to spouses.
2. They must be of legal age to marry.
3. They must be otherwise qualified to enter into a legal marriage.
4. They must have voluntarily cohabited and held themselves out to the world as being considered spouses for a significant period of time.

In addition a relationship in the nature of marriage under the Act, must also fulfil the above requirements, and in addition the parties must have lived together in a 'shared household' as defined in section 2(s) of the Act of 2005. Merely spending weekends together or one night together would not make it a domestic relationship. There is not escape from the above conclusion as Parliament has used the expression 'relationship in the nature of marriage' and not 'live-in-relationship'. The Court in the garb of interpretation cannot change the language of the statute.

The wife of a void marriage can also have domestic relationship with the person with whom she has been living for a considerable period. The presumption, though rebuttable, will be that there was marriage and they are related "through a relationship in the nature of marriage". The Protection of Women from Domestic Violence Act requires that there must be a marriage between the parties, the said marriage need not be legal and valid, in the eyes of law.

In Indra ***Sarma v. V.K.V. Sarma,***[21] the Supreme Court discussed the issue whether a live-in-relationship would amount to a relationship in the nature of marriage falling within the

19. *Id., Para 6.*
20. (2010) SCC 469.
21. Decided in November 26, 2013. Available at http://indiankanoon.org/ doc/192421140/visited on July 12, 2015.

definition of domestic relationship under section 2(f) of Act of 2005? Court laid down following guidelines:

1. Duration of period of relationship should be reasonable period of time to maintain and continue a relationship which may vary from case to case.
2. Shared household is required.
3. Pooling of resources and financial arrangement supporting each other financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of woman, investments in business, etc. may be guiding factor.
4. Domestic arrangement entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, upkeeping the home, etc. is an indication of a relationship in the nature of marriage.
5. Sexual relationship and marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, to give emotional support, companionship and material affection, caring etc.
6. Having children is a strong indication of relationship in the nature of marriage. Parties intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.
7. Socialisation with friends and relation, as if they are husband and wife.
8. Common intention of the parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of relationship.

Court held that in this case the appellant was aware that respondent was a married man with two children and could not have entered in such relationship. All live-in-relationship are not relationships in the nature of marriage.

Court remarked that there is need to expand the connotation of section 2(f) of the Act which defines domestic relationship with a view to include therein victims of illegal relationship who are poor, illetrate alongwith their children who are born out of such relationship and who do not have any source of income.

Supreme Court of India came out on the issue of children born out of live-in-relationship in ***Revanasiddappo v. Mallikarjun.***[22] Court remarked that irrespective of the relationship between parents, birth of the child out of such relationship has to be viewd independtly of the relationship of the parents. Child born out of such relationship in innocent and is entitled to all the rights and privileges available to children born out of legal and valid marriage.

In the case of ***Uday Kumar v. Ayesha,***[23] the Apex Court held that children born out of prolonged live-in-relationship cannot be termed as illegitimate. Court highlighted the plight of children born out of live-in-relationship. The child born during the continuation of relationship between a man and woman can be presumed to be legitimate offspring of that couple.

The Double Bench of Supreme Court in ***Bharatha Matha v. R. Vijaya Renganathan***[24] held that section 16 of Hindu Marriage Act intends to bring about social reforms, conferment of social status of legitimacy on a group of children, otherwise treated as illegitimate, as its prime object. Child born out of void or voidable marriage is not entitled to claim inheritance in ancestral coparcener property but is entitled only to claim share in self acquired property, if any.
Another important issue that relates to live-in-relationship is maintenance for the women involved in it. Supreme Court in ***Virendra Chanmuniya v. Chanmuniya Kumar Singh Khushwaha***[25] protected the right of woman involved in live-in-relationship. The appellant was remarried to respondent, younger brother of her deceased husband, as per customary law. They lived together for a long time and then he started harassing her and refused to pay her any maintenance under section 125 of Code of Criminal procedure. Even High Court held that she was not entitled for maintenance. Supreme Court turned down judgment of High Court and held that women in live-in-relationship are equally entitled for all the reliefs available to a legally married wife.

Thus higher judiciary has taken stand according to the new developments and new challenges. Above decisions can pave the way for more people to engage in such relations. Slowly our society can start approving such relations and it can tackle the problem of dowry, caste, honour killing, religion, language etc. Thus a tolerant and open society can be created. But

22. 2011 (2) UJ 1342 (SC).
23. SLP (Cri.) No. 3390 of 2014.
24. AIR 2010 SC 2685.
25. MANU/SC/0807/2010.

encouraging such relations can lead to the problems of bigamy, multiple partners relationship etc. that can destroy the social fabric and harmony. In such circumstances, women can be exploited. Need of the time is to accept the suggestions by Malimath Committee and to enforce new law to deal with such issues as right of maintenance, status of such women and children born out of such relationship. Issue relating to maintenance, legitimacy, inheritance etc. are still unsolved. As suggested by Malimath Committee right of maintenance should be given to the second wife. Similarly, this right of maintenance should be available to the female live in partner in live-in-relationship. Real need of the hour is to educate the present generation about the importance of marriage and family and at the same time parents should give the children right of choice in their marriage.

MEDIA FREEDOM AND RIGHT TO PRIVACY: BRIDGING THE GAP

Jasleen Chahal*
Ankit Malik**

INTRODUCTION

"Cinema, radio, television, magazines are a school of inattention: people look without seeing, listen in without hearing".

-Robert Bresson

Freedom of speech is the bulwark of a democratic government. But the freedom of speech which the press enjoys today had not been the same for always. It had to fight for its existence. It had to overcome opposition from monarchs, parliament and even from the Courts.[1] In a democratic set up, responsible and independent media is required to protect and further strengthen the democratic institutions. The prime purpose of the free press guarantee is regarded as creating a fourth institution outside the government as an additional check on the three official branches- executive, legislative and judiciary.[2]

The freedom of speech and expression is regarded as an essential part of liberty. The freedom of the press is regarded as "the mother of all liberties in a democratic society"[3]. Freedom of Speech and of the Press lay at the foundation of all democratic organization, for without free political discussion no public education, so essential for the proper functioning of the process of popular Government, is possible.[4] It occupies a preferred position in the hierarchy of liberties giving succour and protection to all other liberties.[5] For this very purpose the Indian Constitution via clause 1 of Article 19 imbibed and provided for the right to freedom of speech and expression from Article 19 of the UDHR, also reflected similarly in Article 19 of the International Covenant on Civil and Political Rights 1966 (ICCPR). This includes the right to express one's views and opinions at any issue through any medium and the freedom to

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1. Gifty Oommen,, "Right To Privacy And Freedom Of Press- Conflicts And Challenges", 30.
2. The New York Times v. Sullivan, 376 U.S. 254; New York Times Company v. United States, 403 U.S. 713 (1971).
3. Re:Harijai Singh and re:Vijayakumar, AIR 1997 SC 73.
4. Romesh Thapper v. State of Madras, AIR 1950 SC124.
5. JAIN, M P , THE INDIAN CONSTITUTION 1019 (Lexis Nexis, 7th ed., 2014).

circulate one's views can be by word of mouth or in writing or through audiovisual media.[6] It further includes the freedom of communication and the right to propagate or publish opinion.[7] Thus, the media has the same rights—no more no less than any individual to write, publish, circulate or broadcast.[8] In ***Sakal Papers v. Union of India***[9] , the freedom of the Press is regarded as a "species of which Freedom of Expression is a Genus".

However, the notion of power and abuse given by Lord Atkin is also relatable with liberty. Liberty does corrupt into license and is prone to be abused.[10] The Indian Constitution with the motive to prevent abuse of liberty provides limitations on the exercise of such right by media in guise of reasonable restrictions under Article 19(2). Contempt of court and impliedly trial by media are such restrictions.

In a democratic set up, equilibrium has to be maintained between integrity and independence of the judiciary and the freedom of media. It is the primary duty of the courts to uphold the freedom of the press and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate.[11] While maintaining the balance between the two, a reasonable care is required to be exercised so that right to freedom of speech and expression by media does not result in the contempt of court.

With the growth of democracy, media should also become mature by acting and providing neutral and true information for the development of a mature thinking society. However, this is not happening in India as many vested interests had crept into its fabric by virtue of its widespread and powerful influence. Commercialization, competition, TRP race, political pressure and lobbying by government are few factors for these vested interests. These interests force the media to sensationalize and try a sub-judicial matter. For rule of law and in public interest media can resort to reasonable criticism of a judicial act or a judgment; however, it should refrain from scandalizing the court or judiciary as a whole and trying a sub-judicial case.

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6. Indian Express Newspapers v. Union of India, (1985) 1 S.C.C. 641.
7. *Supra note, 5 at 1020.*
8. Kauser & Srishti, Trial By Media: A Threat To The Administration Of Justice, 3(4) SAJMS 195, 196.
9. Sakal Papers v. Union of India, AIR 1962 SC 305.
10. S. Devesh Tripathi, Trial By Media Prejudicing The Sub - Judice, 1.
11. Indian Express Newspapers v. Union of India, (1985) 1 SCC 641.

1.2 TRIAL BY MEDIA

"Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."[12]

- Jeremy Bentham

Media intrusion is an ethical dilemma for the developing nations of the globe. It has grown up to be a trend that media come forward to investigate the truth.[13] Trial by Media is a phrase popular in the late 20th century and early 21st century to describe the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law.[14] With the advent of the digital age, the role of technology and media increased many folds. The rapid economic and information technology development in the 21st century gave media an unprecedented role to play in day to day life. With the increased readership of newspaper, widespread access of television and the unification of the globe through social media gave media the power to form and affect the public opinion.

The increased vested interests of corporate houses, political parties and pressure groups in the media houses had adversely affected the quality of journalism. The earlier journalists worked with conviction, commitment; they used to conduct an independent investigation analyzing all the different facets of a case and they then pronounced a value judgment. Such work methodology used to have a wide acceptance amongst different sections of the society and resulting into a trust in favor of these media houses. However, now the trend has considerably changed and media has moved away from these professional values. The media trial has now moved on to media verdict and media punishment which is no doubt an illegitimate use of freedom and transgressing the prudent demarcation of legal boundaries.[15]

In the recent decades although the media has played a positive role by unveiling various scams but it has also done a great damage to the justice administration. With the vested interest it has started serving its masters instead of fulfilling its original constitutional mandate of acting as a watchdog for the other three institutions of the democratic set up. While working for these vested interests it had acquired the self-proclaimed role of "people's court"(pseudo) i.e. the

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12. Samarias Trading Co Pvt Ltd v S. Samuel, (1984) 4 SCC 666.
13. Anamika Ray, Media Glare or Media Trial Ethical Dilemma between two Estates of India Democracy, OOJCMT, 2 April 2015, at 92, 93.
14. Dipali A. Purohit, Impact of Media Trial in Fair Trial, 8(7) IRJMSH 110, 110 (2017).
15. S. Devesh Tripathi, Trial By Media Prejudicing The Sub - Judice, 3.

"Lok-Adalat". Before a judge can take cognizance of the case tabled before him, media had already tried the case. It had done the investigation, without covering all the aspects of a case and gave its verdict. Media instead of acting as the fourth pillar, strengthening and supporting the other pillars, it has undermined the identity of the other one-judiciary.

The supreme court of India has had an occasion to note the consequences of "media trial" in the following words:

"During high publicity cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial impossible but means that regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny"[16].

Media Trial V. Fair Trial

Free and fair trial has been defined as "a trial by a neutral and fair Court, conducted so as to accord each party the due process rights required applicable by law; of a criminal trial, that the defendant's constitutional rights have been respected."[17] Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated."[18] It is ingrained in the concept of due process of law.[19] Freedom of speech and expression incorporated under Article 19 (1)(a) has been subject to 'reasonable restriction' under Article 19 (2) and Section 2 (c) of the Contempt of Court Act. One's life with dignity is always given a priority in comparison to one's right to freedom of speech and expression.

Law is the king of kings; law is supreme- are the cardinal principles of a democracy. However, media trial had put the principle of natural justice *(audi alteram partem)* at stake. Trial by media has undermined various constitutional rights of the accused as provided under Article 14, 20, 21 and 22 of the Indian Constitution. It encompasses several other rights including the right to be presumed innocent until proven guilty, the right not to be compelled to be a witness against oneself, the right to a public trial, the right to legal representation, the right to a speedy trial, the right to be present during trial and examine witnesses, etc.[20]

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16. R.K. Anand v. Delhi High Court, (2009) 8 SCC 106.
17. Priya & Balaji, Trial By Media, SSRN, 6.
18. Zahira Habibullah Sheikh v. State of Gujarat, (2004) 4 SCC 158.
19. Rattiram Vs. State of M.P. through Inspector of Police, AIR 2012 SC 1485.
20. S M Aamir Ali, Media Trial: A Hindrance In Dispensation Of Justice, 5.

Pre-trial publicity is injurious to the health of a fair trial.[21] Trial by media forms the public opinion against the accused and due to such societal pressure the presiding judge is psychologically forced to pronounce a judgment which is against the accused. Sometimes due to such prejudice the accused is not given an opportunity to be heard in accordance with principles of natural justice, in light of the evidence and is declared as guilty in spite of his innocence thereby sabotaging the rule of law and leaving all his rights and liberty unaddressed. Even if the accused is acquitted by the court on the ground of innocence proved beyond reasonable doubt, he/she cannot resurrect his/her previous image. Such kind of exposure provided to them is likely to jeopardize all these cherished rights accompanying liberty.[22]

Media Trial V. Right to Be Represented

Under the fundamental right of freedom of speech and expression, the media acclaim the right to expose, to investigate, to reveal, and to highlight the criminal and it, thus, demands the right to carry on pre-trial publicity. However, on the other hand, the judiciary tries to protect the fundamental rights of the accused – of a "fair trial" and of "due process of law". Since, pre-trial publicity can derail a fair and speedy trial, the judiciary has to balance the competing fundamental rights.

Due to pre-trial, the accused is proclaimed to be guilty by the cacophony of media. And at times, the senior and reputed members of the bar refuse to defend the accused due to hyped media and public pressure. This happens very often with those who are incriminated of rape and terror and the victim. It, therefore, robs the accused of his fundamental right to defend himself. If the identity of witnesses is published, there is danger of the witnesses coming under pressure both from the accused or his associates as well as from the police.[23] Such publicity might convince the hostile witnesses to custom-tailor their testimony to the prosecution case and it further hampers the possibility of fair representation for the accused. The perception and appreciation of the evidence by the public and the judiciary may differ due to which both the victim and the accused have to suffer. Ultimately, pre-trial publicity undermines the criminal justice system and overturns the rule of law.

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21. Justice R.S. Chauhan, Trial by Media: An International Perspective, October S-38 THE PRACTICAL LAWYER, 2(2011).
22. *Id.*
23. Devika & Shashank, Media Trial: Freedom of Speech VS. Fair Trial, 20(5)(IV) IOSR-JHSS 88,92 (2015).

However, an aggrieved party is entitled to an equal and just opportunities of representation, and therefore, in particular, can avail the free legal aid[24] , for securing justice. Such an aggrieved party can also approach the appropriate Writ Court in order to seek an order of postponement of the offending publication/broadcast or postponement of reporting of certain phases of the trial (including the identity of the victim or the witness or the complainant) for an infringement of his/ her rights under Article 21 to a fair trial. The court may grant such preventive relief, on a balancing of the right to a fair trial and rights under Article 19(1) (a) for proper administration of justice.[25]

Constitutionality of Media Trial Vis-a-vis Interference in The Judicial Process

Media trial is challenging the very existence of criminal justice administration system and has made the judiciary a silent spectator and scapegoat under the banner of freedom of unbridled press.[26] A trial by media amounts to travesty of justice if it causes impediments in the accepted judicious and fair investigation and trial.[27] Since, the criminal justice system works on facts and evidence and not on emotions, media trial puts an immense societal and emotional pressure on the presiding judge particularly in high profile cases which consequently affects the judicial trial. However, a Judge has to guard himself against any such pressure and he is to be guided strictly by the rules of law[28] primarily in those publicity cases where the nature of bias is likely to be high.

The media can play both affirmative and negative roles by interfering in the criminal justice system. The best role of media can be seen in ***Jessica Lal case*** (where justice was not delivered but was denied. It was only after *Tehlka* went for a sting operation, which exposed that the witnesses were bribed and the story was broadcast by Star News, public pressure built up with newspapers splashing headlines such as "No one killed Jessica" justice was finally delivered) or in cases the financial and political scandals & corruption like ***Fodder scam, 2G spectrum scam,*** or speeding up the lingering cases for final verdicts ***(Ajmal Kasab- 26/11 convict case)*** and media activism of this nature is acceptable. Also, other serious criminal cases

24. INDIA CONST. art. 39 A.
25. *Id.*
26. Mukund Sarda, Media Trial: Role of Media under Indian Constitution, 2.
27. Manu Sharma v. State (NCT of Delhi), AIR 2010 SC 2352.
28. State of Maharashtra v. Rajendra Jawanmal Gandhi, (1997) 8 SCC 386.

that would have gone unpunished without the intervention of media are case, ***Nitish Katara murder case, Bijal Joshi rape case and Priyadarshini Mattoo murder case*** where Investigation by media exposed numerous lapses in the murder case and case was compelled to reopen. In the very case media's hyper-activism lead to a speedy trial by 42 days and finally the delayed justice was not denied due to media's appreciable role.

However, when the media tries a sub-judice matter, it adversely affects the litigating parties and the golden principles of 'presumption of innocence until proven guilty' and 'guilt beyond reasonable doubt' are kept at stake. Contrary to the basic principle of criminal jurisprudence the identity of the parties are revealed. Particularly, in criminal and sexual offences, a hypothesis is created without any verification. The past sexual history of the prosecutrix is revealed in the media and accused's right to justice is compromised. The basic principles of criminal justice of fair trial, impartial investigation and unbiased administration of justice and independence of the judiciary were taken to ride and thrown in dust.[29] The Punjab High Court ruled that 'liberty of the press is subordinate to the proper administration of justice'. The plain duty of a journalist is the reporting and not the adjudication of cases.[30] In ***State of Maharashtra v. Rajendra Jawanmal Gandhi***[31] , the apex court observed as follows: *"A trial by press, electronic media or public agitation is very antithesis of the rule of law. It can well lead to*

Media Trial V. Contempt of Court

One of the grounds on which reasonable restrictions can be imposed on the freedom of speech of media is contempt of court. The Contempt Of Court Act recognizes contempt as civil and criminal. Criminal contempt[32] has further been divided into three types: Scandalizing or prejudicing trial and hindering the administration of justice. Every accused has a right to a fair trial along with the principle that justice should not only be done but it must also appear to have been done[33] .

There are many ways to prejudice a trial, If allowed, a person may be held guilty of an offence, which he might have not actually committed. Sometimes, fair and accurate reporting of the trial would nonetheless give rise to substantial risk of prejudice not in the pending trial but in

29. *Id.*
30. Rao Harnarain v Gumori Ram, AIR 1958 Punj. 273.
31 State of Maharashtra v. Rajendra Jawanmal Gandhi, (1997) 8 SCC 386.
32. Contempt of Courts Act, 1972, Section 2(c).
33. Rule against Bias (Principle of Natural Justice).

the later or connected trials.[34] Therefore, publications or coverage which interferes or tends to interfere with the administration of justice amount to criminal contempt under the Contempt of Court Act.[35] If the newspaper publishes facts in a particular way to mobilize public opinion in its favor, it is contempt of court. [36] But the law of contempt can only be attracted to prevent comments when the case is sub-judice. If the case is not pending in the court, it is of no avail. In our legal system, the courts do not have any power to impose prior restraints on the publication of prejudicial material during the pendency of court proceedings.

MEDIA TRIAL V. RIGHT TO PRIVACY

The right to privacy is a human right and the need for privacy is universal and deep seated in each human being. Privacy is essential to human dignity and autonomy in all societies, enabling individuals to create barriers to protect themselves from interference in their lives, such as access to their bodies, places and things, as well as their information and communications.[37]

"Privacy" is a notoriously difficult concept to define and cannot be understood as a static and one-dimensional concept. It can only be construed as a group of rights.[38] Privacy has also been considered a "type of social isolation"[39] ; "right against unwarranted intrusion by the state"[40] ; a "right against the intrusion on an individual's personal life or affairs"[41] . As one of the fundamental and indispensable elements of human life, privacy is also closely associated with other deep-seated values, such as autonomy, dignity, spirituality, liberty, trust, reputation and personal development.[42]

Right to Privacy: Evolution

Right to privacy was not always there as it is today. It was only limited to the 'bodily privacy' and 'territorial privacy'. It was considered to be only as a right to be left alone and in the form of a tort and was covered under the term 'defamation' and 'breach of confidence'. It took its present shape through the article 'The right to privacy'[43] by Samuel Warren and Louis Brandies.

34. *Supra note, 21.*
35. Pawan & Vaishali, The Myth of Judiciary being Influenced by the Media Activism: A Critical Analysis.
36. State v. Editors, Printers and publishers of the newspapers, Matrabhumi and Krishak, A.I.R. 1954 Orissa 149.
37. Privacy, Free Expression And Transparency, 32.
38. Anubhav & Anujay, The Curious Case Of Right To Privacy In India, 1.
39. Karl Mannheim, An Introduction To The Study Of Society By Karl Mannheim, LLC, 2013.
40. 2 BASU,D.D., COMMENTARY ON THE INDIAN CONSTITUTION 4772, 14th ed., 2009.
41. Sharada v. Dharampal, (2003) 4 SCC 493.
42. *Supra note, 17.*
43. Harvard Law Review, Vol. 4, No. 5. (Dec. 15, 1890), pp. 193-220.

It was from this article that the idea of a tort remedy for invasions of privacy was conceived.[44] India being a common law country, following the same principles gave protection to individuals only in a few specific areas of interest such as defamation, breach of confidence and trespass which for a long regarded as insufficient. The first step in India giving some directions in the area of privacy was in ***Nihal Chand v. Bhagwan Dei***[45] in which the Allahabad High Court recognized the right of privacy emerging from customs and traditions of people and held that it was not necessary to prove such a right through evidence.

In ***Kharak Singh v. The State of U.P.*** [46], the decision invalidated a Police Regulation that provided for nightly domiciliary visits, calling them an "unauthorized intrusion into a person's home and a violation of ordered liberty." However, it also upheld other clauses of the Regulation on the ground that the right of privacy was not guaranteed under the Constitution, and hence Article 21 of the Indian Constitution (the right to life and personal liberty) had no application. In ***Govind v. State of Madhya Pradesh***[47] , the apex court held that, "Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists".

Similarly in the matter of ***R. Rajagopal v. State of Tamil Nadu***[48] , popularly known as the Auto Shankar Case the Supreme Court held: "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, child-bearing and education among other matters.[49] " In ***Ram Jethmalani And Ors. v. Union of India***[50] , Supreme Court held that right to privacy is an integral part of right to life.

Right to Privacy: A Fundamental Right

On August 24, 2017, a nine-judge bench of the Supreme Court in ***Justice K.S. Puttaswamy (Retd.) v. Union of India***[51] unanimously affirmed that the right to privacy is a

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44. Gifty Oommen, Right To Privacy And Freedom Of Press- Conflicts And Challenges, 22.
45. Nihal Chand v. Bhagwan Dei, A.I.R. 1935 All.1002.
46. Kharak Singh v. State of U.P, A.I.R. 1963 S.C. 1295.
47. Govind v. State of Madhya Pradesh, (1975) 2 SCC 148.
48. R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC632.
49. K.T.S. Tulsi, Right To Privacy V. Disclosure, 6.
50. Ram Jethmalaniand Ors. v. Union of India, (2011) 9 SCC 751.
51. Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 .

fundamental right that emerges from the right to life and liberty guaranteed by Article 21 of the constitution, which is inseparable from the right to live with dignity. In doing so, the Supreme Court explicitly overturned its own rulings in M P Sharma and Kharak Singh to the extent that they were incompatible with this verdict. It did, however, clarify the threshold of invasiveness with respect to this right and adopted the three-pronged test required for encroachment of any Article 21 right – legality-i.e. through an existing law; necessity, in terms of a legitimate state objective and proportionality that ensures a rational nexus between the object of the invasion and the means adopted to achieve that object. This clarification was crucial to prevent the dilution of the right in the future on the whims and fancies of the government in power.[52]

Discussing the interpretation of life and liberty under Article 21, the court reiterated its stance in ***R.C. Cooper***[53], that fundamental rights does not exist in 'silos' and hence, every legislation or action which prima facie tends to violate the liberties -essential for the very existence, required to be examined through a conjoint reading of Articles 14 (equality), 19 (freedom) and 21 (life and liberty).

Media Interference and Right To Privacy

The exponential growth of media, particularly the electronic media in recent years has brought into focus issues of privacy. Although, the right to freedom of Speech and Expression and the right to privacy are two sides of the same coin but one person's right to know and be informed may violate another's right to be left alone.[54] The media has made it possible to bring the private life of an individual into the public domain, exposing him to the risk of an invasion of his space and privacy.[55]

The right to know subjects and events in the public interest do had a reasonable restriction and it does not go to the extent of knowing the name of a rape victim or the family problems of public figures. Such information may harm the dignity and social status of the individual further affecting the prospects of the under trial. It was stated in ***State of Punjab v. Gurmit Singh***[56] , that the identity of rape victims should be protected not only to save them from

52. Agnidipto Tarafder, For the Many and the Few: What a Fundamental Right to Privacy Means for India, THE WIRE (Aug 25, 2017),<https://thewire.in/170988/right-to-privacy-supreme-court-2/>, accessed on Feb.25, 2018 at 3:30 PM.
53. R. C. Cooper v. Union of India, AIR 1970 SC 564.
54. *Supra note, 8.*
55. *Id.*
56. State of Punjab v. Gurmit Singh, (1976) 2 SCC 384.

public humiliation but also to get the best available evidence which the victim may not be in a position to provide if she is in public.[57] In India, under various legislative enactments, the identity and address of the witness and other persons associated with the case are kept secret for the sole purpose of protection of their life which is in imminent danger. The Supreme Court touched the rights of the individual to privacy vis-à-vis invasions by Journalists in ***Prabha Dutt vs. Union of India,***[58] ***Sheela Barse vs. Union of India,***[59] and ***State vs. Charulata Joshi***[60] where the journalists sought permission from the Supreme Court to interview and photograph the prisoners.

Sting Operations: An Intrusion in a Person's Private Space

In today's society, today sting operations have become the order of the day. It is a well-planned scheme used by law enforcement agencies and media houses to entrap a criminal. It usually involves a lot of undercover work, remote control cameras, pinhole camera technology, miniaturized audio-video technology and high fidelity sound equipment to clandestinely spy upon an individual.

There have been huge debates on whether the Tehelka style `stings' are ethical in terms of invasion of privacy or not? However, such stings only have revealed the casting couch syndrome in Bollywood and various scamps of crores of rupees. But still sting operations carried out by so-called private spying agencies are blatant violation of an individual's privacy and therefore, such "invasion of privacy" could be termed as "technology terrorism".

CONCLUSION

Right to privacy being declared as a fundamental right under Article 21 of the Indian Constitution is more than a legal precedent. It was a moment in history. The judgment, in that sense, provides the catharsis of sorts. The victory of democracy lies in the citizen's ability to live life with dignity encapsulated in rights such as privacy, which is for all to enjoy – regardless of ethnicity, language, gender, sexual orientation, religion, race, class or political views. Media being the 4th pillar plays a very important role; however, with the power that the media enjoys today also comes a lot of responsibilities. There should be a balance which has to be maintained

57. Gifty Oommen, Privacy As A Human Right And Media Trial In India,3 AHRJ 102, 115(2014).
58. Prabha Dutt vs. Union of India , (1982) 1 SCC 1.
59. Sheela Barse vs. Union of India, (1987) 4 SCC 373.
60. State v. Charulata Joshi, (1999) 4 SCC 65.

by our media when it performs its duties there is no way that it should be allowed to enter into the private space of an individual. There are certain methods for controlling the pre-trial publicity like:

1. Control the presence of the press at the judicial proceedings.
2. The court should have insulated the witnesses. This implies protecting and isolating the witnesses during the trial.
3. The court should make efforts to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matter.
4. Reporters who wrote or broadcast prejudicial stories could have been warned as to the impropriety of publishing material not introduced in the proceedings.Where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another place not so permeated with publicity.
5. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. But despite the existence of these methods to control pre-trial publicity, the courts, by and large, have been reluctant to utilise this methodology.

It is essential for the maintenance of dignity of the courts and is one of the cardinal principles of the rule of law in a free democratic country, that the criticism or even the reporting particularly in sub judice matters must be subjected to check and balances so as not to interfere with the administration of justice.[61]

61. Anukul Chandra Pradhan v. Union of India, (1996) 6 SCC 354.

FRAUDS IN ONLINE SHOPPING IN INDIA: NEED TO SENSITIZE RIGHTS OF ONLINE CONSUMERS IN E-COMMERCE

Prof. Jay Prakash Yadav*

INTRODUCTION

Information Technology has evolved out of the marriage between two versatile technologies namely, Computer and Communication technologies. Information Technology represents the fourth generation of human communication, after sight, oral and written communication.[1] Information explosion has changed the shape of human civilization. This virtual explosion took place in the field of electronics and its results are lucidly reflected in infinite expansion of knowledge that is commonly described as information explosion. The generative capacity for unrelated and unaccredited audiences to build and distribute content through Internet to its millions of attached personal computers has initiated the growth and innovation in Information technology and has facilitated new creative endeavours.[1] The most outstanding development in this area has been the geometric expansion of trade and commerce through the Internet or the web. The web accepts no restrictions of the country and the free trade and commerce available through website in cyberspace is known as e-Commerce.[2] The cutting edge for business today is e -Commerce and certainly one of the officially proclaimed objectives of the Internet. e -Commerce is a commerce revolutionized by the Internet–era technology (Information and Communication Technology). e- Commerce has revolutionized business activities globally through the use of information and digital technology. e- Commerce means application of electronics in commerce. 'e' is a question of technical capability and commerce is the way in which this capability is applicable.[3] Any form of business transaction in which the parties interact electronically rather than through physical exchanges or direct physical contact is termed as e- Commerce. e- Commerce is a term popularised by the advent of commercial

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1. R.K. Tiwari, P.K. Sastry and R.V. Ravi Kumar, Computer Crime and Computer Forensics, Select Publications, Delhi, 2002, p. 5. Jonathan L. Zittrain, "The Generative Internet", Harvard Law Review, Vol. 119, No. 6, April, 2006, p. 1975.
2. S.R. Sharma (edited), Encyclopedia of Cyber Laws and Crime: Laws on E-Commerce, Vol. 3, Anmol Publications Pvt. Ltd., New Delhi, 2003, pp. 123-140.
3. Mark Norris and Steve West, e-Business Essentials, John Wiley & Sons Ltd., Chichester, 2001, pp. 2-3.

services on the Internet. Before the invention of the Internet, e- Commerce was largely a hidden business-to-business affair. The fact is that the origin of e- Commerce dates back some 30 years and lie in Electronic Data Interchange (EDI), a standard way of exchanging data between companies. Internet e- Commerce is, however, only one part of the overall sphere of e-Commerce.[4] This digital technology provides effective communication platform to communicate to the consumers directly or through online marketing.

Today e-Commerce is taking front seat in all businesses worldwide. Most traditional business practices are getting brushed aside due to the onslaught of an electronic environment. e- Commerce is a new networked economy which has some characteristics quite unlike those of the old industrial economy.[5] With e- Commerce, shopping can be done at any time by using "fingertips" instead of "feet". The geographical barriers have become a blur. A shop located in another country and a shop next to your home is both on "one finger-click" away. In the context of e- Commerce, the relationship is not just selling through the web but managing customer relationship in general. Particularly from the perspective of buyer and seller relationship, e-Commerce application can be divided formally into these categories:[6] Business-to-Business, Business-to-Consumer, Consumer-to-Business, Consumer-to-Consumer, Business-to-Government and Government-to-Consumer. This article is concentrated on Business-to-Consumer and Consumer-to-Business; where the consumers are participating in shopping through Internet and they are day to day victims of online frauds.

NATURE OF INDIAN MARKET AND CONSUMER BEHAVIOR: PHYSICAL MARKET TO CYBER MARKET

Traditionally, a 'market' is a physical place where buyers and sellers gather to exchange their goods and services. Depending on the extent of the use of the new tools, new marketing terminology is known by several names like telemarketing, Kiosk marketing, e-Commerce marketing, e-Business marketing and Cyberspace marketing etc., etc. e-Marketing, in more general terms, is a buying and selling process that is supported by electronic means.[7] Internet

4. D. Whiteley, E-Commerce, Strategy, Technologies and Applications, McGraw-Hill Companies, New York, 2000, p. 4.
5. Vasu Deva, E-Business: Search For Excellence, Commonwealth Publishers, New Delhi, 2003, pp. 1-5.
6. U.G. Shanmuga Sundram, "E-Commerce in the New Millennium", The Indian Journal of Commerce, Vol. 54, No. 4, October-December, 2001, pp. 193-194.
7. L.N. Dahiya and Seema, 2007, pp. 93-94.

Marketing is the process of building and maintaining customer relationships through online activities to facilitate the exchange of ideas, products and services that satisfy the goals of both parties.[8]

Comparison between physical and online shopping

Sr. No.	Physical Shopping	Online Shopping
1.	Shop/Supermarket/Mall Website,	Web Shops
2.	Display Windows	Home Page
3.	Store Layout	Browse and Search function navigation buttons
4.	In-Store Promotions/Sales/Discounts	Special offers, Discounts
5.	Store atmosphere	Interface consistency, Graphics Quality
6.	Number of Branches	Links to other similar sites
7.	Product Displays	Menu buttons
8.	Look and touch of the merchandise	Look and Read the comments on the merchandise by consumers

From this comparison, it is clear that the core focus of the Internet-business or e-marketing is on the creation of a new online market, customer satisfaction, opening new vistas for consumers and so on.[9] Since consumers determine the success of a product or service, therefore, the success of an Internet business strategy too hinges on the anticipation of customer choice, tastes, needs, likings, decision-making patterns and expectations. Internet provides the ability to migrate from one website to another almost without realizing the complicity of software tools that makes this possible.[10]

It is a well-known fact that the consumer plays a pivotal role in an economy.[11] In a very beautiful way Adam Smith about the centuries ago emphasized that:

8. Retrieved from< http://sit.uibe.edu.cn/course/marketing/chapter%201.pdf>, visited on 18 June, 2018.
9. Asit Narayan and L.K. Thakur, Internet Marketing, E-Commerce and Cyber Laws, Authors press, Delhi, 2000, pp. 134 -135.
10. *Id.*
11. D. Himachalam, Consumer Protection in India, The Associated Publishers, Delhi, 2006, p.1.

"Consumer is the sole-end purpose of all production and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer."[12]

Consumers are the pillars of economic development in any country as the entire economy revolves around them for existence.[13] Consumers are the wheels of the chariot of economy. In sales campaign, the primary task of a salesman is to identify a consumer for his preferences and requirements of product or service. Consumer is the very source of all sales of the products or commodities produced in a country.[14] Consumers create and shape markets through demand of goods, services and ideas.[15] Every person is a consumer in one transaction or the other. A consumer can also be a producer and a producer cannot exist without himself being a consumer.[16] Consumers may be individuals, household, group of persons, government, non-government bodies and organizations. The size and operation of markets are determined by the behaviour of consumers which is reflected through internal factors like need, motives, perception and attitudes as well as the external factors or environmental influences, such as population, family size, social groups, culture, economic and business influences. As a result of the combined effect of these, size of market in India is determined.[17] From psychological point of view, behaviour of consumer is very important to be captured by the successful businessmen. The formal expression of consumer behaviour has been put forward by various theories both behaviouristic and psychological. All these theories postulate that a rational act of consumer is directed towards satisfaction or utility maximization. A rational consumer attains his equilibrium when he/she gets the maximum satisfaction in each unit of money spent on his/her purchase of goods and services. If he/she gets less than that, he/she is not satisfied, and feels cheated.[18] With the change of nature of Indian economy from physical to digital economy, consumers have also been entered into a new online economy.

With the 'e'-revolution electronic commerce has emerged as the potential emblem of a new worldwide virtual economy in which consumers from all corners of the globe do shopping.

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12. Adam Smith, The Wealth of Nations, J.M. Dent & Sons Ltd., London, 1937, p.155.
13. Rakesh Khanna, Consumer Protection Laws, Central Law Agency, Allahabad, 2002, p.1.
14. Mona Mehra, "Consumerism in Service Industry", Indian Journal of Marketing, Vol. VII, May 1977, p. 11.
15. L.N. Dahiya and Seema, "Consumer in E-Marketing Environment", in S.S. Chahar, Consumer Protection Movement in India: Problems and Prospects, Kanishka Publishers, New Delhi, 2007, p. 91.
16. Kurian Joseph, "Consumer Protection: Significance and Effectiveness" in Zacharias Thomas, Current Topics in Economics, Commerce and Management, Discovery Publishing House, New Delhi, 1998, p.185.
17. G.N. Shau, "Consumer Problems in India", Indian Journal of Marketing, Vol. XI, May 1981, pp. 3-4.
18. L.N. Dahiya and Seema, 2007, p. 91.

Just as today's economy is a mixture of old and new, similarly, marketing pattern is a hybrid[19] of the traditional and the modern. The traditional marketing competencies have established their deep roots since the time immemorial, however, new technological competencies have also been absorbed in the market to add potential for growth. In the same way consumers take advantage of online shopping convenience but still visit the physical market for human interaction and shopping. In the real world, before finalizing any purchase, consumer looks, feels, touches, smells, tastes and satisfies himself/herself and chances of cheating are very less. In Internet shopping, consumers can satisfy himself/herself only with looks, advertisement of variety of goods and remarks given by users of that product. But it is also an accepted reality that Internet shopping is in trend and it has become part and parcel of our day-to-day shopping experience.

FRAUDS IN ONLINE SHOPPING IN INDIA: AN OVERVIEW

The consequences of shopping in the borderless world of the Internet function differently from the offline world in various ways. Consumers usually lack the opportunity to obtain sufficient information about the identity of the supplier; the terms and conditions of any transaction (including the price of the goods and services); details of delivery costs; the quality of the goods or services, timely, affordable and fair dispute resolution. In online shopping, on the one hand, consumers are tendered convenience, speedy, global choices, comparison in services, goods and, more importantly, in prices. However, on the other hand, the Internet implies new hazards for consumers in the environment of e-marketing. Consumers using the Internet are usually obliged to pay entire purchase amounts in advance. Also, for transactions involving small purchases, there may be an absence of any practical means of redress in the event of a dispute. This problem is accentuated further on the Internet as a consequence of the possible cross-border dimension of the transaction.[20] The Internet has provided transparency in prices and brand selection, but not adequate transparency in the quality of products and services. The e-consumer is also more manipulated as a result of polished marketing strategies and less in control of what exactly happens with data, information and communication processes.[21] Some of the important

19. Donald C. Wood (edited), Economic Development, Integration, and Morality in Asia and the Americas, Emerald Group Publishing Limited, Bingley (UK), 2009, p. 85.
20. B. Van Klink & J.E.J. Prins, Law and Regulation: Scenarios for the Information Age, IOS Press, Amsterdam, 2002, p. 167.
21. Devashish Bharuka and Ajit Roy, "Computer Crimes" in S.K. Verma and Raman Mittal, Legal Dimensions of Cyber Space, Indian Law Institute, New Delhi, 2004, pp. 241-242.

violations are highlighted as under:

Frauds in e-Banking

In Indian physical banking industry, the classification of banking frauds used to be like: misappropriation and criminal breach of trust, fraudulent encashment through forged instruments, manipulation of books of account or through fictitious accounts and conversion of property, unauthorized credit facilities extended for reward or for illegal gratification, negligence and cash shortages, cheating and forgery and irregularities in foreign exchange transactions.[22] Till today frauds are committed on consumers in markets, however, modes of cheatings have become very refined and sophisticated. On one hand, technological advancements have provided a bundle of facilities to consumers in cyber world, however, on the other hand, novice modes of committing frauds have also come into existence which are very difficult to recognize and investigate. The frauds in e-transactions can be categorized as: Cyber Money Laundering or e-Money Laundering, Credit Card Frauds, Phishing, Pharming, ATM Frauds, Unwanted Programs (Adware, Spyware, Browser Parasites), Hacking, Cybervandalism and Malicious Code (Worms, Trojan Horse and Bots).

E-Advertisements

E-advertisements are roots for generation of on-line shopping frauds. On-line shopping frauds refers generally to any type of fraud scheme that uses one or more components of the Internet-such as chat rooms, e-mail, message boards, or web-sites-to present fraudulent solicitations to prospective victims, to conduct fraudulent transactions or to transmit the proceeds of fraud to financial institutions or others connected with the schemes. There are various fraudulent schemes envisaged over the Internet from which the criminals benefit financially. Various Internet frauds include online auctions, Internet access services, work-at-home plans, information/adult service, travel/vacation plans, advance free loans, prizes and win lottery portals. Fraudulent schemes often use the Internet to advertise purported business opportunities that will allow individuals to earn thousands of rupees through work at-home ventures. These schemes typically require the individuals to pay anywhere but fail to deliver the materials or information that would be needed to make the work-at-home opportunity a

22. Retrieved from:< http://rbidocs.rbi.org.in/rdocs/notification/PDFs/80CR010712FL.pdf>, visited on 11 January 2018.

potentially viable business. In on-line advertisements goods are shown in a very tempting way, however, they are not actually as they are shown in advertisements.

No Delivery or Defective Delivery of Online Ordered Products

With E-Commerce, shopping can be done at any time by using our "fingertips" instead of our "feet". The geographical barriers have become a blur. A shop located in another country and a shop next to your home is both on "one finger-click" away. In the physical real world, a consumer goes into shop, selects commodity and hands over cash in return for the goods which he/she carries away. The risks are very small, and even if things go wrong, consumer can usually exchange the faulty goods. One knows where to go back to shop because bricks and mortar rarely move overnights. However, when trading over the Internet, things are not simple: The dream of virtual trader can suddenly become a nightmare. Exploitation of the rights of e-consumers under the veil of information technology has grown from a cesspool into a huge iceberg. The safety, security and protection of consumers are a big challenge in India. 'Consumer is sovereign' and 'Customer is the king' are nothing more than myths in the present scenario particularly in the developing societies.[23] Therefore, in the light of above mentioned threats to consumers in online shopping, it is very crucial to ponder upon the new concept of 'e-Consumerism' in Indian digital economy.

Validity of e-Contracts in case of Misrepresentation

The essential ingredients of a valid contract in physical world have a distinct connotation in the context of online contract. There are some issues to ponder upon very gravely. One of the essentials of a valid contract is that the parties should enter into the contract with their free consent. Two or more persons are said to consent when they agree upon the same thing in the same sense i.e. consensus ad idem. A Contract is unenforceable on the ground of flaw in consent. Flaw in consent takes place in five ways- (1) Coercion (2) Undue Influence (3) Fraud (4) Misrepresentation and (5) Mistake. In online contract, the consent is said not free when it is dominated by three factors, namely: (1) Fraud (2) Misrepresentation and (3) Mistake. An agreement to which the consent is caused by fraud is voidable at the option of the party whose consent was so caused. In an online contract it is very difficult to circumscribe all different acts of fraud with the limits of simple and precise definition of 'online-fraud'. The offences of

23. Rodney D. Ryder, "Law and Privacy in the Cyber Space: A Premier on the Indian Information Technology Act, 2000", Manupatra Newsline, September, 2008, p. 3.

'Spamming', 'Spoofing' have been originated to cheat innocent customers and contract concluded under the cover of spamming and spoofing can never be considered as a legal contract. A contract, the consent to which is induced by misrepresentation, is voidable at the option of the deceived party.[24] In an on-line shopping misrepresentation is the trend. Mistake or error makes the contract void i.e., it is not enforceable at the option of either party. Mistake may operate upon a contract in two ways: It may defeat the consent altogether or it may mislead the parties as to the purpose which they contemplated. As the formation of a valid contract forms the corner-stone of e-commerce, it is essential that sufficient attention must be paid to the formation of a valid online contract before finalizing transactions in the click-world.

INDIAN LEGAL MECHANISM ON E- COMMERCE: UNCITRAL MODEL LAW, 1996 AND THE INFORMATION TECHNOLOGY ACT, 2000 (2008)

In order to pave the way for the development of e- Commerce and internationally acceptable level of legal uniformity and compatibility of rules and practices, the United Nations Commission on International Trade Law (UNCITRAL) established by the United Nations General Assembly in 1996 has adopted the Model Law of Electronic Commerce in 1996. It is intended to facilitate the use of EDI, e-mail, telegram, telex or telegraphy etc. etc., by providing standards with which their legal value can be assessed.[25]

On the basis of the UNCITRAL Model Law of Electronic Commerce 1996, India has enacted the Information Technology (IT) Act 2000. This Act has been amended by Information Technology (Amendment) Bill, 2006, passed in Lok Sabha on 22 December and in Rajya Sabha on 23 December of 2008. The salient features of the Act are elaborated upon as under:

1. Chapter I- Preliminary; has explained the short title, extent, commencement, application of this law and important definitions of words used under this legislation.
2. Chapter II-Digital Signature and Electronic Signature; has recognized the authentication of electronic records and electronic signature.
3. Chapter III-Electronic Governance; is based on the legal recognition of e-records in government agencies.
4. Chapter IV-Attribution, Acknowledgement and Despatch of Electronic

24. Ashok K. Jain, Law of Contract, Ascent Publications, Delhi, 1997, p. 123.
25. Pranab Kumar Bhattacharya, "Legal Framework of Electronic Commerce: A Study with Special Reference to Information Technology Act 2000", The Indian Journal of Commerce, Vol. 54, No. 4, October-December, 2001, p. 201.

Records; has highlighted the legal provisions on time and place of despatch of electronic record.

5. Chapter V-Secure Electronic Records and Secure Electronic Signatures; has clarified security procedures and practices to be followed under this Act.
6. Chapter VI- Regulation of Certifying Authorities; is focussed on appointment, powers and functions of Controller and Certifying Authorities.
7. Chapter VII-Electronic Signature Certificate; has given provisions on grant, suspension and Revocation of Electronic Signature Certificate.
8. Chapter VIII-Duties of Subscriber; has discussed the procedure for generating key pair and control of private key.
9. Chapter IX- Penalties, Compensation and Adjudication; discloses penalty and compensation for damage to computer, failure to protect data and compensation amount.
10. Chapter X-The Cyber Appellate Tribunal; explains establishment, composition, term of office, conditions of service and power of Cyber Appellate Tribunal.
11. Chapter XI-Offences; has given a long list of various forms of offences, cyber crimes and their punishments.
12. Chapter XII-Intermediaries Not to be Liable in Certain Cases; has determined the liability of intermediaries.
13. Chapter XII-A- Examiner Jet Electronic Evidence; clarifies that Central Government makes notification of Examiner Jet Controller under this Act.

The analysis of these provisions from consumer perspective reveals that the rights of consumers in online shopping are not given in e-Commerce legislation. The researchers personally feel that with the participation of consumers in online shopping, the Information Technology Act, 2000 (2008) has become living law that comes into operation the moment anyone enters into 'e'- world. It is incompetent to protect consumers from these white collar (highly sophisticated) crimes. Not even a single provision in the Information Technology Act

2000 (as well as 2008) protects consumers from frauds in online shopping. As the Information Technology law has become a living law, therefore, it needs to be updated as per the needs of day to day society. It is submitted that this law is like a skeleton legislation where all provisions are decorated in a very beautiful and systematic way, however, these are not worth for ordinary human being who is daily user of this technology. There is lack of soul/spirit behind these provisions. The law is of as much interest to the layman as it is to the lawyer. The laws which were written for traditional world, now, need to be changed to suit the digital world. The purpose of the Act is not a mere addition as the decoration piece in the legal world library, but to provide justice to the users of this technology. It is possible only when keeping aside all the technicalities it must be made easy for layman to understand and for being applicable. The Information Technology Act, 2000 (as well as 2008) must contain some provision on acknowledgement of the rights of online consumers, like:

1. Lack of any punishment for online banking frauds in online shopping is likely to give way for the growth of more e-banking frauds and hence there should be a provision for strict punishment.
2. There must be provisions for compensation to victimized innocent consumers who are cheated due to fake e-advertisements.
3. Strict regulations must be made for online vendors. They must disclose complete information regarding web-site, name and address of company, warranty, after the sale service, complaint redressal mechanism and policy matters.
4. Government must make e-Consumerism policy matrix; wherein such policies must be framed which can provide better shield to online consumers.

CONCLUSION AND SUGGESTIONS:

The 'E-Revolution' has placed virtually the entire trading universe in cyberspace. Today the relevance of technology is so pervasive that it is virtually impossible to think of a life without it. Technology has moved into products, the workplace and the marketplace with astonishing speed and thoroughness. Information Technology has led to the birth of fast and cost effective marketing.[26] Market is not a passive spectator of this Internet revolution[27] rather

26. Retrieved from http://www.sbaer.uca.edu, visited on 1 July, 2018.
27. L.N. Dahiya, "Some Emerging Issues in Marketing in India", The Indian Journal of Commerce, April-June, 1999, p.79.

marketing is one of the most dynamic fields. Therefore, new marketing ideas keep surfacing to meet the new market place namely-Cyber marketing. It is observed that people have started taking the advantage of Information Technology and e-Commerce. For some, it is enjoyment and part and parcel of their lives, however, for others it is time consuming, risky and wastage of money. In addition to online shopping, there are several online services that are cherished by us. But the major fear in the minds of respondents has been lack of trust in quality of products, authenticity of web-shops, security of personal financial information and privacy in e-Banking transactions, which is the biggest hindrance in the growth of e-Commerce.

1. A strong platform for flourishment of e-Commerce can only be provided when consumers are safe in e-Commerce and this safety can be availed only when consumers would be aware about their rights in cyberspace.
2. This consumer awareness can provide a safe as well as fertile ground for the growth of 'e-Consumerism' in India.
3. A plethora of literature is available on 'Consumerism' in physical commerce; however, the concept of 'e-Consumerism' is highly ignored in online market.
4. The underlying destination of consumer education and awareness must be to provide all people the information and confidence that will give them a sense of control over their individual and collective consumer decisions.
5. In order to avail the full benefits of e-Commerce, it is ripe time to revamp movement for e-Consumerism in India for the protection of the rights of consumers in an online world.

The nature of e-Commerce is conducive to creating a context in which frauds are more likely to increase than in face-to-face transactions. In the relatively brief legislative history of e-Commerce, Indian legislations have not responded to the cheatings with online consumers during online shopping by settled principles of law. e- Commerce without e-Justice is irrelevant. These e-Commerce disputes must be resolved efficiently, fairly and securely so that online consumers can place full confidence in e-Commerce markets. The Internet must be viewed as a trustworthy online global marketplace fully operating under the rule of law. There is need of sensitization of rights of online consumers in legal texts.

PRE- TRIAL RIGHTS OF ACCUSED AND MEDIA TRIAL: GENDER MATTERS

Jyothi Abraham*

INTRODUCTION

Attaining gender justice is not an easy task in India. From time immemorial, a girl child has been considered as an unwanted entity and a burden that the parents would not mind doing away with. Discrimination against women begins even before her birth. The gruesome evils of female feticide and infanticide prove how brutal the world could be to women. Though the Indian constitution provides equal rights and privileges for men and women and makes equal provision to improve the status of women in society, majority of women are still unable to enjoy the rights and opportunities guaranteed to them. Traditional value system, low level of literacy, more households' responsibilities lack of awareness, non-availability of proper guidance, low mobility, lack of self-confidence family discouragement and advanced science and technology are some of the factors responsible to create gender disparity in our society. The most important causes of gender disparity include poverty, illiteracy, unemployment, social customs, belief and anti-female attitude.[1]

Every person is entitled to the basic human rights, fundamental rights under the Indian Constitution and certain legal rights under various laws. These rights are provided to a person; irrespective of the fact that the person is accused of a crime. "The rights of accused in India are provided at different stages which include right of an accused before his trial begins (Pre- trial rights), rights of accused during a court trial, and right of an accused after his trial is completed". Pre-Trial Rights of the Accused are given to ensure the freedom and liberty are not hampered. The first stage of a trial is the pre-trial stage where a FIR is filed on the basis of which the police

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1. DR. SUKANTA SARKAR AND DR. MANASWINI PATRA, Women Rights In India Human Rights Perspectives, 1-12 (2016).

arrests a person, searches his property. The accused has rights including the right to be presumed innocent until proven guilty; the guilt is to be proved beyond reasonable doubt, Right to know about the accusations and charges,[2] Right against wrongful arrest,[3] Right to privacy and protection against unlawful searches,[4] Right against self-incrimination,[5] Right against double jeopardy,[6] Right against ex-post facto law,[7] Bail as a right of the accused,[8] Right to legal aid,[9] Right to a free and expeditious trial[10] etc. At the same time, the "Right to Fair Trial", i.e., a trial uninfluenced by immature pressures is recognized as a basic tenet of justice in India.[11]

The criminal justice system has deal with the citizen at several stages, arrest is the first stage. At this stage the freedom of the citizen is restrained and safeguards public interest. Different purposes are served by arresting a person. Sometimes, it saves him/her from retaliatory assault from the public. Sometimes, he/she is prevented from committing further crimes. And surely arrest helps him/her to be presented before the appropriate court to stand trial. It is to serve the third purpose that usually a suspect is arrested by the police. Despite the fact that the Constitution of India guarantees basic Human Rights and Fundamental Rights to an accused, the paper would conclude that, 'media trials' of cases involving women as accused hamper the Rights of the accused as well as reinforce the patriarchal values by moral policing them in public media platforms. The paper would try to analyse how the media took a patriarchal stand through the stereotypical portrayal of the accused women by only focussing on their moral

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2. Under the Cr.Pc the accused person has the right to know the details of the offence and the charges that are filed against him.
3. The right is provided only in cases where a warrant is issued. Section 57 of Cr.P.C. and Article 22(2) of Constitution provides that a person arrested must be produced before a Judicial Magistrate within 24 hours of arrest.
4. The police officials cannot violate the privacy of the accused on a mere presumption of an offence. The property of an accused cannot be searched by the police without a search warrant.
5. A person cannot be compelled to be a witness against himself as per Article 20(3) of the Indian Constitution.
6. A person cannot be prosecuted and punished for the same offence more than once as per Article 20(2) of the Constitution.
7. A person cannot be tried for an offence that was earlier a crime and now is not. This means that retrospective effect of a law is not applicable. An act that was not a crime on the day when it was done cannot be considered as an offence.
8. An accused person has the right to file a bail application to be released from jail custody. There are three kinds of bail under Indian law- anticipatory bail, interim bail and bail by a bond. A bail application for normal bail can be filed only in case of bailable offences. However, a person can also file an anticipatory bail through his criminal lawyer, before his arrest.
9. An accused person has the right to hire a lawyer to defend him and in case, he is not able to afford a lawyer, the State has to provide free legal aid to him for his representation in court.
10. An accused has the right to have an expeditious trial, which is free of any bias or prejudice.
11. DR. SUKANTA SARKAR AND DR. MANASWINI PATRA, Women Rights In India Human Rights Perspectives, 231- 237 (2016).

sides, thereby affecting the trials of the cases.

SEXUAL EQUALITY

The injustice of sexism is not irrationality, it is domination. Law must focus on the latter and that focus cannot be achieved through a formal lens. Binding ourselves to rules would help us only if sexism were a legal error. A commitment to equality requires that we undertake to investigate the genderization of the world, leaving nothing untouched. The principles of objectivity, abstraction, and personal autonomy are at risk. A male point of view focuses narrowly on autonomy, on the separation between self and others. That disjunction contains the roots of domination. In the terms of feminist theory, male reality manifests itself by negating that which is nonmale. The male model defines self and other important concepts by opposing the concept to negativized other. Male rationality divides the world between all that is good and all that is bad between objective and subjective, light and shadow, man and woman. For all of these dichotomies the goodness of the good side is defined by what it is not. Whereas the male self/other ontology seems to be oppositional, the female version seems to be relational.[12]

Male and female perceptions of value are not shared and are perhaps not even perceptible to each other.[13] In our current genderized realm, therefore, the rights-based and care-based ethics cannot be blended. Patriarchal psychology sees value as differently distributed between men and women: Men are rational; Women are not. Feminist psychology suggests different conceptions of value, women are entirely rational, but society cannot accommodate them because the male standard has defined into oblivion any version of rationality but its own.[14] Paradigmatic male values, like objectivity, are defined as exclusive, identified by their presumed opposites. Those values cannot be content with multiplicity; they create the other and then devour it. Objectivity ignores context, reason is the opposite of emotion, rights preclude care. As long as the ruling ideology is a function of this dichotomization, incorporationaism threatens to be mere coopetition a subtler version of female invisibility. By trying to make everything too nice, incorporationism represses contradictions. It usurps women's language in order to further define the world in the male image, it thus deprives women power of naming.[15] Incorporationism means to give over the world, because it means to say to those in power. We

12. Mac Kinnon Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence, 8 SIGNS 635 (1983).
13. A. DWORKIN, Our Blood, 96-111 (1979).
14. A. DWORKIN, Pornography: Men Possessing Women 13-24 (1979).
15. Feminist Discourse, 34 Buffalo L, Vol II 27 (1985).

will use your language and we will let you interpret it. Law, like the language which is its medium, is a system of classification. To characterize similarities and a mechanistic manipulation of essences. Rather that step always has a moral crux. Law needs some theory of differentiation. Feminism as a theory of differentiation is particularly well suited to it. Feminism brings law back to its purpose to decide the moral crux of the matter in real human situations. Law is a complex system of communication its communicative matrix is intended to give access to the moral crux. Finding the crux depends upon the relation among things, not upon their opposition. In any case, imperfect analogies are available, a case is similar or dissimilar to others in an unlimited variety of ways. The scope and limits of any analogy must be explored in each case, with social reality as our guide. This is a normative but not illogical process. Any logic is a norm[16] and cannot be used except with reference to its purposes[17].

Feminism inverts the logical primacy of rule over facts. Feminist method stresses that the mechanisms of law- language, rules and categories are all merely means for economy in thought and communication. They make it possible for us to implement justice without reinventing every wheel at every turn. But we must not let means turn into ends. When those mechanisms obscure our vision of the ends of law, they must be revised or ignored. Sometimes we must take the long route in order to get to where we really need to be.

In the past, two legal choices appeared to resolve claims of social injustice. Law could either ignore differences, thereby risking needless conformity or it could freeze differences, thereby creating a menu of justifications for inequality. Concrete universality eliminates the need for such a choice. When our priority is to understand differences and to value multiplicity, we need only to discern between occasions of respect and occasions of oppression. Those are judgements we know how to make even without a four-part test to tell us, for every future circumstance what constitutes domination. A precise picture of a fuzzy scene is a fuzzy picture. Domination comes in many forms. Its mechanisms are do insidious and so powerful that we could never codify its 'essence.' The description that uses no formula, but which points to the moral crux of the matter, is exactly what we need[18].

Women are portrayed as nurturers defined by their relationships and focused on

16. A. LORDE, Age, Race, Class and Sex: Women Redefining Difference, Sister Outsider 114-122 (1981).
17. L. WITTGENSTEIN, Philosophical Investigations 66-78 (G.Anscombe trans. 3rd ed) (1968).
18. CATHARINE, A. MACKINNON, Feminism Unmodified 1-56 (1987).

contextual thinking, men are depicted as abstract thinkers, defined by individual achievement. One reason why the feminism of difference has proved so persuasive is that it has claimed for women two of the central critiques of twentieth century thought. In a strain of argument particularly popular in law reviews, feminists characterize traditional western epistemology as "male" and identify the twentieth century critique of that epistemology as an integral part of "women voice"[19]. The darkest expression of the traditional view that women unsupervised quickly slipped into collusion with evil was the persecution of women as witches. In this modern era till this notion and stereotypes thinks that if a woman related or involved in any crime which means that women is characterless or morally week women.

WOMEN AND MEDIA TRIAL

The emergence of media and its easy accessibility has led to the beginning of a phenomenon called 'media trial'. Media platforms are used as a medium to make the voices heard and mobilize popular support. It is now a widely recognized fact that the media has the potential to facilitate social transformations by promoting and disseminating information and ideas. When we talk about this potential, we cannot afford to deny the role media play in the context of women's issues in the society.

"Trial by Media is the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law". There is a heated debate between those who support a free press which is largely uncensored and those who place a higher priority on an individual's right to privacy and right to a fair trial.[20] During high publicity court cases, the media is often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but also the accused persons will not be able to live the rest of their lives without intense public scrutiny regardless of the result of the trial. ''The counter-argument is that the mob mentality exists independent of media which merely voices the opinions which the public already has.'' There are many reasons why the media attention is particularly intense surrounding a legal case (i) is that the crime itself is in some way sensational, by being horrific or involving children (ii) is that it involves a celebrity either as victim or accused. Although a

19. CAROL GILLIGAN, In A Different Voice 6-9 (1982).
20. Nimisha Jha, Constitutionality of Media Trials in India: A Detailed Analysis, Nov.13, NLIU (2015).

recently coined phrase, the idea that popular media can have a strong influence on the legal process goes back certainly to the advent of the printing press and probably much beyond. This is not including the use of a state-controlled press to criminalize political opponents, but in its commonly understood meaning covers all occasions where the reputation of a person has been drastically affected by ostensibly non-political publications. The problem is more visible when the matters involve big names and celebrities. In such cases media reporting can swing popular sentiments either way. Even where a criminal court finds somebody guilty the media can still appear to sit in judgement over their sentence.

Indrani Mukerjea[21] women accused in the Sheena Bohra murder case[22] , is a perfect example of media trial in recent India. The media has gone full throttle, publishing materials ranging from the college life of Indrani Mukerjea to the personal life of Siddhartha Das, details about all the children of Indrani and even the diary of Sheena Bora. A major bulk of the entire reporting has been focused on the character of Mrs. Mukerjea and attempts to establish a motive for Sheena Bora's murder. While motive may play an important role in this case, particularly if the entire case is built on circumstantial evidence, it will be most crucial for the prosecution to establish intent and accomplishment.

One should also spare a thought for the children of Indrani Mukerjea who are certainly turning out to be collateral damage in this public trial conducted by the media. These children and other people connected to her but in no way connected to the alleged murder will forever be labelled by society and will find the going extremely difficult even after this intense media scrutiny is over. That is why the media should have refrained from naming names and publishing photographs of witnesses and others connected to the accused during the investigation itself. Why do we even need a criminal justice system, if we as a people are so keen on passing judgment ourselves?

The most striking and disappointing part of the reporting of the Sheena Bora disappearance case has been the tendency of the media to speculate and pass judgement on the

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21. She is a former HR consultant and media executive. She is the wife of Peter Mukerje, a retired Indian television executive. In 2007 she co-founded INX Media with her husband, where she took on the role of CEO. In 2009 she resigned from the company and later sold her stake in it. In August 2015, she was arrested by Mumbai Police and charged as the main accused in the alleged murder of her daughter, Sheena Bora.
22. Sheena Bora, an executive working for Mumbai Metro One based in Mumbai went missing on 24 April 2012. In August 2015 Mumbai Police arrested her mother Indrani Mukerjea, her stepfather Sanjeev Khanna, and her mother's driver, Shyamvar Pinturam Rai, for allegedly abducting and killing her and subsequently burning her corpse. Khanna and Rai confessed to the crime.

morality of Indrani Mukerjea. The morality of the accused is not on trial here and will not be of consequence to a learned judge when the matter reaches trial.

In the context of this sensational reporting and the moral judgements flying thick and fast about Indrani Mukerjea's values and character, there is one question that haunts us: what if, a few years later, the courts determine that the prosecution has failed to make their case against her and her co-accused beyond 'reasonable doubt'? What if the courts are compelled to exonerate/acquit her? Will we, as a society that is judging her, ever be able to restore the lives of the accused and all those connected to them to normalcy? Unlike in war, there is unfortunately no mechanism for providing reparations to the victims of a media trial.

Saritha Nair[23] (Solar scam case) was often portrayed as a immoral woman. More or less the interviews taken by media and the confessions given by accused during interviews and the statement given by accused in front of media later are quoted by the media to judge the morality of these accused women. Programs like Janadalat, F.I.R, Counter Point, Crime petrol and soon try to sensationalize such cases there by affecting the reputation and credibility of the accused and the right of pre-trial under Constitution of India (right against self-incrimination). However, more credibility is generally given to printed material than 'water cooler gossip'. The responsibility of the press to confirm reports and leaks about individuals being tried has come

23. In 2011, Team Solar, led by Directors Biju Radhakrishnan and Saritha S. Nair allegedly cheated their investors by offering business partnerships on the pretext of installing solar energy in homes. The company awarded a 'Virgin Earth Golden Feather Environment Award' too many people Keralites to gain credibility. This 10 crore scam was exposed in 2013 when an investor filed a case against the company The investor, Sajad A, stated that the company had taken Rs 40 lakh as consultation fee for making him the owner of 3 wind mills projects. When none of the projects began, he lodged the police complaint. This resulted in the arrests of Nair and Radhakrishnan and further investigations. The direct links to the CM led to a formal investigation being launched during investigations, 3 members of Chief Minister Oommen Chandy's staff were found to have direct links to the couple. Protests broke out across the state demanding resignation of the CM. Finally, it was pressure from the Opposition in the legislative assembly which forced CM Chandy to call for a judicial probe. The investigation faced hitches because of another pending case of Radhakrishnan. In 2014, a judicial probe dug up a pending murder case against Radhakrishnan who was then sentenced to life imprisonment by a Session Court. In 2015, the Judicial Commission deposed Radhakrishnan, who alleged that CM Chandy had accepted a bribe of Rs. 5.5 crore. The prime accused Saritha Nair alleged involvement of several other politicians A judicial panel deposed Saritha Nair, who claimed to have had close relations with Chandy's family. Chandy has denied these allegations. By March 2016, Saritha Nair was crossed examined by the Solar Judicial Commission during which she accused Benny Behanan, Congress MLA and Kerala Pradesh Congress Committee (KPCC) General Secretary of corruption. In July 2016, she even stated that DMK leader and former Union Minister Palanimanickam were involved in the scam. There were 34 cases against solar scam (Saritha Nair) and 32 were settled and reset of the cases was still in front of court for justice.

under increasing scrutiny and journalists are calling for higher standards.

A Trial by press, electronic media or public agitation is an antithesis to the rule of law. It can only lead to miscarriage of justice. Therefore, it may be contempt to publish an interview with the accused or a potential witness because there is always a likelihood that the trial is prejudiced by these publications or broadcasting. If the media in the process of reporting adds anything in excess to the actual proceedings in the Court, it no doubt amounts to interference with justice [24]. In UK, when Courts are convinced of the fact that media has influenced the jury, then the case is taken away from that Court and posted to a Court far away from that area. In India, it is very difficult to prove that the judge has been influenced by the media talk. Whenever the accused is a woman the role of media is stereotyped and patriarchal in nature and every aspect of her (accused) personal life and character are digged by media. The stereotypical notion that only a woman with weak moral side can commit crime or fraud is reinforced by the media trial by reporting only by focusing on that aspect of the accused. But there is no doubt that no person, even if it is the judge, can stop himself from keeping track of the news of the day. There is every possibility of not only the judges but also the witnesses getting influenced. The intention of the reporter to interfere with the administration of justice or not is immaterial in determining whether it constitutes contempt of court. The possibility of influence has to be considered and not the intention of the journalist.

Nowadays there is a competition between the media houses to publish investigative reports on cases even before the police starts investigation. This investigative journalism is good but at the same time it is going out of hand. There is no way to regulate it or stop it. Though we have the Press Council of India, which was established around twenty-two years before, the electronic media does not come under it. The PCI entertains more than 10,000 complaints a year, has no teeth and the purpose is defeated as it evokes no fear or sanction. Simply an apology is demanded from the press, if found guilty. These types of liberal approaches are not going to remedy the harm caused by press reporting. More stringent measures are to be adopted to curb the malady though self-regulation can operate as a useful and viable tool.

Provisions aimed at safeguarding this right are contained under the Contempt of Courts Act, 1971 and under Articles 129 and 215 (Contempt Jurisdiction-Power of Supreme Court and

24. State of Maharashtra v. Rajendra Jawanmal Gandhi SC (1997).

High Court to punish for Contempt of itself respectively) of the Constitution of India. Particular concern to the media is restrictions which are imposed on the discussion or publication of matters relating to the merits of a case pending before a Court. A journalist may thus be liable for contempt of Court if he publishes anything which might prejudice a 'fair trial' or anything which impairs the impartiality of the Court to decide a cause on its merits, whether the proceedings before the Court be a criminal or civil proceeding.

CONCLUSION

The media exceeds its right by publications that are recognized as prejudicial to a suspect or women accused. Reports concerning the character of women accused, publication of confessions, publications which comment or reflect upon the merits of the case, photographs, police activities, imputation of innocence, creating an atmosphere of prejudice and criticism of witnesses are considered as prejudice. In this sensational reporting and the moral judgements flying thick and fast about women accused values and character, there is one question that haunts us: what if, a few years later, the courts determine that the prosecution has failed to make their case against her and her co-accused beyond 'reasonable doubt'? What if the courts are compelled to exonerate/acquit her? Will we, as a society that is judging her, ever be able to restore the lives of the accused and all those connected to them to normalcy? There is unfortunately no mechanism for providing reparations to the victims of a media trial. And this attitude of media causes damage a person's reputations which cannot be regained and it's a clear violation of fundamental rights of a citizen too. Ending this form of sexual inequality could free men to express their "feminine" side, just as it frees women to express their "masculine" side.

RIVERS AS LEGAL PERSONS

Kriti Parashar*

INTRODUCTION

Traditions and Culture around the world have lived in Harmony with nature. Christianity, Islam, Hinduism, Chinese and African cultures have worshipped the trees, plants, rivers and animals as Gods and Goddesses. Rivers out of these have received prominent respect being the source of life and supporting life of the whole community. Water bodies have been considered as deities and are often personified. River Lourdes amongst Catholic Romans, Jordon River in Christian Churches, the Zamzam Well in Islam, Majority Rivers under Hinduism, 'Hapi' the Nile God in Africa and The Yellow River (Huang He) in China are examples of rivers that have been assigned the status of deities and been culturally important for centuries. The relationship of the present legal system with rivers and other natural bodies has not remained this direct. Rivers are protected under the environment protection law, water pollution is made punishable and municipalities have been assigned their duties to maintain them. What is pertinent is that the legal system does not directly recognize rivers, it gives them status through individuals. The Rights of humans to have healthy environment including clean water is being enforced by the courts and it is through this right that river exist for the courts and the legal system. A direct relationship with these life giving water bodies by establishing them as a legal person is a distant idea at present. This paper explores the viability of this idea for our legal system to ensure not only human rights to individuals but also rights to these bodies on which human civilization largely depends.

RIGHTS OF NATURE AND LEGAL PERSONHOOD

Law has treated nature as property subject to ownership. Christopher D. Stone in his book, 'Should trees have standing?' has remarked "Until a rightless thing receives its rights, we cannot see it as anything but a thing for the use of 'us' – those who are holding rights the time"[1]. Peter Singer writes with regard to animal rights that "The fact is, that each time there is a movement to confer rights onto some new 'entity,' the proposal is bound to sound odd or

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1. Christopher D. Stone, 'Should trees have standing? Toward legal rights for Natural objects', 1, California Law Review, 59 (1985).

frightening or laughable"[2]. Assigning rights to nature would acknowledge that they are not just resources to be used but also life forms which have the right to exist, persist, maintain and regenerate. Rivers being part of the eco system would also be granted these rights. Scholars to grant rights to natural bodies are few.

Rodrick Frazier Nash in his book on 'The Rights of Nature', Christopher Stone in his work 'Should Trees have Standing?', David R. Boyd's book on 'The Rights of Nature: A Legal Revolution that could Change the World' and 'The Rights of Nature' by Council of Canadians- are pertinent works advocating the idea that nature could be assigned rights. The Pachamama Alliance of the Global Alliance for the Rights of Nature and the first Global Tribunal on the Rights of Nature in 2013 are also some such developments.

Apart from writings of these scholars, there is atleast one reported decision of the Supreme Court of the United States, penned by the great environmentalist Justice William O. Doughlas, suggesting that America's trees and rivers deserved the legal status given to individual citizens, private corporations and even ships to bring a law suit. Justice Doughlas has forcefully asserted that "the voice of the existing beneficiaries of these environmental wonders should be heard"[3]. Recently, while interpreting animal rights in the case of *Animal Welfare Board of India v. A. Nagaraja*[4], Supreme Court of India remarked that:

'Article 21 of the Constitution, while safeguarding the rights of humans, protects life and the word "life" has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including animal life.'

Such an expansive interpretation of Article 21 would also grant a constitutional standing to river being a form of life. The Indian Supreme Court has also expanded the locus standi requirements for filing a case on anyone's behalf a decade ago saying that the same can be done "in the service of the poor, oppressed and voiceless."[5] Nature being voiceless- it makes both the state and public its trustee.

Developments like such imply that the groundwork for assigning rights and duties to rivers is being laid, it only upto the legislators and the legal system in the country to move ahead

2. Peter Singer, Animal Liberation (Harper Perennial Modern Classics, Reissue edition, February 24, 2009).
3. Sierra Cluv v. Morton , 405 U.S. 727 (1972).
4. (2014)7SCC547, 2014 (5) SCJ 614.
5. Subhash Kumar v. State of Bihar, A.I.R. 1991 S.C. 420, para. 7.

and implement the idea. Eric O Donnel, in this regard, remarks that: "There is still a big question about whether these types of legal rights are relevant or appropriate for nature at all. But what is clear from the experience of applying this concept to other non-human entities is that these legal rights don't mean much if they can't be enforced."[6] Begonia Filgueria, an environmental lawyer has questioned- "It took until 1998 for the United Kingdom Parliament to incorporate human rights directly into the domestic legal system. In light of the dangers posed by climate change, is it time to go one step further and grant rights to the Earth herself?"[7] Community Environmental Legal Defense fund (CELDF), a pertinent body associated with environmental agendas and rights of nature has remarked as follows:[8]

Many nations have expanded their body of legal rights to recognize a human right to a healthy environment, including Spain, France, Portugal, Greece, and Finland. However, as global warming accelerates and ecosystems are pushed to collapse, we are finding that the human right to a healthy environment cannot be achieved without securing rights of the environment itself. This means recognizing in law the right of nature to be healthy and thrive.

In light of these questions being asked time and again it does not make sense- legally, philosophically, or ethically- for rivers not to be relegated to the property status, while ships and corporations can sue and be sued in the courts of law? If a legal fiction can come to aid of inanimate companies, why can't a natural fact be taken notice of to assist them?[9] Hence, it is about time that theories of legal personality be made flexible enough to the idea of assigning personality to rivers.

DEVELOPMENT OF RIVERS AS LEGAL PERSONALITY AROUND THE WORLD

In past year, three rivers around the world have been identified as legal persons: First in the Whanganui River granted personality by the legislators in New Zealand under a new legislation. The legislation emerged as a result of the Māori tribes efforts and negotiations to protect the river with which they had special relationship under their culture. The other two are Rivers Ganga and Yamuna in India which were identified as persons by Uttarakhand High Court. At present, the

6. Erin O Donnel, '3 Rivers just became legal persons', Available at: https://www.livescience.com/58398-3-rivers-just-became-legal-persons.html (Visited on 20/06/2018).
7. Available at: https://ukhumanrightsblog.com/2011/06/02/and-about-time-for-rights-to-nature-by-begonia-filgueira/ (Visited on 20/06/2018).
8. 'Rights of Nature', Available at: https://celdf.org/rights/rights-of-nature/ (Visited on 20/06/2018).
9. Raju Moray, 'Fundamental Rights for Animals: An idea whose time has come', 10, Lawyers Collective, 26, (January-February, 1995).

Uttarakhand High Court Order is stayed and the issue is pending to be finally decided before the Supreme Court of India. Joerg Muller in this regard says that

Granting legal rights to New Zealand's Whanganui River catchment (Te Awa Tupua) has taken eight years of careful negotiation. In contrast, almost overnight, the High Court in India had ruled that the Ganga and Yamuna Rivers will be treated as minors under the law, and will be represented by three people– the director general of Namami Gange project, the Uttarakhand chief secretary, and the advocate general– who will act as guardians for the river.

Studying the contrasting set ups in these two and other different countries we see how rivers around the world can be made legal persons.

New Zealand

In New Zealand Whanganui River Claims Settlement Act, 2017 grants Whanganui River personhood. Section 14 of the Whanganui River Claims Settlement Act, 2017 declares Te Awa Tupua (Whanganui River) to be legal person as follows:

1. Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person.
2. The rights, powers, and duties of Te Awa Tupua must be exercised or performed, and responsibility for its liabilities must be taken, by Te Pou Tupua on behalf of, and in the name of, Te Awa Tupua, in the manner provided for in this Part and in Ruruku Whakatupua—Te Mana o Te Awa Tupua.

The Act defines liabilities of the river as "debts, charges, duties, and other obligations, whether present, future, actual, contingent, payable, or to be observed or performed in New Zealand or elsewhere." Section 25 of the Act makes the river a single person for the purpose of tax treatment and not separate from its representative body and beneficiaries.[10] Schedule 5 of the Act specifies that Liabilities of the river exclude the following:

10. Section 25 of the Act states that "(1) Te Awa Tupua and Te Pou Tupua are deemed to be the same person for the purposes of the Inland Revenue Acts and the liabilities and obligations placed on a person under those Acts.".

1. remediation of any historical contaminated site on the relevant land if the contamination was caused at any period when the land was held by the Crown:
2. an existing structure on the bed of the Whanganui River if the structure was established before the date on which the relevant land vested:
3.) an existing activity (whether authorised under a consent or designation, as a permitted activity, or by or under any legislation) if the activity was authorised before the date on which the relevant land vested:
4. public access to, and use of, the Whanganui River, including for navigation.

On and from the date on which land vests in Te Awa Tupua by section 41(1) or under section 53(3) or 55(3)(a), the Crown retains—

(a) any existing liabilities it may have in relation to the land arising from—

1. a historical contaminated site if the contamination was caused while the Crown held the relevant land:
2. an existing structure on the bed of the Whanganui River if the structure was established before the date on which the relevant land vested:
3. an existing activity, whether authorised under a consent, under a designation, as a permitted activity, or by or under legislation, if the activity was authorised before the date on which the relevant land vested:
4. plants that are attached to the bed of the Whanganui River, together with the biosecurity risks associated with those plants; and
5. any other liability arising from landowner functions performed or decisions made by the Crown before the date on which the relevant land vests.

Schedule 7 of the Act provides certain customary activities that would be permitted by an authorised notice of the Board. The trustees are only permitted to authorise certain activities when they do not cause significant adverse impact to the river. Thus, we can say that the Act comprehensively provides the rights and liabilities of the river. Exclusion in the liabilities of the crown with regard to the river limit the lacuna that could have arisen from making river an entity in the eyes of law. Similar provisions can be taken as a framework for other countries thinking to grant river bodies rights and duties.

Ecuador

The Constitution in Ecuador mandates that nature has the right to exist, maintain and regenerate. Preamble to the Constitution states that 'Celebrating nature, the Pacha Mama (Mother Earth), of which we are a part and which is vital to our existence'. Article 71 of the Constitution states that:

Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate. The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

Article 72 gives nature the right to be restored. It provides that "This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems." Based on such a set up, rivers have also received rights. This has opened the door for many environmental advocates. Vilcabamba River had half receded from its basin, when a lawsuit was brought by Mr. R.F.Wheeler and E.G. Huddle in the name of the river as a plaintiff. The plaintiff i.e. the Vilcabamba River was contending its right to thrive and exist which was hampered due to a construction project of the government. In 2011, the Provincial Court ruled in favor of the river. It granted a constitutional injunction to the plaintiff river stating that:[11]

1. The suitability and efficacy of the Constitutional injunction as the only way to remedy in an immediate manner the environmental damage focusing on the undeniable, elemental, and essential importance of nature, and taking into account the evident process of degradation;
2. That, based on the precautionary principle, until it is objectively demonstrated that the probability of certain danger that a project undertaken in an established area does not produce contamination or lead to environmental damage, it is the responsibility of the constitutional judges to incline towards the immediate protection and the legal tutelage of the rights of nature, doing what is necessary

11. Natalia Greene, 'The first successful case of the rights of nature implementation in Ecuador', Available at: http://therightsofnature.org/first-ron-case-ecuador/ (Visited on 21/06/2018).

to prevent contamination or call for remedy. Note, that we consider in relation to the environment that one act not only under the certainty of damage but its probability;

3. The recognition of the importance of nature, raising the issue that damages to nature are generational damages, defined as such for their magnitude that impact not only the present generation but also future ones;
4. That, using the principle of inversion of the burden of proof, the plaintiffs should not have to prove the existence damages but that the Provincial Government of Loja, as the entity that administers the activity and as the defendant, had to have provided certain proof that the widening the road would not affect the environment;
5. That the argument of the Provincial Government that the population needs roads does not apply because there is no collision of constitutional rights of the population, nor is there any sacrifice of them, because the case does not question the widening of the Vilcabamba-Quinara road, but the respect for the constitutional rights of nature;

This case has marked the first time that a court upheld the constitutional rights of a river. This judgment is a remarkable example of how granting rights to river could open up the door for several litigation which are avoided due to lack of locus standi. The court had shifted the burden of proof not on the representatives of the river to prove damage but on the state to prove that its activities were not violative of the rights of the river. Granting rights to river in the constitution itself has taken the river on the highest pedestrian, thus, protecting them from damage due to over exploitation.

Bolivia

Bolivian 'Framework Law of Mother Earth and Integral Development for Living Well' has established judicial character to Mother Earth. Article 7 of the law enumerates seven rights to which Mother Earth are entitled:[12]

To life: It is the right to the maintenance of the integrity of life systems and

12.'Framework Law of Mother Earth and Integral Development for Living Well', available at: http://www.ftierra.org/ft/index.php?option=com_content&view=article&id=4288:rair&catid=152:cc&Itemid=210 (Visited on 21/06/2018).

natural processes which sustain them, as well as the capacities and conditions for their renewal

To the Diversity of Life: It is the right to the preservation of the differentiation and variety of the beings that comprise Mother Earth, without being genetically altered, nor artificially modified in their structure, in such a manner that threatens their existence, functioning and future potential

To water: **It is the right of the preservation of the quality and composition of water to sustain life systems and their protection with regards to contamination, for renewal of the life of Mother Earth and all its components**

To clean air: It is the right of the preservation of the quality and composition of air to sustain life systems and their protection with regards to contamination, for renewal of the life of Mother Earth and all its components

To equilibrium: It is the right to maintenance or restoration of the inter-relation, interdependence, ability to complement and functionality of the components of Mother Earth, in a balanced manner for the continuation of its cycles and the renewal of its vital processes

To restoration: It is the right to the effective and opportune restoration of life systems affected by direct or indirect human activities

To live free of contamination: It is the right for preservation of Mother Earth and any of its components with regards to toxic and radioactive waste generated by human activities

The original law was adopted in December 2010 and its successor Framework Law of Mother Earth and Integral Development for Living Well was passed in October 2012.[13] This Law also makes a specific mention to water bodies right not to be contaminated and to sustain life systems. Even though the framework has not yet received implementation at practical front, it is nevertheless a positive step in granting rights to rivers.

13. Law of the Rights of Mother Earth, available at: http://www.worldfuturefund.org/Projects/Indicators/motherearthbolivia.html (last visited on June 21 2018).

India

Granting a river rights in India might seem an ambiguous concept but the truth is we have already traveled in that direction a certain distance- whether through constitutional mandate under directive principles and fundamental duties or statutory rights or in the form of judicial pronouncements. Article 51A(g) in the Constitution Of India casts a fundamental duty on every citizen "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;" [14] There are also comprehensive provisions for inter-state river disputes under our Constitution.[15] It also guarantees cities the right to decide and implement its environmental policies. This was done through the 74th Constitutional Amendment.[16]

The Indian Penal Code, 1860 punishes "whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purposes for which it is ordinarily used."[17] Similarly, the Water Act, 1974 also provides for similar protection to water bodies. The Act is comprehensive in its coverage, applying to "streams (including those temporarily dry), inland waters (whether natural or artificial), subterranean waters, and sea or tidal waters."' The Act protects the rivers by establishing State and Central Boards[18] which can sure and be sued on behalf of the river[19]. We can say that in India there is already a set up no matter how slow in implementation towards giving environmental bodies a standing.

The most pertinent development in India, however, was the Uttarakhand High Court's Judgment on March 20, 2017 that held Rivers Ganga and Yamuna to be Legal Persons. In *Mohd **Salim v. State of Uttarakhand & Ors***[20] a local resident Mohammed Salim had filed a petition asking the High Court to direct the government of the State of Uttarakhand to remove illegal

14. The late T.K.Tope was of the view that with the inclusion of the chapter on Fundamental Duties by the 42nd Amendment the Constitution has accepted the concept of 'unenumerated rights'. Accordingly, the rights of animals/living creatures fall within the category of unenumerated rights which are crying out for enumeration by our Supreme Court.
15. Article 262 confers exclusive power on Parliament to enact a law providing for the adjudication of any dispute or complaint with respect to the use, distribution or control of waters of, or in, any inter-state river or river valley.
16. 'For the love of Ganga', Available at: http://www.blueplanetjournal.com/ecology/for-the-love-of-ganga-science-religion-and-a-clean-conscience.htmlhttp://www.blueplanetjournal.com/ecology/for-the-love-of-ganga-science-religion-and-a-clean-conscience.html (last visited on 30/12/2014).
17. S. 277 India Penal Code.
18. S. 3(3), 4(3) of the Act.
19. S. 3(2)(d), 4(2)(d) of the Act.
20. WPPIL No. 126 of 2014.

construction along the banks of the Yamuna and to manage water resources properly.[21] The Court while holding them to be legal persons held that:

To protect the recognition and the faith of society, Rivers Ganges and Yamuna are required to be declared as the legal/living persons. This would support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganges and Yamuna are breathing, living and sustaining the communities from mountains to sea.

The Court remarked "We may, therefore, define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights or duties may be attributed." The Court finally declared that:

Accordingly, while exercising the parens patrie jurisdiction, the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently these rivers are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna. The Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand are hereby declared in loco parentis as the human face to protect, conserve and preserve the Rivers Ganga and Yamuna and their tributaries. These Officers are bound to uphold the status of the Rivers Ganges and Yamuna and also promote the health and well-being of these rivers.

This Judgment now stands stayed via Order of Supreme Court on 7 July[22]. The stay order came upon hearing the Special Leave Petition of State of Uttarakhand against the verdict. The one sentence order reads: "In the meantime, the operation of the impugned order shall remain stayed." In light of this order it is rather ambiguous to say where India Stands in terms of giving personality to rivers. One thing is however certain that acceptance of personality to rivers has found its establishment in India. It is only awaited if this would accepted by the Supreme Court and most importantly, how would it be incorporated and implemented in the Indian legal system.

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21. Vrinda Narain, Indian Court Recognizes Rivers as Legal Entities, Int'l J. Const. L. Blog, June 13, 2017, at: http://www.iconnectblog.com/2017/06/indian-court-recognizes-rivers-as-legal-entities (last visited on 21/06/2018)
22. Special Leave Petition No. 16879/2017.

A lawyer at the Indian Supreme Court in this remark has criticized the idea of rivers being persons as follows:[23]

If a farmer pumps water onto his land from the river, is he violating the 'person' of the river? What happens in the case of a flood, will the authorities in loco parentis compensate the people harmed? In the case of temples and their trusts, there are rights and responsibilities, but in this case there are only rights. A religious trust can both sue, and be sued. Who is going to sue a river, if it runs dry, if it is polluted, if it floods?

These questions can only be answered by a comprehensive legislation like National Ganga River Rights Act as has been done by New Zealand by environmentalists and nature right activists in India could specify the details associated with personhood at best.

Shyam Krishnakumar in his article says that: [24]

These verdicts represent a shift from a view that sees nature as a resource to one that considers it an entity with fundamental rights. Environmental laws only focus on regulating exploitation. But this is now changing, with calls for the inherent rights of nature to be recognised, both in India and around the world. It may no longer be necessary to prove in court that polluting the Ganges actually harms humans. Contamination on its own could be enough to make the case that it violates the river's "right to life".

This shift would provide several reliefs in the putting constraints on polluting developmental activities. The burden of proof is always on the prosecution to prove that a river was being polluted or a pond put with sewage, they inherently have no rights. Further, even if you prove the pollution to the river, the polluter would just be punished and the river as a whole would not get any benefit or rights or damages to prevent its damage. Even if he is made to pay fine the amount of fine is never equivalent to the amount of damage. Christopher Stone writes in this regard that "there are threefold problems with natural bodies- they have no standing in their own right, their unique damages do not count in the award and they are not always beneficiaries of their award." [25] These can be solved by giving rights to rivers.

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23. Available at: https://scroll.in/article/833069/a-court-naming-ganga-and-yamuna-as-legal-entities-could-invite-a-river-of-problems (Visited on 21/06/2018).
24. Available at: https://www.bbc.com/news/world-asia-india-39488527 (Visited on 21/06/2018).
25. *Supra note 1*

RIGHTS AND DUTIES OF RIVERS

Having studied the developments regarding rivers as legal person, we also need to know the implications of making rivers legal persons. If suppose a river is made a legal person in the eyes of law. What would it imply- in terms of its rights and duties? Making rivers legal persons like mosques, idols, companies and trust would imply the following:

1. Appointment of guardians for the rivers as their representatives and beneficiaries
2. Giving them Locus Standi to file a case on behalf of the river
3. Making the representatives of the river accountable in cases brought against the river

Most of the above implications regarding personhood of the river can be easily solved by appointing a government body as its representative. The problem arises when the rights and duties are to be enforced by and against private persons. Can a private person be sued to ensure the River's Right to flow freely? On a positive side this would make industries disposing effluents and citizens polluting the river accountable to one single entity as compared to the idea of 'abstract state'. Begonia Filgueira says that "This will put an end to much of the legal standing issues that NGOs come across when trying to stand in and defend nature from overexploitation or damage."[26] The guardianship approach also provides rivers with supervision like bankruptcy provides endangered corporation. The guardian[27] knows that the lawn needs water or the smog is destroying the forest reserve.

Since such a body would be representative of the river, so the compensation received can be used for restoring balance in the river directly. This would ensure transparency in river management. However, when the activities like Dams and irrigation projects would come in conflict with the river, would they still be violating the rivers right to flow freely or not to be polluted. Perhaps river's right would become subservient to the 'public purpose' then. What would constitute public purpose then is an important agenda. Development activities conflicting right of the rivers can often be protected under this garb. It is therefore necessary that while granting personhood to the rivers we should also carve out exceptions to their rights when they come in conflict with public purpose or development agendas.

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26. Begonia Filgueira, 'About time to give rights to nature?', Available at: https://ukhumanrightsblog.com/2011/06/02/and-about-time-for-rights-to-nature-by-begonia-filgueira/ (Visited on 25/06/2018).
27. Water Control Board or Pollution Control Board are guardians of these natural bodies this way.

Another area in which making rivers legal persons would be problematic is implementing duties. Floods and displacement are caused rivers. A citizen can claim compensation from the representatives of the river body. To avoid these situations the river body can be assigned imperfect right. According to Salmond, "a perfect right is one which corresponds to a perfect duty. A perfect duty is one which is not merely recognized by law but also enforced by law." These rights and duties which, though recognized by law, are not perfect in nature. Those rights are called imperfect rights. Example of such an imperfect right is the claim barred by the lapse of time. In such a case, the limitation does not extinguish the right, but bars the remedy only. Assigning such nature of rights to rivers can make them immune to such force majeure situations.

CONCLUSION

It is time that the idea that rivers be made legal person be given serious thought by environmentalists, legislators and judiciary alike. Keeping in mind the benefits associated with granting rights to rivers, the pigeon holes in the idea are merely lacunas that can be covered by a well drafted legislation, policy or judicial pronouncement. Broader locus Standi, Better river management, assigning direct responsibility, compensation to restore pollution caused by industries, etc. are few of the plausible advantages of this idea. It not only strengthens the existing environmental legislations but also empowers the doctrines like public trust, polluter pays and sustainable development at the practical level. It is time that we moved from the grey area lying between worshiping rivers under our religion to using them as property for our benefit. It is time we clarify in our mind, legislations and doctrines that rivers, the very source around which human civilizations flourished, should neither be worshiped, used nor protected; They need to be assigned their true status as a person as did our ancestors when they paid obeisance to them as deities.

"TREMBLING ON TRANCE – A MESMERISM FOR MUSLIM WOMEN"

Dr. M. Madhuri Irene *

INTRODUCTION

Among all the religious of antiquity divorce was regarded a matrimonial right in one or other form. Islam is the first religion in the world which has expressly recognized the termination of marriage by way of divorce.

Divorce among ancient Arabs was easy and frequent occurrence. Prophet Md. showed his dislike to it. "It was regard as the most hateful before almighty god of all permitted things.

The Prophet of Islam never thought that he was bringing a new religion, but that he was merely trying to reintroduce the old faith in the „One God? to the Arabs. It was basically a social reform movement brought about to teach the savage pagan Arabs the laws of humanity and to create a society where weak and vulnerable is treated with respect. The Prophet of Islam was indeed a social reformer, thinking far ahead of his time. The emancipation of women was a project dear to prophet?s (PBUH) heart. According to Karen Armstrong,[1] "Muhammad was one of those rare men who truly enjoy the company of women. Some of his male companions were astonished by his leniency towards his wives and the way they stood up to him and answered back.[2]" Prophet of Islam disliked the practices of pagan Arabs of treating women as goods and chattels. He looked upon those customs with extreme disapproval and regarded their practice as calculated to undermine the foundation of society. He told to his people: "Now onwards, only twice in the whole life can a husband pronounce a *talaq* and revoke it; whenever he does so for the third time the marriage would be instantly dissolved, leaving no room for remarriage between the divorced couple.[3]" This simple reform of the Prophet got corrupted in the course of time and this pre-Islamic custom of arbitrary divorce, which was abhorred by the prophet once again, became prevalent. In the following paper a study has been made on the origin of this practice of triple-*talaq* and its *sharia* basis, and its impact on the society so far.

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1. Karen Armstrong, Islam: A Short History 13 (Phoenix Press, London, 1st edn., 2000). Electronic copy available at: http://ssrn.com/abstract=1597858.
2. Furqan Ahmad, "Understanding the Islamic Law of Divorce", 43 JILI 484 (2003).
3. *Supra note 3.*

HISTORY BEHIND DISSOLUTION OF MARRIAGE:

To understand the nature and concept of divorce in Islamic law, a brief account of its historical back ground is necessary.[4] Among all the nations of antiquity, the power of divorce was regarded as a natural corollary to marital obligation. Among the pre-Islamic Arab (during the period of *jahiliyat*)[5] the power of divorce possessed by the husband was unlimited and was frequently exercised without any regard to the marital obligations. They could divorce their wives at any time, for any reason or even without any reason. They could give divorce and also revoke the same as many times as they preferred. They could, moreover, if they were so inclined, swear that they would have no intercourse with their wives, though still living with them. They could arbitrarily accuse their wives of adultery, dismiss them, and leave them with such notoriety as would deter other suitors; while they themselves would go exempt from any formal responsibility of maintenance[6]. In pre-Islamic Arabia, divorce was used as an instrument of torture. These social and moral ills and injustices engaged the attention of the prophet of Islam. Fully conscious of the evils flowing from divorce, he framed the laws of marriage and divorce in order to remove these evils.

NATURE OF MARRIAGE IN ISLAM:

Before delving into the debate of divorce under Islam, it is imperative for us to understand the nature of marriage ordained under Islam so as to form a better perspective of the concept of divorce.[7] It has been always said that under Islam marriage is a contract, and like any other contract it comprises of offer acceptance and consideration, so it can also be terminated or dissolved like a contract by the parties to the contract at anytime. But this view is not proper.

Tahir Mahmood in his book said that the general impression that there is no religious significance or social solemnity attached to a Muslim marriage and that it is a mere civil contract is not true. The Quran does not treat marriage as an ordinary contract. The prophet described *nikah* as his *Sunnat;* and those who know the socio religious significance of *Sunnat* as

4. This is a period of ignorance among the ancient Arab before the teaching of Prophet (PBUH)
5. Furqan Ahmed, Triple Talaq: An Analytical Study with Emphasis on Socio-Legal Aspect 13 (Regency Publication, New Delhi, 1994).
6. *Supra note 3 at 484.*
7. Tahir Mahmood, Muslim law of India 48 (LexisNexis Butterworth, New Delhi, 3rd edn., 2002).

recognized by the Muslims can well understand what marriage means to a follower of Islam.[8] 8 According to Ameer Ali "Marriage" says the *"Ashbah"* is an"institution ordained for the protection of the society, and in order that human beings may guard themselves from foulness and unchastity….. "No sacrament but marriage has maintained its sanctity since the earliest time. It is an act of *ibaadat* or piety for it preserves mankind free from pollution. It does not give man any right over the person of the wife except from mutual relationship according to the law of nature and not contrary to it."[9] Also the Prophet (PBUH) has described, "He who marries complete his half religion, it now rests upon him to complete the other half by leading a virtuous life in constant fear of God."[10] Thus it is said to be half *iman.*

There is indeed a specific purpose for which Muslin law regard marriage as an agreement, a very special nature. It is meant to accord full contractual freedom to the parties to a proposed marriage; and this is indeed a unique feature of Islamic law.[11]

The Prophet of Islam was indeed social reformer thinking far ahead of his time. He found arbitrary divorce-practices prevailing among the pagans and Jewish-Christian Arabs. Disgusted he set out to reform them[12] . It was impossible, however, under the existing condition of the society to abolish the custom entirely. The prophet has to mould the mind of an uncultured and semi-barbarous community to a higher development. Accordingly he allowed the exercise of power of divorce under certain conditions. He permitted the parties to divorce the parties at three distinct and separate time periods within which they might endeavour to become reconciled; but should all attempt to reconcile prove unsuccessful; then in the third period the final separation become effective[13] .

The Mussalmaan law of divorce is the logical consequence of the status of marriage. As it regards it as an „Aqd? or a contract, it confers on both the parties to the contract the power of dissolving the tie or relationship under certain specified conditions. The Islamic law did not take away the customary right of the husband to divorce his wife unilaterally, but it imposed numerous restrictions, on the exercise of this right. A Muslim man cannot divorce his wife and

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8. Syed Ameer Ali, Muhammadan Law 471 (English Book Store New Delhi 4th edn, 1985).
9. Zubair A. Khan, "Divorce in Islam: Not Easy Going", 14 Religious and Law Review 109 (2005.
10. *Supra note 6 at 14.*
11 Tahir Mahmood "No More Talaq, Talaq, Talaq: Juristic Restoration of True Islamic Law of Divorce", 12 Islamic and Law Quarterly Review, 1 (1992).
12. Ameer Ali, "The Spirit of Islam", as cited in Khalid Rashid, Muslim Law 47 (Eastern Book Company, Lucknow, 4th edn., 2004).
13. *Supra note.*

take her back as he pleases [14].

Though permissible in law, divorce is not favoured in Islam as prevents conjugal happiness and interfered with the proper up-bringing of the children. Prophet told his people: **"Divorce is most detestable in the sight of God; abstain from it**[15] .He also said: **"Divorce shakes the throne of God."**[16] The permission therefore, in the Quran, though it gave a certain countenance to the old custom, has to be read with light of law giver?s own words. When it is borne in mind how intimately law and religion are connected in Islamic system, it will be easy to understand the bearing of words on the institution of divorce [17].

DISSOLUTION OF MARRIAGE UNDER QURAN:

It is imperative to understand the various forms through which a marriage can be dissolved. When dissolution proceeds from the husband it is called *Talaq* and when it takes place at the instance of the wife, it is called *Khula.* When it is by mutual consent it is called *Mubaraa*,[18] and when it is by *qadi* through a judicial process it is *Faskh* or sometime it can be *Lian.*

Talaq

Talaq as defined in law *"is a release from the marriage tie, either immediately or eventually, by the use of special words.*[19]*"* It is used by Muslim jurists to denote release of women from marital tie. A Muslim husband under all schools of Muslim law can divorce his wife by unilateral action and without the intervention of the court. It is not necessary to provide for such power in the Marriage-Contract; the husband derives this power from the law itself this power is known as the power to pronounce *talaq.*

The husband though given the unilateral power to pronounce *talaq* has to be very judicious in its exercise. The Quran has laid down certain rules which have to be followed strictly. He has been given this power with expectation that firstly he will not ordinarily exercise it and avoid it as much possible. Secondly that if he finds it unavoidable then he shall do it with a sense of justice *(adl)* and rationality. There is nothing in Islamic law which gives husband the

14. "Al-Talaqu indallah-i abghad al-mubahat"; This Hadith is found in many authentic collections of tradition.
15. *Ibid.*
16. *Supra note 3 at 472.*
17. *Id. at 487.*
18. Faiz Badrudin Tyabji, Muslim Law 205 (N.M. Tripathi Ltd., Bombay, 4th edn., 1968.
19. An Enlightenment Commentary into the Light of the Holy Quran (The Scientific and Religious Research Centre, Iran, 2nd edn., 1995).

power to divorce his wife arbitrarily, irrationally and in unreasonable manner. Further, it has been laid in Quran that before the procedure for *talaq* is to be started the spouses should try to reconcile with each other by appointing arbitrators, one from the side of wife and the other from the side of husband. This has been provided under verse 4:35[20] of Holy Quran.

It has been observed by a learned commentator of Holy Quran[21] : as "An excellent plan for setting the family disputes, without too much publicity or mud-throwing or resort to chicaneries of the law." The Latin countries recognized this plan in their legal system. It is a pity that Muslims do not resort to it universally, as they should. They arbiters from each family would know idiosyncrasies of both parties and would be able, with *Allah"s* help to effect reconciliation."

According to *Moulana* Mohammed Ali, this a procedure par excellence, which portrays Islam in its true glory. But later Muslim jurists of "great antiquity and high authority" threw to the winds this salutary procedure[22] .

According to Tahir Mahmood there is a simple procedure of *talaq* in Islam which is, unfortunately, misunderstood by majority of Muslim themselves. They erroneously believe that they are allowed different "modes" or "forms" of *talaq* and also have absolute freedom of action. He says that there are not any modes of *talaq* like *ahsan, hasan* or *bid"at.* The law of Islam says to husband [23]:

(1) *Talaq* is "worst of all permitted things"; better avoid it: but if you find necessary to have recourse to talaq, then;

- Wait till the wife enters the period of *,, tuhr"* [24]*;*
- During that period pronounce talaq and do not make it irrevocable by your words;
- Revoke the Tale, if possible, before the expiry of the wife?s iddat;
- If you do not revoke it by that time, at the expiry of wife?s iddat the marriage

20. Holy Quran English Translation of the Meanings and Commentary, 220 Ministry of Hajj and Endowments, kingdom of Saudi Arabia as cited in S.A. Kader, Muslim Law of Marriage and Succession 37 (Eastern Law House, Lucknow, 1998).
21. S.A.Kader, Muslim Law of Marriage and Succession, 37 (Eastern Law House, Lucknow 1998).
22. Tahir Mahmood, The Muslim Law of India 117 (LexisNexis Butwerworth, New Delhi, 1980).
23. Tuhr is a period when a woman is not in her menstrual period and is pure. This is basically to assure that husband is not acting in haste. And the husband resolve to be separate from his wife, is not a passing whim, but is a result of self determination.
24. *Supra note 12 at 3-4.*

will stand dissolved;

- If you have exercised your power of Tale in this way, your behavior has been " best" (ahsan);
- Now you cannot revoke the talaq at your pleasure; but after expiry of the wife?s iddat you can marry the same woman with her consent.

(2) If you have revoked the *talaq* pronounced by you for the first time, never pronounce it again. However, in case you find it necessary to pronounce the talaq once again then,

- Wait till the wife enters the tuhr period;
- Pronounce *talaq* in tuhr;
- Do not by your words make, this second talaq irrevocable;
- Try to revoke this second *talaq* before the expiry of wife?s *iddat;*
- If you do not revoke it then, at the expiry of wife?s *iddat* the marriage will once again stand dissolved;
- As before now, you cannot revoke the *talaq* at your pleasure, but after the expiry of her *iddat* you can re-marry the same women with her consent.

(3) If you have succeeded in preparing yourself to revoke the *talaq* (which you pronounced for a second time), never pronounce a *talaq* again, but if, again, you really find it unavoidable to pronounce a *Talaq,* then:

- Wait for her being once more free from her menstrual periods;
- Know that if you now pronounce a *talaq* (for the third time) you cannot revoke it anymore; also you will not be able even to remarry your divorced wife right away; if you so wish you will have to pay a penalty-which, due to human nature, you will never like the penalty of finding your wife becoming somebody else wife and remarrying her only if and when she is lawfully free of the second marital bond *(the halala);*
- If, knowing all this, you still find it impossible to withhold yourself, pronounce a *talaq* (for the third time);
- The moment you do so the marriage will stand dissolved;
- If you have exercised your power of *talaq* in this way, your behavior is still "good" *(hasan)* [25].

25. *Supra note 3 at 488.*

This is the one and only form of divorce which has been given in the Quran. Further there is one more confusion that hasan talaq must be given in three "consecutive" or "successive" tuhr. This is submitted as wrong. The correct position is that if the husband has given talaq once he should not pronounce the next talaq before the second tuhr but he can give the same at any time during the subsistence of marriage and that *talaq* will be counted as one. The same is the situation when he pronounces the second *talaq*. Thus it should be understood that the condition for next *"tuhr"* for the second or the third *talaq* is that there should be minimum time of one month for the husband to think and it is not to be taken as maximum limitation.

TRIPLE-TALAQ (TALAQ-UL-BIDDAT):

Triple-Talaq is a form of *talaq-ul-bid"at* in which, the husband may pronounce the three formulae at one time, and it is irrelevant that whether the wife is in state of *tuhr* or not. It is denoted in Arabic as *Mugallazah,* means very hard-divorce which is most disapproved and which does not conform to *Talak-us-sunnat.* The separation then effects definitely after the woman has fulfilled her *,, iddat"* or period of probation.

According to *Asghar* Ali Engineer, the Islamic *Shariah* which was formulated more than hundred years after the death of the prophet and had evolved under complex influences of various civilizations and took away what was given to women by the Prophet and the Quran the issue of triple divorce in one sitting illustrates this very well. It was practiced during the *jahiliyah* period (times of ignorance) before the advent of Islam. The triple divorce was not allowed during the Prophet's lifetime, during the first Caliph Abu Bakr?s reign and also for more than two years during the second Caliph Umar?s time. Later on Umar (RA)

Permitted it on account of a peculiar situation. When the Arabs conquered Syria, Egypt, Persia, etc.., they found out women there much more beautiful than their own women and hence were tempted to marry them. But those women did not know about Islam's abolition of triple-*talaq* in one sitting, and therefore insisted that before marrying them the men should pronounce *talaq* thrice to their existing wife which they readily accepted to do (as they knew that Islam has abolished triple-talaq and that would not be effective) and even after marrying with the Syrian or

Egyptian women they would also retain their earlier wives. When the Egyptian and Syrian women discovered that they had been cheated, they complained to Umar, the Caliph, to enforce triple divorce again in order to prevent its misuse by the Arabs. He had complied with their demands to meet an emergency situation and not with an intention to enforce it permanently, but later on jurists also declared this form of divorce as valid and gave sanction to it.[26]

Thus we see that triple-*talaq* came into being during the second century of Islam when *Umayyads* monarch, finding that the check imposed by the prophet on the facility of repudiation interfered with the indulgence of their caprice; they endeavored to find an escape route from strictness of law [27]. It must be noted that it was not the Quran but the *Umayyad* practice which gave validity to these divorces. According to most of the jurists this divorce should not be given effect to as it?s against the principles of both the Quran and the Prophet of Islam. Abdur Rahim is more pungent when he says "I may remark that interpretation of the law of divorce by jurists especially of the *Hanafi* School is one flagrant instance where, because of literal adherence to mere words and certain tendencies toward subtleties they have reached a result in direct antagonism to the admitted policy of law in subject[28] . Such *talaq* is lawful, although sinful in *Hanafi* law; but in *Ithna,* Ashari and *Fatimi* law it is not permissible. According to *Tyabji,* by a deplorable development of the Hanafi law the sinful and the most abominable forms have become the most common for men have always molded the law of marriage so as to be most agreeable to them.[29]

NATURE OF TRIPLE-TALAQ

There is a lot of controversy regarding the effect of triple pronouncement of the divorce at one and the same time. The difference in the opinion of jurists is due to the difference in their interpretation and application of the law. One class of the jurists is of the opinion that no leniency is to be shown in the application of laws so that people should not take undue advantage on that account. Abu Hanifa and Malik, therefore, hold the three repetitions of divorce to be final. The other jurists explained that *Allah* wants to treat people leniently so that they may not be put to hardship, and also to minimize the chances of separation. Hence, they hold three repetitions to

26. *Id. at 491.*
27. Abdul Rahim , Principles of Muhammadan Jurisprudence (All-Pakistan Legal Decision, Lahore, 1958).
28. Faiz Badrudin Tyabji, Muslim Law 163 (N.M.Tripathi LTD Bombay) 4th edition 1968).
29. K.N.Ahmad, Muslim Law of Divorce 85 (Kitab Bhawan, New Delhi, 1978).

amount to one only. Ibn Rushd has explained that Islam believes in golden mean[30] . There is great controversy regarding the effect of triple divorce at one and the same time.

Under most of the classical schools of *Sunni* Islamic Jurisprudence there is no material difference regarding the effect of "Triple Divorce" in substance, however, there is some slight difference only in respect of procedure. According to *Hanafi* jurists this result in a *Mughallaza* divorce though they call it an innovation. Whereas the *Shafii* holds that if a husband repeats three pronouncements of divorce but without intending, only for the emphasis it will result in a single divorce but if he pronounces the three divorces intending or without any intention, it shall result in three divorces. More or less same view is held by the *Hambali* School. *Maliki* differ in their view in the sense that they make a distinction between various expression used in the pronouncement of divorce. The only progressive group is the *Ahl-ehadis* sect who accepts three divorces at a single sitting as one only.

Whereas in *Shia* law there is general consensus of opinion that the divorce in single sitting should be counted as one and the *Imamia* sect go so far as to say that such a divorce is no divorce at all.

POSITION OF TRIPLE-TALAQ IN QURAN:

In the Holy Quran there is nowhere been ordained the three divorces pronounced in a single breath would amount to three separate divorces. The verse of Quran relied upon is verse 2:229:

"Divorce must be pronounced twice and then (a woman) may be retained in honour or released in kindness. And it is not lawful for you that ye take from women aught of that which ye have given them, except (in the case) when both fear that they may not be able to keep within the limits (imposed by) *Allah*. And if ye fear that they may not be able to keep the limits of *Allah,* in that case it is not sin for either of them if the woman ransom herself. These are the limits (imposed by) Allah. Transgress them not. For whoso *transgresseth Allah*?s limit, such are wrong doers[31]." Accordingly Imam Razi writes: "Divorce two times, this is, divorce on two separate occasions."[32]

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30. *Supra note 28.*
31. Al-tafseer Kabeer (2) 260, as cited in supra note 6 at 44-45.
32. *Ibid.*

He further says: "A lawful divorce is that given separately because the existence of "two" is only possible when there is space between once and the other."[33]

Thus it can be said that if two divorces in the same breath cannot be regarded as valid divorce then how three divorces can be treated as valid. Also it has been laid down in holy Quran that when the divorce is given it should be given for the prescribed period of waiting *(iddat):*

"O Prophet when ye (men) put away women, put them away for their (legal) period and reckons the period, and keeps your duty to your *Allah,* your Lord.[34]"

The giving of divorce for the *(Idda)* "waiting period" means that the divorce is given at such a time as marks the beginning of *Idda.* He who gives three divorces at a time does not take *Idda* into consideration because with the pronouncing of first divorce the *Idda* starts, but in the case of the second and the third the *Idda* has not been taken into account, although for every divorce it is necessary to have regard for the *Idda.* In short, there is no *Quranic* basis to establish that three divorces on a single occasion should amount to an irrevocable divorce. As to deduction of one point from another, it is nearer to the purpose of *Quran* to treat three divorces as one.

TRIPLE TALAQ AND INDIAN JUDICIARY:

The view of judiciary on the subject of triple divorce has to be analyzed critically so as to determine how the judiciary has examined the controversy of *triple-talaq* prevalent in the Muslim world. Triple Divorce is recognized and enforced by Indian Judiciary from inception, as early as in 1905 in the case of ***Sara Bai v. Rabia Bai***[35] the Bombay High Court recognized „triple divorce? on irrevocable footing. Further the Privy Council also in the case of **Saiyid Rashid Ahmad v. (Mst)** ***Anisa Khatun***[36] recognized „triple divorce? pronounced at one time as validly effective. In ***Ahmad Giri v. Begha*** [37], the court for the first time counted the role of intention as very important factor in determining the effectiveness of the divorce. However, the court refused to bring about any change in existing form of *talaq-ul-biddat:*

The basic reason for this attitude of the judiciary could be due to the fact that judiciary in

33. Quran: chapter LXV, verse 1.
34. ILR (1905) 30 Bom 537.
35. AIR 1932 PC 25.
36. AIR 1955 J&K 1.
37. Sayid Rashid Ahmad v. Anisa Khatun, AIR 1932 PC 25.

British India believed that the Muslims in India have faith that there law is of „divine? origin, therefore is infallible, immutable and unchallengeable. There was reluctance among the judiciary on the account that a decision should not hurt the feeling of the general Muslim. In spite of realizing the deficiency they could not contribute meaningfully.

But later on a change in trend can be seen in the attitude of the judiciary. Through the study of true Islamic law and writing of many authors like Ameer Ali, Yusuf Ali, it was contradicted that the law of divorce in Islam gave arbitrary and whimsical power to husband to divorce his wife. As it has been already mentioned that the true Islamic philosophy of „*Talaq"* as enunciated in Quran reveals that there is no scope of arbitrary and easy divorce in Islam.

Mr. Justice Baharul Islam has given an eye-opening judgment, and through the paramount source of Islamic Authority has given a right meaning to law of divorce under Islam. Well aware of his limitations imposed by the precedent of the Privy Council, he attempted a bold break-through to reveal the true meaning and connotation of *talaq* as envisaged in Quran. Finally, he projected the true concept of *talaq* as enjoined by the great light that:[38]

1. *Talaq* must be for reasonable Cause;
2. It must be preceded by "attempts at reconciliation"; and
3. It "may be effected" if the said effects fails.

Logical conclusion of original sources of Islam relating to talaq reveals that neither the husband nor the wife has the unbridled and arbitrary power to divorce. In view of these facts unintentional *tripletalaq* pronounced at single occasions, are in total negation to *Sharia*[39] . Also, K. Iyer, J. in the case of A. ***Yousuf Rawthher v. Sowramma*** held that it is a popular fallacy that Muslim male has unbridled power of divorce as it?s against the injunction of Holy Quran. And that the

Muslim law as applied in India has taken a course contrary to the spirit of Islam. Also in the case of ***Rukia Khatun v. Abdul Khalique Laskar***[40] , the Court went out to hold that the correct law of *talaq* as ordained by the Quran is that the *talaq* must be for a reasonable cause and be preceded by the attempts at reconciliation between the husband and wife by two arbitrators,

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38. He was Chief Justice of Gauhati High Court and tried to give correct meaning to law of divorce among Muslims in India. His view point on Talaq get support of Prof. Tahir Mahmood?s writings on Talaq: the Muslim Law of India (1980). Also it is very unfortunate that most of his decisions have remained unreported, so the reforms were further delayed.
39. 1981) 1 Gau.L.R 368.
40. AIR 1971 Ker. 261.

one chosen by the wife from her family and other by the husband from his. It is only when their attempts failed talaq may be effectuated. In ***Ahmadabad Women Action Group v. Union of India***[41], a writ petition was filed to declare Muslim Personal Law which enables a Muslim male to pronounce unilateral *talaq* to his wife without her consent and without resort to judicial process of courts as

Violating articles 13, 14 and 15 of the Constitution. However, court refused to entertain the writ petition, because the issue involved state policies.

The Supreme Court has directed the Parliament to frame a Uniform Civil Code in the year 1985 in the case of ***Md. Ahmed Khan v. Shah Bano Begum***[42] , popularly known as the Shah Bano case. In this case, Muslim women claimed for maintenance form her husband under S.125 of Cr.P.C. after she was given triple talaq pronouncements by her husband. The Supreme Court held that Muslim Women have a right to get maintenance from her husband under s.125 and commented that Art.44 (3) of the Constitution of India has remained in the dead light. However, the then Rajiv Gandhi led government has overturned the Shah Bano case decision by Muslim Women (Right to Protection on Divorce) Act, 1890 which curtailed the right to maintenance of a Muslim Woman.

The Second instance was in the case of ***Sarla Mudgal v. Union of India***, where the question of whether a Hindu husband by embracing Islam can solemnize a second marriage. The court held that this would amount to nothing but merely abusing the personal laws. It was held that a Hindu marriage can be dissolved under the Hindu Marriage Act, 1955 only and by converting into Islam and marrying again does not dissolve the marriage under Hindu Marriage Law and thus, it would be an offence under S.494(5) of The Indian Penal Code, 1860. The judge in this case opined that it is high time that a uniform civil code be introduced and that Art.44 be taken out of cold-storage. He commented that, *"Where more than 80% of the citizens have already been brought under the codified personal law, there is no justification whatsoever to keep in abeyance, any more, the introduction of the 'uniform civil code' for all the citizens in the territory of India."*

Another landmark judgment called for the implementation of Uniform Civil Code. In this case, a priest from Kerala, challenged the Constitutional validity of S.118 of the Indian

41 AIR 1985 SC 945.
42. AIR 1995 SC 153.

Succession Act, which is applicable for non-Hindus on India. *Mr. John Vallamatton,* contended that S.118 of the said act was discriminatory against the Christians as it imposes unreasonable restrictions on their donation of property for religious or charitable purposes by will. The bench struck down the section as unconstitutional[43]. It called for the parliament to take concrete steps to enact a Uniform Civil Code. It was stated that a common civil code will help the cause of national integration by removing the contradictions based on ideologies.

The primary question before the Supreme Court was whether the practice, which authorized a Muslim man to unilaterally, irrevocably and instantaneously divorce his wife by saying the word 'talaq' three times in succession was constitutionally valid or violated the fundamental rights guaranteed under the Constitution of India, particularly Articles 14 (equality before law), 15 (protection against discrimination) and 21 (protection of life and personal liberty).

In ***Shayara Bano vs Union of India and Ors.*** to answer this question, the Supreme Court had to first examine whether instantaneous triple *talaq* was a practice regulated by codified/statutory law (i.e. the Muslim Personal Law (Shariat) Application Act, 1937) or whether it was merely in furtherance of *uncodified* religious practice or 'personal law'. This is important because of the existing position of law as had been laid down by the Bombay High Court in 1951 in the case of State of Bombay versus. *NarasuAppa Mali*.

In Narasu, the high court held that personal laws were not subject to judicial scrutiny and cannot be examined for violating fundamental rights. Therefore, if the Supreme Court found that triple talaq was a practice sanctioned by a statute, the 1937 Act, it could be examined for violation of fundamental rights. On the other hand, if it found that triple *talaq* was a part of uncodified 'personal law', it would have to revisit the decision in *Narasu* and answer a second question as to whether *uncodified* personal law could be subject to a scrutiny for violating fundamental rights and whether the practice of triple talaq did in fact violate any fundamental rights.

While the majority judges agreed on the outcome of striking down instantaneous triple talaq as unconstitutional, they took two different routes to arrive at that outcome.

Justice Rohinton Nariman, with whom Justice UU Lalit concurred, held that the practice of

43. John Vallmattom v. Union of India AIR 2003 SC 2902.

triple talaq derived statutory sanction from the 1937 Act, and could therefore be subject to a challenge for violating fundamental rights. Having so found, their judgment sought to analyse whether the practice of triple talaq would be protected by Article 25 of the Constitution (freedom of conscience and free profession, practice and propagation of religion). While doing so, the judgment made forays into the domain of Islamic practices and held that instantaneous triple talaq is not essential to the practice of Islam and does not therefore benefit from the constitutional protection granted by Article 25.

The judgment then went on to examine whether triple talaq is inconsistent with any of the fundamental rights. While doing so, the judgment upheld the doctrine of manifest arbitrariness as a valid touchstone for examining the constitutionality of a practice, overruling a series of decisions that held the contrary view. The doctrine of manifest arbitrariness allows the striking down of a law under Article 14 on account of being capricious, irrational, disproportionate or excessive. The judges went on to hold that the practice of triple talaq violates Article 14 of the constitution for being manifestly arbitrary. Specifically, Justice Nariman held:

"…This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India…"

Justice Kurian Joseph, in a separate opinion, held that triple talaq is bad in theology and therefore bad in law and lacks legal sanctity. Justice Joseph differed from Justices Nariman and Lalit, inasmuch as he held that triple talaq was not regulated by the 1937 Act, rather it fell within the domain of 'personal law'. He, however, relied on the earlier Supreme Court decision in Shamim Ara versus State of UP and concluded that triple talaq was not integral to Islam, was against the tenets of the Quran and Shariat, and therefore constitutionally void.

Despite the inconsistencies in the reasoning of the two sets of opinions constituting the majority judgment, the conclusion arrived at by these judges is consistent in striking down the practice of instantaneous triple talaq as unconstitutional.

Surprisingly, they also held that the practice was not amenable to a challenge on the grounds of Articles 14, 15 and 21, because these provisions are limited to State actions, whereas the practice of triple talaq regulated the conduct of private parties. In so doing, the minority opinion held that the practice of triple talaq was not inconsistent with constitutional values and

fundamental rights, and directed the government to consider legislating on the issue.

The majority opinions have been commended by many, including feminist legal activists, as a necessary step in reforming inherently patriarchal and discriminatory practices, and rightly so. The exposition of law on the doctrine of arbitrariness to strike down a practice as unconstitutional would also have been commendable, had the Supreme Court not entirely overlooked the issues of gender justice, which were at the forefront of the case.

The issue was more of discriminatory treatment meted out to Muslim women through the 'capricious and whimsical' practice of men, rather than that of arbitrariness. Numerous arguments were advanced before the Supreme Court on the practice of triple talaq being antithetical to gender justice in general, and to Article 15 and the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which India is a signatory, in particular.

Unfortunately, the Supreme Court has chosen to use this case to set the legal position right on the doctrine of arbitrariness, wholly sidelining the very pressing issue of sex discrimination. That being said, Justice Nariman specified in his judgment that since he based his decision on the narrower ground of arbitrariness, there was no occasion to examine the grounds of discrimination. Nonetheless, the lack of exposition on gender discrimination and the the missed opportunity to ground the decision in progressive sex discrimination jurisprudence in such a seminal case is a major drawback in an otherwise welcomed decision.[44]

TRIPLE TALAQ BILL:

The Lok Sabha has passed a landmark bill that makes instant "triple *talaq*" a criminal offence and proposes a three-year jail term for a Muslim man who divorces his wife by uttering the word "*talaq*" thrice. The bill will now be introduced in the Rajya Sabha, possibly on Monday or Tuesday, where it is expected to face rough weather, with several parties opposing it; its passage in the Lok Sabha was smooth given the big majority the government has in the lower house.

1. Law Minister Ravi Shankar Prasad, who introduced the bill in the Lok Sabha and later wrapped up a debate, urged the house to pass the bill "for the sisters of

44. The Triple Talaq Bill in Parliament, available at https://economictimes.indiatimes.com/news/politics-and-nation/government-to-move-ordinance-for-new-law-that-on-triple-talaq/articleshow/63997913.cms.

the Muslim community, for the dignity of women, gender equality," rejecting allegations of political move by the ruling BJP saying, "We do not take decisions to garner votes. We introduced the bill after the Supreme Court called triple talaq illegal."

2. Several parties that have opposed the bill abstained from voting in the Lok Sabha. Among them were the Biju Janata Dal, AIADMK and the Trinamool Congress. The BJD has 20 MPs, AIADMK 37 and Trimamool 33 in the Lok Sabha.
3. All India Majlis-e-Ittehadul Muslimeen (AIMIM) Chief Asaduddin Owaisi sought six amendments in the bill in the Lok Sabha and insisted on a division of votes or voting recorded on a machine on them to make a political point. He has alleged that the bill "does injustice to Muslim women," violates the Right to Freedom and that Muslims were not consulted in its drafting.
4. The Congress has emphasized that it supports "any move to abolish the Triple Talaq," but has questioned the jail term provision asking how a man in prison will provide for the woman and children he has abandoned using the triple talaq. It also wants some other changes in the bill, that it would prefer a review of the proposed legislation by a parliamentary panel.
5. Sources said the main opposition party is likely to seek amendments to the bill in the Rajya Sabha, where the government is in a minority and so the opposition's requests for changes are likely to be passed. The bill will have to be sent to a parliamentary committee for review and is unlikely to be passed in the winter session. Both houses must clear the bill for it to become law.
6. The Supreme Court had in August 2017 ruled that the "Triple Talaq" is unconstitutional. Muslim women had petitioned the court, arguing that practice of husbands divorcing them through "Triple Talaq", including by Skype and WhatsApp, not only violated their rights but also left many women destitute.
7. "Only a law can explicitly ban Triple Talaq, we have to enforce legal

procedures to provide allowance and protect custody of children," said Ravi Shankar Prasad as he introduced the bill, noting that the practice has continued despite the Supreme Court order. [45]

CONCLUSION:

Triple Talaq practice is being called as regressive, unethical. Recent Supreme Court judgment stated that triple Talaq is unconstitutional and advised the government to form the framework and law accordingly. Meantime Muslim man cannot use this practice. This is a much-needed relief for Muslim women in India, it is one more step ahead in gender equality in the Muslim community.

The question remains that whether declaring the practice of triple talaq unconstitutional would ameliorate the condition of Muslim women more than the invalidation has done. Further such a move would pit the rights of a Muslim woman against her social and cultural believes. It is important to understand that identity subversion is a very complex phenomenon. In principle Law is always good but in practice it has been mislead. We all have to remember that spirituality is fact and religious practices are myth. Hence abide to Quranic principles and resist religious practice.

45. www.ndtv.com/india-news/triple-talaq-bill-in-parliament-now-minister-says-its-about-equality-1793027.

ACCESS TO JUSTICE VIS A VIS ADR SYSTEM IN INDIA

Dr. Puja Jaiswal*

INTRODUCTION

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good main. There will be business."

-- Abraham Lincoln

From the above quote, we can draw out the importance of Alternative Dispute Resolution system in administration of justice. Alternative Dispute Resolution (ADR) is nowadays gaining popularity in resolution of the disputes primarily of civil nature. Seeing the rate of pendency of cases in the courts, it shall be practical if the mechanism of Alternative Dispute Resolution is adopted. In the past few years it is has been seen that quasi-judicial mechanism have been proficient to generate better results than the established court procedures. It is mainly because under the ADR techniques, disputes have been resolved in straight participation by the parties and exhaustive involvement in the negotiations that have facilitated in reaching to a settlement much faster than the regular courts. In the mechanism of Alternative Dispute Resolution, the principles of natural justice, equity and reasonableness always support in reaching to a resolution. ADR, thus can be defined as a problem-resolving technique, fair, reasonable & convenient in redressing disputes through compromise. ADR has emerged as a trustworthy tool for resolution of dispute at domestic and global level and has come up as a perfect measure for the dispute resolution in the commercial sector. To cut litigation, the disputing parties are advised not to go to court for their disputes and instead opt for arbitration or other forms of alternative dispute resolution.

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CONCEPT OF ADR

Alternative Dispute Resolution (ADR) is the blistering new-fangled socio-legal concept of the 1990s.[1] Everyone is supporting it, becoming an expert in it and lauding it as magic potion for the high-priced, inefficient and intransigent legal system. The attention paid to the phenomenon of ADR has raised a number of issues. The primary prickly issue is to define the expression ADR. Endeavour has been made from diverse quarters.[2] The wide range of innovative mechanisms commonly employed to settle disputes outside the courtroom is illustrative of the larger potential for organisational innovation in other fields designed to enhance governance nationally and globally. Alternative Dispute Resolution (ADR) in the common law tradition that has its origins rooted in English legal development.

As early as the Norman Conquest, legal charters and documents indicate that English citizenry instituted actions concerning private wrongs, officiated by highly respected male members of a community, in informal, quasi-adjudicatory settings. In some instances, the King utilised these local forums as an extension of his own legal authority rather than adjudicate a suit via the more formal King's court. The King would simply adopt the decision of a local, but highly respected, layperson without ever "reaching the merits" of the suit, creating one of the first forms of arbitration.

In some sense, then, common law ADR has been around for centuries. It is an innovative name describing an old methodology. An alternative means the privilege of choosing one of two things or courses offered at one's choice. The alternative in the ADR refers to something other than State-sponsored mechanism for adjudication of disputes. ADR is an endeavour to work out a mechanism, which can work as an alternative to established litigation method. It does not connote the picking of an alternative court, but something which is alternative to the court procedure or something which can be as skilful as court procedure. It is a set of mechanism or strategic practice for resolving a dispute outside the typical practice of litigation. ADR procedures are extra-judicial in their makeup. They consist of various techniques to determine disputes involving a structural process with third party intrusion.

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1. DR.ANUPAM KURLWAL, AN INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION (ADR) 3 (Central Law Publications, Allahabad, 2nd edn, 2014).
2. *Ibid.*

SIR FRANCIS BACON DESCRIBED THE CONCEPT OF ADR IN THE FOLLOWING WORDS:

"It is generally better to deal by speech than by letter, and by the mediation of a third man than by a man's self."[3]

Alternative Dispute Resolution is a non-judicial procedure for the resolution of disputes. In its comprehensive sense, the term refers to everything from assisted settlement negotiations in which parties enjoy freedom to some other legal process, to arbitration system or mini trials that seem and sense very much like a court room process. In plain terms, it can be formal or informal in nature. It has certain instrumental and intrinsic functions. It enables the amicable settlement of disputes through means, which are not available to courts. It is termed as intrinsic because it enables the parties themselves to settle their disputes. But it is not an alternative in a restrictive sense. The need for public adjudication and normative judicial pronouncements on the momentous issues of the day is fundamental to the evolution of the laws of the land. ADR is necessary to complement and conserve the functions of the court.[4] The expression "ADR" is now regarded politically and sociologically incorrect in some cultures. Alternative reflects egocentric description of the world by a few trial lawyers. Worldwide statistics show that over 90% of the conflicts, which enter lawyer`s offices or court files resolve by an agreement or abandonment.[5]

ADR is nowadays growing in popularity in India. It has been observed that ADR is proficient to generate better results than the established court procedures. Firstly, diverse categories of disputes may call for different kinds of approaches, which may possibly be not offered in the courts. Secondly, the ADR techniques resolve the disputes in straight participation and exhaustive involvement by the parties in the negotiations to turn up to a settlement. Thirdly, the principles of natural justice, equity and reasonableness always favour the ADR actions. Fourthly, ADR is a problem-solving approach and sincere to resolving disputes through compromise. Fifthly, ADR is nowadays being more and more accredited in the field of law, besides the business segment. In the preceding century, there was an exceptional progress in science and technology, which produced competition as well as created a concern for consumers

3. O.P.Motiwal, Alternative Dispute Resolution in India, 15 JIA 117 (1998).
4. Prof. Nomita Aggarwal, Alternative Dispute Resolution Concept and Concerns, Vol. VII, Jan 1, NAYA DEEP 68(2006).
5. Kurlwal, supra note 1.

to safeguard their rights. Therefore, ADR acts as a trustworthy tool for resolution of dispute at domestic and global level. Sixthly, ADR is a specially suited approach, which covers all the matters and disputes that are not covered up by the litigation procedure. And lastly, ADR is a perfect measure for the dispute resolution in the commercial sector because in commercial and business matters, regular courts have to decide cases only on the basis of evidences produced and arguments presented before it. The court has to provide preference to evidence and arguments instead of viewing in terms of commercial sense.[6]

HISTORICAL DEVELOPMENT OF ADR

ADR is not a new concept. This informal quasi-judicial system is as old as civilisation. Different forms of ADR have been in existence for thousands of years. An Act[7] was passed in 1698 under William III. This was an Act for rendering the award of arbitrators more effective in all cases for the final determination of controversies referred to them by merchants and traders, or others. In 1854, Common Law Procedure Act expressly empowered courts to remit an award for reconsideration by the arbitrators. It empowered courts to stay an action in court if the parties had agreed to take the dispute to arbitration. Effectively, the Arbitration Act 1940 provides a number of model steps to be taken for settlement of disputes between the parties. The parties appoint arbitrators or court may also appoint arbitrators if the parties fail to do so to decide the disputes informally and make an award, or settle the dispute by mediation, compromise or by any other way. The court may pass a decree in terms of the award. Arbitration Tribunal was competent to appoint expert for assisting it on technical matters. Later, in Arbitration Act 1950, there was a consolidation of the Arbitration Acts of 1889 and 1934. It included the power of a court to stay actions where there was an applicable arbitration agreement.

In addition, the Arbitration Act of 1975 gave effect to the New York Convention[8] on the Recognition[9] and Enforcement of Foreign Arbitral Awards 1958. In 1976, Professor Frank Sander, in his book, said that in future, not just a court, but a dispute resolution centre has to be established, where disputants would be screened and channelled for a variety of dispute resolution processes, such as mediation, arbitration, fact-finding, malpractice screening panel, or an ombudsman.

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6. AVTAR SINGH, LAW OF ARBITRATION AND CONCILIATION 393 (Eastern Book Company, Lucknow, 8thedn., 2007).
7. The English Arbitration Act, 1698.
8. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
9. Frank E.A.Sander, Stephen B. Goldberg, et.al., Dispute resolution-Negotiation, Mediation, and other Processes (Aspen Publishers, 2007).

In 1976, in Bangladesh, Gram Adalat law was passed by the Bangladesh Government to settle minor criminal and civil law suits. This Gram Adalat law provides for the Gram Adalat Chairman with power of a third class magistrate. The Adalat comprised of five members, including the Chairman, two General members and two members selected by the complainant and defendant. The judgment of the Gram Adalat will be validated with unanimous support or by majority of 4:1. No one raised any question regarding the legality of the verdict.[10] Then came the Arbitration Act 1979 dealing, principally, with regulating the court's powers to review arbitration awards and to determine any question of law arising in the course of arbitration. In 1980, the Government of Bangladesh had passed a bill[11] for introducing the office of an ombudsman to meet a constitutional commitment.

In 1981, considering expenses and delays in disposal of cases through the legal system of India, a judgment was given by the Supreme Court of India in the ***Guru Nanak Foundation v Rattan Singh & Sons***[12] saying, "Interminable, time-consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, leas formal, more effective and speedy for resolution of disputes avoiding procedural claptrap".

MODES OF ADR

One can say that the art and heart of ADR involve a range of mechanisms. Amongst the various ADR techniques, arbitration and conciliation/mediation are the oldest and famous. Other ADR techniques, although commonly practiced in the USA and other countries for over 20 years, are almost unfamiliar in India where ADR movement has yet to take momentum.[13] With the adjudicatory procedures, there are also various non-adjudicatory procedures, which contribute to resolution of disputes. The non-adjudicatory procedures contribute to resolution of disputes of the parties without adjudication. As a matter of logic, it follows that it is not viable to compile an exhaustive list.[14] Presently, the forms of ADR are divided into three categories, namely:

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10. UNDP, Report: Activating village courts in Bangladesh project, 2012 (Ministry of local government, Rural development and cooperatives).
11. The Ombudsman Act, 1980 (Act No. XV of 1980).
12. (AIR 1481 SC 2075).
13. Kurlwal, supra note 1.
14. B.R.Agarwala, Our judiciary 152-155, 158 (Pub. National Book Trust, India, 3rd ed., 2004), Nishita Medha, Alternative Dispute Resolution in India: A study on Concepts, Techniques, Provisions, Problems in Implementation and Solutions 9, 10-22, 27, 33, 35, 36 (Central law agency, Allahabad, 2nd ed., 2002).

1. Informal techniques
2. Advanced techniques
3. Hybrid techniques

The informal methods are the diverse private dispute resolution methods, which the societies have built up themselves. Such indigenous systems may be violent, self-help, avoidance, negotiations, coercion, enlistment of public opinion, apology, etc. Several other informal procedures were also there, like belief in God's justice, advice of elderly people, decisions by society's representative body, etc.

The advanced methods can be further classified as negotiation, mediation and conciliation & arbitration. The methods of arbitration and conciliation are quasi-judicial methods to resolve a dispute with minimum court intervention. The same is now recognised by the Arbitration and Conciliation Act, 1996[15] . The Courts have always assisted in proper conduct of the arbitration proceedings and enforcements of arbitration awards.

Each of the primary processes can be used in its own right without adaptation. In addition, by drawing elements from the primary processes and tailoring them, an ADR practitioner can devise a permutation of procedures and approaches, which fit all the nuances of the parties' needs and circumstances without being constrained by prescribed rules. Mediation and hybrid processes generally provide a framework of informal procedures in which a neutral assists the disputing parties in information gathering, clarifying and narrowing issues, facilitating dialogue, and negotiation, smoothing out personal conflicts, identifying options and testing. It may be appropriate for the practitioner of ADR first to have informal discussions with the parties, arrange for certain facts of technical questions to be investigated and to allow each of them to present their respective cases informally to one another before resuming attempts at settlement. This lead to any other permutation of requirements, which can be met by devising a sequence for procedures specifically designed for that dispute and those parties. Certain common combinations of usage of the primary processes have developed in this way and are known as hybrid processes. These include:

1. **Mediation,** a process where a neutral third party assists disputing parties in resolving conflict through the use of specialised communication and

15. The Arbitration and Conciliation Act, 1996 (Act 26 of 1996).

negotiation techniques,

2. **Arbitration,** a technique for the resolution of disputes outside the courts,
3. **Med-Arb,** a procedure that starts with an arbitration proceeding; after which a non-binding arbitration award is issued. Then, the parties work with a mediator to attempt to resolve their conflict,
4. **Mini-Trial,** a structured negotiated settlement technique to hear the other side's point of view and attempt a negotiated settlement,
5. **Neutral Listener Agreement,** wherein parties to a dispute discuss their respective best settlement offer in confidence with a neutral third party who, after his own evaluation, suggests settlements to assist the parties to attempt a negotiated settlement,
6. **MEDOLA,** a procedure in which if the parties fail to reach an agreement through mediation, a neutral person, who may be the original mediator or an arbitrator, will select between the final negotiated offers of parties such selection being binding on the parties,
7. **Rent a Judge,** usually a retired judge or lawyer before whom the parties to dispute present their case in informal proceedings,
8. **Final Offer Arbitration,** in which each party submits its monetary claim before a panel that renders its decision by awarding one and rejecting the other claim, etc.

NEED FOR ADR

The wheels of Indian justice system grind slowly, but there are times when they don't move at all, as has happened with the record breaking case of Bengali royal's property. The matter, which is now in the Calcutta high court, has been pending for 175 years, making it perhaps the country's longest running case.[16] One of the major flaws in India legal system is the delay in dispensing with the justice. The average time taken by the Indian courts for deciding a case varies between 5 to 15 years. In The Guinness Book of Records, there is an entry, which says that the most protracted law suit ever, recorded was in India, A MAHANT, who is a keeper of a temple, filed a suit in Pune in 1205 AD and the case was decided in 1966, 761 years later.[17]

16. Available at: http://m.timesofindia.com/india/175-years-later-west-bengal-case-goes-on-and-on/articleshow/3690564.cms (visited on Feb. 16 2017).
17. Available at: http://m.indiatoday.in/story/ias-officer-finds-the-guinness-entry fallacious/1/31 9546.html (visited on Feb. 20, 2017).

There are various instances when the present judicial system has resulted into a painful experience for the litigants seeking redressal. It's shocking to see as to how many cases are pending in the courts. The mounting arrears in the courts, inordinate delays in the administration of justice and expenses of litigation have the potential to erode trust and confidence in our legal system, which is the pillar of our democracy. Delay also gives rise to corruption and other evils. Ideally speaking, judicial system is blind to power, wealth and social status. Courts are supposed to offer a forum where the poor, powerless and marginalised can stand with all other as equal before law. But with the present state of affairs, our fellow citizens have chosen to avoid courts rather than face intimidation cost and time in legal proceedings.[18]

The 14th Law Commission report recommended devising ways and means to ensure that justice should be simple, speedy, cheap, effective and substantial.[19]

The 77th Law Commission report observed that India is agrarian and is not sophisticated enough to understand the technical procedures of courts.[20]

The 114th Law Commission report observed that the judicial system suffers from inordinate delays, excessive costs, legal technicalities and even uncertainty of judicial decision.[21]

The observations made in the Report of the Arrears Committee[22] also reflect the general mindset regarding court system in India:

"…… settlement of cases by mutual compromise is a much better method than seeking adjudication in the advisory system. Fighting litigation to its bitter and final end apart from generation tension and leaving a trial of bitterness, burdens the parties with heavy financial expenditure. Besides, the successful party has to wait for years before enjoying the fruits of litigation. Results in consonance with justice, equity and good conscience can sometimes be achieved by having a mutual settlement of the dispute than by inviting the court to decide a case one way or the other……"[23]

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18. ADR: speech delivered by Justice Y.K.Sabarwal-Judge Supreme Court of India on 21-11-2004 in a seminar organized by Bombay High Court.
19. Law commission of India, 14th Report on Reforms of Judicial Administration, 1958.
20. Law commission of India, 77th Report on Delay and arrear in Trial Courts, 1979.
21. Law commission of India 114th Report on Gram Nyayalaya, 1986.
22. Constituted by the Government of India in 1989 on the recommendation of the Chief justices Conference, published by the Supreme Court of India – 1990.
23. *Id., at p.109.*

To examine the courts' working methods and work environment and to suggest improvements thereof, the National Judicial Pay Commission[24] engaged the services of Indian Institute of Management, Bangalore (IIMB). The IIMB, after in-depth study, concluded that most people having stakes in judicial work are of the opinion that justice delivery system is unsatisfactory. The main reasons given by them are carefully analysed below:

1. The time taken to serve summons and emergency notices varied from three months to three years,
2. The time to file written statements ranged from six months to twenty four months,
3. Interlocutory application caused delays ranging from four months to four years,
4. Framing of issues consumed as much as three years and six months in one case, and
5. Other stages that delayed the cases were absence of advocates and innumerable adjournments.

Therefore, people are looking forward to developing Alternative Dispute Resolution modes, which will minimise the overall time and cost of a person, while maximising the time available at one's disposal. This is evident from the fact that a considerable litigation burden has been shifted to the hybrid variety of ADR modes developed in the country during last five decades.

TECHNIQUES OF ADR FOR DISPUTE RESOLUTION IN INDIA

Alternative Dispute Resolution (ADR) is a term that refers to several different methods of resolving disputes outside traditional legal and administrative forums. These philosophically similar methodologies have surged in popularity in recent years because companies and courts became extremely frustrated over the expense, time, and emotional toll involved in resolving disputes through the usual legal avenues. The adversarial system is expensive, disruptive, and protracted. More significantly, by its very nature, it tends to drive the parties further apart, and weakening their relationship to, often, irreparable point. ADR emerged as an alternative,

24. Constituted by Government of India on 1996 on the direction of the Supreme Court of India given in All India judges Association v. Union of India, AIR 1992 SC 165.

litigation-free method of resolving business disputes. Following are the few modes, which are mostly used for the dispute resolution:

Arbitration

Arbitration is the procedure by which parties agree to submit their disputes to an independent neutral third party, known as an arbitrator, who considers arguments and evidence from both sides, then hands down a final and binding decision. This alternative, which can be used to adjudicate business-to-business, business-to-employee, or business-to-customer disputes, can utilise a permanent arbitrator, an independent arbitrator selected by the two parties to resolve a particular grievance, or an arbitrator selected through the several procedures. A board of arbitrators can also be used in a hearing. After the arbitrator is selected, both sides are given the opportunity to present their perspectives on the issue or issues in dispute. These presentations include testimony and evidence that are provided in much the same way as a court proceeding, although formal rules of evidence do not apply. Upon completion of the arbitration hearing, the arbitrator reviews the evidence, testimony, and the collective bargaining agreement, considers principles of arbitration, and makes a decision. The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal withot unnecessary delays and expenses.[25]

Mediation

In contrast to arbitration, mediation is a process whereby the parties involved utilise an outside party to help them reach a mutually agreeable settlement. Rather than dictate a solution to the dispute between labour and management, the mediator who maintains scrupulous neutrality throughout suggests various proposals to help the two parties reach a mutually agreeable solution. In mediation, the various needs of the conflicting sides of an issue are identified, and ideas and concepts are exchanged until a viable solution is proposed by either of the parties or the mediator. Rarely does the mediator exert pressure on either party to accept a solution. Instead, the mediator's role is to encourage clear communication and compromise in order to resolve the dispute. The terms "arbitration" and "mediation" are sometimes used interchangeably, but this mixing of terminology is careless and inaccurate. While the mediator suggests possible solutions to the disputing parties, the arbitrator makes a final decision on the

25. Available at: http://www.gktoday.in/alternative-dispute-resolution/amp/ (visited on April 20th , 2017)

labour dispute, which is binding on the parties.

Mediation can be a tremendously effective tool in resolving disputes without destroying business relationships. It allows parties to work towards a resolution out of the public eye without spending large sums on legal expenses. Its precepts also ensure that a company will not become trapped in a settlement that it finds unacceptable.

Ombuds

An ombuds is a high-ranking company manager or executive whose reputation throughout the company enables him/her to facilitate internal dispute resolutions between the company and employees. It provides a confidential, typically low-key approach to dispute resolution that keeps conflicts in the family. Properly affected, the ombuds mechanism can do much to enhance the perception that the company is concerned and eager to address the problems of its employees by providing them with an accessible, non-threatening avenue for seeking redress when they believe they have been wronged. The primary drawback of ADR by the ombuds process, however, is that many companies whether large or small do not have an individual equipped with the reputation, skills, or training to take on such a task.

Conciliation

Conciliation is the process of facilitating an amicable settlement between the parties. It is an alternative dispute resolution process whereby the parties to a dispute agree to utilize the services of a conciliator, who then meets with the parties separately in an attempt to resolve their differences. Conciliator can suggest the solutions binding on the parties.[26] Prof. Dr. Nael G. Bunni says that conciliation is a formal process than mediation and it could generally involve the engagement of legal representatives, thus making it a more expensive process than mediation. There is, however, the added advantage that should no amicable solution be reached. The conciliator has the duty to attempt to persuade the differing parties to accept his own solution to the dispute.[27] The proceedings relating to Conciliation are dealt under sections 61 to 81 of the Act.[28]

26. DR.ANUPAM KURLWAL, AN INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION (ADR) 22 (Central Law Publications, Allahabad, 2nd edn, 2014).
27. Bunni, The FIDIC Forms of Contract (Blackwell Publishing 3rd edn., 2008) at 445.
28. The Arbitration and Conciliation Act, 1996.

TECHNOLOGY PROVIDES THE SOLUTION-ONLINE DISPUTE RESOLUTION

In the recent times, the information technology has evolved as an important means for future resolution of certain types of conflict. Internet with large number of applications has emerged as one of the most significant and revolutionary inventions of the current times. Online Dispute resolution is one of ADR mechanism that uses information technology in providing fast, quick and convenient solution to the disputes. .

Online dispute resolution, or "ODR", is a mechanism for resolving disputes through the use of electronic communications and other information and communication technology.[29] According to the American Bar Association Task Force on E-Commerce and ADR,

"Online Dispute Resolution has only one overarching feature – it takes place online."[30]

Further, it is also rightly observed in this Report that

"ODR encompasses many forms of ADR and court proceedings that incorporate the use of the Internet, Web sites, e-mail communications, streaming media and other information *technology as part of the dispute resolution process."*[31]

In the Online Dispute Resolution system, Internet plays a very vital role in resolving commercial disputes. The ODR platform is a web-based platform developed by the European Commission. Sometimes this involves agents, mediators & advocates and sometimes it does not. It depends on the vehicle/provider that the parties agree to use to resolve their claim.[32] It mainly involves negotiation, mediation or arbitration, or a amalgamation of all these three techniques. ODR provides a platform to parties at conflict to settle their dispute using the Internet. Its objective is to help consumers and traders resolve their contractual disputes, out-of-court settlement, at a low cost in an affordable, convenient and quick way.[33] It represents significant opportunities for access to dispute resolution between the buyers and sellers concluding cross-border commercial disputes, majorly in developed and now gradually in

29. Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade Law, Section V- ODR definitions, roles and responsibilities, and communications, p.4.
30. Final Report and Recommendations of The American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution, "Addressing Disputes In Electronic Commerce",https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalReport102802.authcheckdam.pdf. (visited on October,08, 2017).
31. *Ibid.*
32. Arthur M. Monty A halt, "What You Should Know About Online Dispute Resolution", The Practical Litigator, March 2009.
33. Alternative and Online Dispute Resolution (ADR/ODR), Available at: http://ec.europa.eu/consumers/solving_consumer_disputes/nonjudicial_redress/adr-odr/index_en.htm (visited on October, 22, 2017).

developing countries too.

As recognized in the *UNCITRAL Technical Notes on Online Dispute Resolution*[34] , ODR system is one that embodies principles of impartiality, independence, effectiveness, efficiency, due process, accountability, fairness and transparency. Although, the said *Technical Notes On Online Dispute Resolution* are non-binding, but it takes the form of a descriptive document reflecting elements of an online dispute resolution process, that guides in resolving disputes online. The scope of the ODR as recognized by *UNCITRAL's in its Technical Notes on Online Dispute Resolution,* that an ODR process may be predominantly constructive for disputes arising out of cross-border, low-value e-commerce transactions. An ODR process may apply to disputes arising out of both a business-to business as well as business-to-consumer transactions.[35] Thus, the salient features of ODR which make it ideal for such business disputes for both developed and developing are:

1. Faster Redressal
2. Convenience
3. Easy Accessible
4. No geographical barriers
5. Economical

It is well evident that technology has provided a remedy on most of the occasions of complexity to humans. Internet has emerged as one of the most noteworthy, significant and far-reaching inventions of our time. It has a large number of applications with very significant and unique features. With increase in globalization and liberalization, business has crossed territorial boundaries and has gone up and so has the business disputes. The traditional methods of resolving such business disputes have turned out to be very time consuming, not cost effective and cumbersome too. Litigation has never been considered as the method of choice for resolution of international business disputes and therefore, ADR methods had been favoured in past few years. And further, the use of information technology, has paved way for an advanced mechanism i.e. the Online Dispute Resolution. ODR, especially to resolve the commercial

34. Resolution adopted by the General Assembly on 13 December 2016 [on the report of the Sixth Committee (A/71/507)] 71/138., "Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade Law". (visited on October, 25, 2017).
35. Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade Law, 2017, Section IV — Scope of ODR process, p.3.

disputes, has turned out to be a more convenient and a suitable way.

CONCLUSION

Although it is clear that there is now widespread experience with ADR, the reasons for its popularity need further explanation. Fundamentally, there are three situations that lead to the use of ADR by corporations. Firstly, corporate decision making in the course of doing business, for which adoption of an alternative to litigation may be desirable. Such case-by-case decision making may characterise much of the use of ADR. Secondly, an important variation occurs when corporations agree in advance to use ADR techniques to resolve disputes that will arise in the future. And thirdly, corporations use ADR when a court orders the parties of dispute to resolve it themselves through the ADR techniques.

The rapid spread of ADR techniques is a consequence of a unique convergence of several important factors. One of the most significant forces driving corporations toward ADR is the cost of litigation and the length of time needed to reach a settlement. All else being equal, ADR is widely considered cheaper and faster.[36] To compete effectively in global and domestic markets, without any doubt, ADR is preferred.[37] With cost-effective and time-managed resolution mechanism, the parties are motivated to adopt ADR over other dispute resolution techniques. The uncertain mechanisms from the legal system created the atmosphere to adopt the ADR techniques over the litigation process. The numerous amounts of litigations with the judicial authority create the blockage for the disputes to early resolution. The parties to disputes are now increasingly incorporating the use of the ADR as conflict management mechanisms for the conflicts and disputes within their policies. In addition to this resolution mechanism, the disputants are also emphasising on dispute prevention. The front-line managers and supervisors are given responsibilities for preventing conflicts from arising and if any dispute occurs, the managers are given a responsibility for the prevention as well as resolution of the dispute consistent with the company's interests. Parties engaged in conflict management tend to use a variety of procedural devices for the handling of disputes, such as in-house grievance procedure with other preventive measures. While some have invested in various training programmes,

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36. David B. Lipsky and Ronald L. Seeber, The Appropriate Resolution of Corporate Disputes: A report on the growing use of ADR by U.S. Corporations (1998) (Unpublished work Cornell University, Ithaca, NY: Institute on Conflict Resolution).
37. *Ibid.*

such as classroom trainings, interactive exercises and role playing that focus on making sure that employee understand the application of statutes and policies associated with responsibilities.[38] Both mediation and arbitration are used extensively in international disputes.

Using ADR has a variety of benefits, depending on the type of ADR process used and the circumstances of the particular case. Some of the benefits of ADR are summarised that a dispute can be settled or decided much sooner with ADR, often in a matter of months, even weeks, while bringing a lawsuit to trial can take a year or more. When cases are resolved earlier through ADR, the parties may save some of the money they would have spent on attorney fees, court costs, experts' fees, and other litigation expenses. In ADR, parties typically play a greater role in shaping both the process and its outcome. In most ADR processes, parties have more opportunity to tell their side of the story than they do at trial. Some ADR processes, such as mediation, allow the parties to fashion creative resolutions that are not available in a trial. Other ADR processes, such as arbitration, allow the parties to choose an expert in a particular field to decide the dispute .ADR can be a less adversarial and hostile way to resolve a dispute. For example, an experienced mediator can help the parties effectively communicate their needs and point of view to the other side. This can be an important advantage where the parties have a relationship to preserve. It also provides for practical solutions for resolving the disputes as compared to the litigation process. Dispute of any form can be resolved through ADR. This provides a wider scope to ADR over the existing legal system of dispute settlement. ADR resolves the dispute in a confidential way and preserves the integrity of the information of parties shared with the arbitrator or conciliator or any other alternative dispute resolution authority. Thus, ADR moves the drawbacks in the judicial system and facilitates access of justice

38. David B. Lipsky, Patterns of ADR use in Corporate disputes, (1998), an article excerpt from "The Appropriate Resolution of Corporate Disputes: A Report on the Growing use of ADR by U.S. Corporations, " a survey Published in 1998 by the PERC institute on conflict Resolution.

AN ANALYTICAL STUDY OF REGULATIONS UNDER THE DRUGS AND COSMETICS ACT, 1940

Rohini Attri*

INTRODUCTION

The recognition of 'Health' as human right presupposes that Governments bear certain responsibility for the health of their population. The Governments have to provide for a health infrastructure and create conditions under which the availability, accessibility and quality of health services are guaranteed. Therefore, the State is duty bound to provide a mechanism so as to ensure adequate quantity as well as quality of food stuffs, medicines and drugs etc. to its people.[1] In India, the problems of adulteration of drugs; and production of spurious and substandard drugs are posing serious threats to the health of the users.[2] According to data released by the Government to Parliament from 2011 to 2013, India has witnessed a five- time (455%) increase in the drug hauls. The officials have seized 1,05,173 tonnes of illegal drugs over this period.[3]

Problems related to the safety and quality of drugs exists in many places around the world today, in developing and developed countries alike.[4] Some incidents, very unfortunately, have ended in tragedy, often with children as the victims. They are caused by the over use of drugs containing toxic substances or impurities; drugs whose claims have not been verified, drugs with unknown and severe adverse reactions, substandard preparations, or outright fake and counterfeit drugs. Effective drug regulation is required to ensure the safety, efficacy and quality of drugs, as well as the accuracy and appropriateness of the drug information available to the public.[5]

THE DRUGS AND COSMETICS ACT, 1940: ORIGIN AND SCOPE

In the beginning of the current century, the Drug industry was practically non-existent

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1. BINDUMOL V.C., MEDICAL LAW 13 (Allahabad Law Agency, Faridabad, 2015).
2. Tripti Tandon, "Drug Policy in India" International Drug Policy Consortium, United Kingdom, February 2015.
3. Rajeev Sharma and Yogita Bansal, Drug Abuse: Problem, Management and Prevention 54 (R.D. Publication, Jalandhar, 2017).
4. B.S. KUCHEKAR, PHARMACEUTICALS JURISPRUDENCE 5 (Pragati Books Pvt. Ltd., Pune, 2008).
5. *Ibid.*

in India and pharmaceuticals were being imported from abroad. The First World War changed the situation and not only were finished and cheap drugs imported in increasing volume, the demand for indigenous products also were voiced from all sides. With the clamour for Swadeshi goods manufacturing concerns, both Indian and Foreign, sprang up to produce pharmaceuticals at cheaper rates to compete with imported products. Naturally some of these were of inferior quality and harmful for public health. The Government was, therefore, called upon to take notice of the situation and consider the matter of introducing legislation to control the manufacture, distribution and sale of drugs and medicines.[6] According to Indian Medical Gazette, there was no control over the manufacturing, sale and distribution of drugs in India. As there were no restrictions on quality of drugs that are being imported, unscrupulous manufacturers abroad took advantage and flooded the Indian markets with adulterated & spurious drugs.[7]

As a result of such frauds, the British Government was forced to initiate action for drug legislation. Sir Haroon Zaffer moved a resolution on March 9, 1927 in the Council of States, recommending to the Governer General "to take immediate steps to control the craze of medicinal drugs by legislation for standardization of preparation and sale of such drugs. In every civilized country the sale of foods and drugs is control by law, but in India there were no such restrictions. To avoid this Lt. Col. H. A. J Gidney in the Legislative Council, demanded for the control of adulterated drugs. The local press and even the pharmaceutical journal of England supported the agitation.[8]

In response to such agitations and in order to have a comprehensive legislation, which the rapid expansion of the pharmaceutical production and drug market required by the end of the second decade for its control, Drugs Enquiry Committee was constituted under the chairman ship of Lt. Col. R. N. Chopra, Shri C. Govindan Nair as secretary and Dr. B. Mukharjee as Assistant Secretary. The main objectives of this Committee were to enquire & check the quality of drugs, that are being imported, manufactured and sold and to suggest remedial measures in preventing adulteration. The Committee was asked to make recommendations about the ways and means of controlling the production and sale of drugs and pharmaceuticals in the interest of

6. Contents are provided and maintained by the Ministry of Health and Family Welfare, India, available at: http://www.fdaharyana.org/FDA-LawsforDrugsCosmetics (last visited on April 18, 2016).
7. N.K. JAIN, TEXTBOOK ON FORENSIC PHARMACY 11 (Vallabh Prakashan, 2003).
8. *Ibid.*

public health. The Chopra Committee toured all over the country and after carefully examining the data placed before it, submitted a voluminous report in 1931 to government suggesting creation of drug control machinery at the centre with branches in all provinces. For an efficient and speedy working of the controlling department the Committee also recommended the establishment of a well-equipped Central Drugs Laboratory with competent staff and experts in various branches for data standardization work. Under the guidance of the Central Laboratory, it was suggested, small laboratories would work, in the provinces. For the training of young men and women, the Committee recommended the permission of Central Pharmacy Council, and the Provincial Pharmacy Councils, with registrars who would maintain the lists containing names and addresses of the licensed pharmacists.[9]

The outbreak of the Second World War in 1939 delayed the introduction of legislation on the lines suggested by the Chopra Committee which the Indian government contemplated and considered as urgent. However, the Drugs and Cosmetics Act was passed in 1940 partly implementing the Chopra recommendations.

The Drugs and Cosmetics Act, 1940[10] was adopted to regulate the import, manufacture and distribution of drugs in India. The primary objective of the Act is to ensure that the drugs and cosmetics sold in India are safe, effective and conform to state quality standard.[11] The definition of 'drug'[12] is a comprehensive enough to include not only medicines but also substances intended to be used for or in the treatment of diseases of human beings or animals. The expression 'substances' means something other than medicines but which are used for treatment. [13]

The Drugs and Cosmetics Act, 1940 consists of thirty eight Sections followed by two Schedules. The provisions envisaged in the legislation have been divided into five chapters. The First

9. Lily Srivastava, Law and Medicine 215 (Universals Law Publication co., New Delhi, 2010).
10. Act 23 of 1940.
11. The Drugs and Cosmetics Act (Act 23 of 1940), Preamble.
12. Id.; s. 3(b) defines drug as ' (i) medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes;
(ii) such substances (other than food) intended to affect the structure or any function of human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette;
(iii) all substances intended for use as components of a drug including empty gelatin capsules; and
(iv) such devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board.
13. Chiman Lal Seth v. State of Maharashtra, AIR 1963 SC 665.

Schedule talks about the list of books related to Ayurvedic, Siddha and Unani Drugs. The Second Schedule entails about the standards to be complied with by imported drugs and by the drugs manufactured for sale or distribution; stocked or exhibited for sale and distribution. Another peculiar feature of the Act says that the provisions of the Act of 1940 are in addition to, and not in derogation of, the Dangerous Drugs Act, 1930[14], and any other law for the time being in force, making the application of other laws are not barred.[15]

The Constitution of India also earmarked subjects on which Parliament or State Legislatures could make law either exclusively or concurrently. "Cultivation, manufacture, and sale for export, of opium" was placed the Union List.[16] "Drugs and poisons" was placed in the concurrent list,[17] allowing both center and states to legislate whereas "Public health" is only on the state list.[18] Control of production, trade and use of drugs and poisons is an important component of the subject-matter of these entries. The drug evils, which are closely associated aspects of these entries, have not only local but global dimensions.[19]

The Drugs and Cosmetics (Amendment) Act, 2008[20] passed by the Parliament on December 5, 2008 provides deterrent penalties for offences relating to manufacture of spurious or adulterated drugs which have serious implications on public health. It will help regulatory authorities to handle anti social elements involved in the manufacture of such drugs and playing with human safety. The Drugs and Cosmetics Rules, 1945 is an offshoot of the Act of 1940 and concerned mainly with the standard and quality of drugs and checks the production of spurious and substandard drugs in the country.[21] Under these Rules, the drugs are classified in certain schedules, and regulations are laid down for their storage, display, sale, dispensing labeling, prescribing, etc.

REPORTS OF VARIOUS SELECT COMMITTEES AND EXPERT COMMITTEES

The Pharmaceutical Enquiry Committee appointed by the Government of India to make comprehensive survey of the pharmaceutical industry, trade and profession in the country

14. Act 2 of 1930.
15. The Drugs and Cosmetics Act (Act 23 of 1940) s. 2.
16. The Constitution of India, Seventh Schedule, Entry 59, List II.
17. *Id., Entry 19, List III.*
18. *Id., Entries 51 and 6, List II.*
19. M.P. Jain, Indian Constitutional Law 565 (LexisNexis, Nagpur, 6th edn., 2012).
20. Act 26 of 2008.
21. In the exercise of the powers conferred by ss. 6, 12, 33 and 33N of the Drugs and Cosmetics Act, 1940, the Central Government has made these rules.

unanimously recommended that Drugs Standard Control which was exercised by State governments should be centralized for better enforcement of the Drugs Act, 1940. On the basis of the recommendation of the Committee it was proposed to amend the Drugs Act, 1940, so as to empower the Central Government to control the manufacture of drugs, to appoint Inspectors, Government and to provide a minimum punishment of one year imprisonment and fine for manufacture, sale etc. of uncertain misbranded drugs and a minimum of two years' imprisonment with fine for subsequent offences.[22]

In order to keep check on drugs which were contaminated with foreign matter or which are manufactured, packed or held under insanitary conditions whereby they may have been contaminated or rendered injurious to health, it was proposed to bring within the scope of the Act a separate category called adulterated drugs and to prohibit the import, manufacture, sale, etc. of such drugs.[23]

The Government of India expressed great concern over the growing problem of spurious and substandard quality of drugs and maintained that various committees have been constituted in order to solve the problems related to drugs in India which had examined the issues and made relevant recommendations but the core issues have remained unsolved.[24] Therefore, an Expert Committee under the chairmanship of Dr. R.A. Mashelkar to examine all the aspects regarding the regulatory infrastructure and the extent and problem of spurious/substandard drugs in the country. The Mashelkar Committee suggested a roadmap for implementation of the recommended measures so that this problem could be solved in its entirety. The committee made several important recommendations with regard to strengthening of drug regulatory infrastructure in Centre and States, clinical research, tackling the problem of spurious drugs, specially trained officials, improvement of Drug testing laboratories, etc.[25]

Another important Expert Committee was constituted by the Government of India under the Chairmanship of Prof. C.K. Kokate for examining the safety and efficacy of certain Fixed Dose Combinations (FDCs).[26] The Committee submitted a detailed report on in this

22. J.S.P Singh, Socio Economic Offences 119 (Sri Sai Law Publications, Faridabad, 2007).
23. Act 13 of 1963.
24. Report of Expert Committee on 'A Comprehensive Examination of Drug Regulatory Issues including the Problem of Spurious Drugs', Ministry of Health and Family Welfare, November 2003, p.1; available at: http://cdsco.nic.in/writereaddata/Final%20Report%20mashelkar.pdf (visited on September 21, 2017).
25. *Ibid.*
26. A fixed dose combination contains two or more drugs combined in a fixed ratio of doses, available in a single dosage form. available at: http://www.pharmabiz.com/NewsDetails.aspx?aid=94168&sid=1 (visited on October 14, 2017).

regard with its recommendations concerning efficacy of certain FDCs. On the basis of the recommendations of this Committee the Government of India banned 344 FDCs.[27]

REGULATORY BODIES UNDER THE ACT

In order to execute the legislative provisions and make it workable it is always obligatory to provide for a mechanism in form of a regulatory/ administrative body of persons. To bring the provisions into effect the Chapter II of the Drugs and Cosmetics Act, 1940 empowers the Central Government to constitute the Drugs Technical Advisory Board which shall advise the Central Government and State Government on technical matters arising out of the administration of the Act and to carry out the other functions assigned to it by the Act.[28] This regulatory body consists of huge cluster of members in which the Director General of Health Services shall be the Chairman and the Drugs Controller of India shall act as *ex officio*[29] . Besides this, there are various other members of the board which are to be appointed by the Central Government or other medical bodies from pharmaceutical industry, teachers of medicine or therapeutics on the staff of an Indian University or college thereto. All these nominated members shall hold office for the term of three years and also eligible for re-nmination or re-election. The Board may regulate its own procedure and may also make bye-laws for conducting its business transactions. It is also e}powered to constitute sub-committees for particular matters.[30]

Under the mandate of the Act, the Central Government shall constitute the Central Drugs Laroratory which shall remain under the control of the Director for tle purpose of carrying out various functions entrusted to it under tie Act. For the purpose of functions and procedures regarding submission of drug samples for analysis, the Central Government may make rules after consultation with the Board.[31]

In order to meet the needs of proper advice and consultation by the Central Government, State Government and the Drugs Technical Advisory Board on matters concerning securing uniformity throughout India and administration of the Act, the Central Government is empowered to constitute an advisory committee which shall be called as "The Drugs

27. Ministry of Health and Family Welfare Order no. X11035/53/2014-DFQC dated 16 September 2014. available at: http://cdsco.nic.in/forms/list.aspx?lid=2175&Id=32 (Visited on September 21, 2017).
28. The Drugs and Cosmetics Act (Act 23 of 1940) s. 5(1).
29. *Id.; s. 5(2).*
30. *Id.; ss. 5(4), 5(5).*
31. *Id.; s. 6.*

Consultative Committee"[32].

Besides the above stated regulatory bodies, the legislation also provides for the appointment of certain officials like Government Analyst and Drug Inspectors in order to regulate the objectives of the Act which are to be appointed by by appropriate Government for such areas as assigned to them by the concerned Government[33] The inspectors appointed under the Act have been granted various powers to exercise such as inspection of the premises where the drugs have been manufactured, stocked or exhibited for sale and distribution. They can also take samples of the drugs which are being manufactured or sold from any place or from any person in the course of preparation, delivery or conveyance to any purchaser or consignee. In addition to this they are also empowered to search any place, person, conveyance, vehicle or vessel used for carrying the drugs.[34] Whenever any such sample is being collected by the Inspector for testing or analysis, he is required to follow the procedure established for taking and disposing off the sample of drugs to the Government analyst or to the court before which the proceedings are going to be instituted in respect of that drug.[35]

The Central Drugs Standard Control Organization (CDSCO) is the Central Drug Authority for discharging functions assigned to the Central Government under the Drugs and Cosmetics Act. The CDSCO has six zonal offices, four sub-zonal offices, thirteen port offices and seven laboratories under its control.[36] The CDSCO performs major functions in relation to drugs including regulatory control over the import of drugs, approval of new drugs and clinical trials, meetings of Drugs Consultative Committee (DCC) and Drugs Technical Advisory Board (DTAB), approval of certain licences.[37]

IMPORTATION OF DRUGS

The term 'to import', with its grammatical variations and cognate expressions, means to bring into India.[38] There are various reasons for which a drug can be imported such as, for personal use, for sale and distribution, for testing and analysis, treatment of patients by Government hospitals and medical institutions, conducting clinical trials, for use in

32. *Id.; s. 7.*
33. *Id.; s. 21.*
34. *Id.; s. 22.*
35. *Id.; s. 23.*
36. Available at: http://www.cdsco.nic.in/forms/contentpage1.aspx?lid=1423 (visited on September 24, 2017).
37. *Ibid.*
38. The Drugs and Cosmetics Act (Act 23 of 1940) s. 3(g).

manufacture of formulations. One of the important requisite here is to ensure the quality and standards of the imported drugs. The Act clearly prohibits the import of all those drugs which is, not of standard quality, misbranded drug, adulterated drug or any drug which contains any ingredient which may render it unsafe or harmful for use. There is prohibition of import of patent and proprietary medicine unless the true formula of that medicine or list of ingredients contained in it along with their quantities thereof have been mentioned in a prescribed manner on the label or container of that medicine. The Central Government is also authorized to prohibit the import of any drug, if necessary in public interest, which is likely to involve any risk to human beings or animals or any drug which contains no therapeutic value or therapeutic justification.[39]

MANUFACTURE, SALE AND DISTRIBUTION OF DRUGS

Before the Act of 1940, selling an adulterated drug or medicinal preparation, the adulteration lessening the efficacy or changing its operation or rendering it noxious, with the knowledge of such adulteration brings the seller to the mischief of Section 275 of the Indian Penal Code, 1860. But now, the sale of adulterated drugs is also an offence under the Drugs and Cosmetics Act, 1940.[40]

The term 'manufacture' is a broad term which includes, any process or part of process for making, altering, finishing, packing, labeling, breaking up or otherwise treating or adopting any drug with a view to its sale or distribution.[41] The manufacturing, sale and distribution of drugs face certain problems so far as their nature, quality, branding, labeling, licensing, etc. are concerned. For this purpose, the legislation prohibits the manufacture and sale of all those drugs which are not of a standard quality or is misbranded or spurious in nature. Besides this no person shall manufacture any drug, for the purpose of stock, sale, exhibition or distribution, which contains any ingredient unsafe or harmful for use under the directions indicated by the State Government.[42] The drugs manufactured, for sale or distribution, in contravention of, any provision of this Act or rules made under the Act, or conditions necessary for licensing, shall be prohibited.[43]

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39. *Id.; s. 10.*
40. Ratanlal and Dhirajlal, The Indian Penal Code 1095 (Wadhwa and Company, Nagpur, 31st Enlarged edn. 2007).
41. The Drugs and Cosmetics Act (Act 23 of 1940), s. 3(f).
42. *Id.; s. 18.*
43. *Ibid.*

PUNITIVE APPROACH

The legislature has very well followed the punitive approach so far as prohibitions under the Act are concerned. There are various penalties, in the form of imprisonment and fines, incorporated in the Act for those who violate the provisions of the Act. The term of imprisonment and the amount of fine varies on the basis of nature of offence committed.[44] The maximum term of punishment under the Act shall be imprisonment for life. There are separate penalties for subsequent convictions. Whenever any offence under the Act is committed by a company, the Act has envisaged provisions to incur criminal liability on the company as well as on the persons who were in charge of, or responsible for the conduct of the business of the company.[45] Similarly, the criminal liability shall also be incurred by the Government officials when any offence under the Act is committed by any Government Department.[46]

The Supreme Court in State of ***Karnataka v. Pratap Chand***[47] laid down that "where the partnership firm was charged for offences under Section 18(a) (ii) and (e) the partner of the firm who was in overall control of the day to day business of the firm would alone be liable to be convicted and the partner who was not in such control could not be proceeded with merely because he had the right to participate in the business of the firm under the terms of the partnership deed." Also in ***G.L. Gupta v. D.N. Mehta,***[48] the Supreme Court explained that "a person 'in charge' must mean that the person should be in overall control of the day to day business of the company or firm."

In view of these decisions of the Supreme Court, it was held in ***M.N.A. Arumugha Perumal v. State,***[49] the initial burden lies on the complainant- Drug Inspector to show that the accused were in overall control of the business, and in the absence of the same they cannot be prosecuted. Only then the burden shifts on the accused to establish that the offence was committed without their knowledge and they had exercised all due care and diligence."

CURRENT SCENARIO OF IMPLEMENTATION OF THE ACT

The World Health Organization (WHO) in a recent study titled 'Public Health and Socioeconomic Impact of Substandard and Falsified Medical Products' released a report and

44. *Id.; ss. 13, 27- 30.*
45. *Id.; s. 34.*
46. *Id.; s. 34A.*
47. AIR 1981 SC 872.
48. AIR 1971 SC 28.
49. 1984 LW (Crl.) 271.

concluded that approximately 10.5% of medicines in low and middle income countries including India are sub-standard and falsified. The WHO findings are in conjunction with a recent study done by National Institute of Biologicals (NIB), Noida, commissioned by Union Ministry of Health and Family Welfare. The Ministry had drawn around 47,954 samples from 2014 to 2016 and found that around 10% of the drugs in the government supply chain were not of standard quality.[50]

Also specific batches of 60 drugs failed quality tests in sample-based screening in India. The Central Drugs Standard Control Organization declared some of the most common medicines such as *Combiflam* and *D-Cold* consumed in India were as sub-standard.[51]

The Central and the State Governments and other administrative authorities are actively taking steps and making contributions from time to time in order to effectively implement the provisions of the Act. In a recent decision, the Government of India has prohibited manufacture, sale and distribution of 344 Fixed Dose Combination (FDC) drugs, including well known brands like *Corex Cough Syrup, Vicks Action 500 extra* and several anti-diabetes medications, that are likely to involve risk to human beings when safer alternatives to the said drugs were available through Gazette notification to this effect on 10 March 2016.[52] An expert committee expressed that these drugs were found to have no therapeutic justification.[53] But later on The Delhi High Court in the case of ***Pfizer Limited and Anr. v. Union of India and Anr***.[54] quashed the ban by maintaining that the said decision was taken in a haphazard manner. The court observed that the said power of the Central Government under section 26A i.e. power to prohibit manufacture of drugs and cosmetics in public interest of the Drugs and Cosmetics Act, 1940 cannot be exercised in public interest except when a drug poses a risk to consumers.[55]

Lately, the Supreme Court of India again in the case of Union of India and Anr. v. Pfizer Limited and Anr.[56] set aside the above stated order of the Delhi High Court and said that the requisite

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50. Available at: http://www.livemint.com/Industry/6i5W6D4n07yGwmZDV2JalN/India-among-countrieswhere-10-of-drugs-are-substandard-WH.html (visited on December 5, 2017).
51. "60 Drugs marked 'Substandard' in quality test", The Economic Times, Apr. 26, 2017.
52. Gazette of India, Ministry of Health and Family Welfare, Notification no. SO 705(E) to 1048(E), Pt. II, s. 3(ii) dated March 10, 2016.
53. "Manufacture and Sale of 344 FDC Drugs banned", The Hindu, Mar. 15, 2016.
54. W.P. (C) No.2212 of 2016 decided on December 1, 2016.
available at: https://indiankanoon.org/doc/16479147/ (visited on September 5, 2017).
55. "HC quashes ban on 344 Fixed Dose Combination Medicines", The Hindu, Dec. 1, 2016.
56. Civil Appeal No. 22972 of 2017, decided on December 15, 2017.
available at : http://supremecourt.gov.in/supremecourt/2017/3271/3271_2017_Judgement_15-Dec-2017.pdf (visited on December 16, 2017).

procedure prescribed in the Drugs and Cosmetics Act, 1940 was not followed and ordered re-examination of 344 Fixed Dose Combination (FDC) drugs by the Drugs Technical Advisory Board (DTAB). The Court further observed that the DTAB or its sub-committee appointed for this purpose would hear the drug manufacturers and also the submissions from NGO All India Drugs Action Network and must also apply its own mind as to whether it is expedient, in the larger public interest, to regulate, restrict or prohibit the manufacture, sale or distribution of such FDCs.[57]

In another major development, the Central Drug Standard Control Organization (CDSCO) has notified to all the State Drug Controllers, on the basis of notification issued by the Central Government, regarding strict regulatory control over manufacture, sale and distribution of Oxytocin[58] and to curb its misuse. The Government of India, Ministry of Health and Family Welfare, issued a notification under Section 26A of the Drugs and Cosmetics Act, 1940 restricting the manufacture and sale of Oxytocin and directed that the manufacturers of bulk Oxytocin drug shall supply the active pharmaceutical drug only to the manufacturers licensed under the Drugs and Cosmetics Rules, 1945 for manufacture of formulations of the said drug.[59]

In the case of ***Narang Medical Store v. Union of India and Others***,[60] the petitioner, a wholesaler chemist and druggist, challenged the validity of the above stated notification dated January 17, 2014, issued under Section 26-A of the Drugs and Cosmetics Act, 1940. The Punjab and Haryana High Court dismissed the petition by maintain that the manufacture and sale of the 'Oxytocin drug' in clandestine way in large quantities and its misuse by the farmers or dairy owners is a matter of great concern. It is no doubt true that the Government is empowered to prohibit any drug which is likely to involve any risk to human-beings and that any drug does not have a therapeutic value claimed or purported to be claimed for it or contains the ingredients and in such quantity, as there is no therapeutic justification and that in public interest, it is necessary or expedient to do so.

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57. "SC for relook into 344 Drugs by Advisory Board", The Tribune Dec. 16, 2017.
58. Synthetic Oxytocin is being widely administered in obstetric practice for induction of labour, control of bleeding following delivery, and for the stimulation of milk letdown reflex in human and cattle as well. available at: http://www.bwcindia.org/Web/Awareness/LearnAbout/ Oxytocin.html (visited on 7 December 2017).
59. Gazette of India, Ministry of Health and Family Welfare, Notification no. G.S.R. 29(E), Pt. II, s. 3(i) dated January 17, 2014.
60. CWP No. 7135 of 2014, decided on January 1, 2016. available at: https://indiankanoon.org/doc/112201562/?type=print (visited on September 5, 2017).

CONCLUSION

The Drugs and Cosmetics Act, 1940 was passed with the main object to prevent sub-standards in drugs, presumably for maintaining high standards of medicinal treatment. Successive amendments were incorporated and numerous modifications were made in the Act from time to time to widen its scope, conception and purpose such as, providing enhanced penalties for heinous crimes, prescribing qualification and experience for the enforcing authorities, updating standards of drugs as well as amending Schedules depending upon change in techniques, research and various other parameters. The Act as on today is the result of pains taken by numerous persons either collective or individually.

The Drugs and Cosmetics have been in force from the past 77 years but the level of enforcement in many states has been far from satisfactory. The non uniformity in the interpretation of the provisions of laws and their implementation at the varying levels of competence of regulatory officials are the main reasons for this less than satisfactory performance.

It is submitted that appropriate amendments should be made in the Act as well as in the Rules to plug loopholes in the statutory mechanism and more effective enforcement machinery should be brought in place to properly implement all provisions of this branch of law to achieve the desired results.

IMPACT OF MEDIA: PAWNED DEMOCRATIC PSYCHOLOGY

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INTRODUCTION

'Media' is the plural derivation of the Latin word 'medius' or medium. Thus, media is a channel of expression; 'expression' of information, knowledge, opinions, ideas, thoughts, emotions, entertainment, enlightenment, awareness and above all the 'society'. Media is an agency of the society, by the society and for the society. And since, media is a mirror image of our society, (although a little blurred one); it has the peculiar characteristic of catering to the needs of the changing times. However nowadays, media 'changes' because it symbolises a constantly evolving society or; that the society 'changes' because it is impacted by a constantly evolving media; this is a little difficult to comprehend. But what comes out to be irrefutable is the indispensably unique relationship of interdependence that our society and the modern media shares, and cherishes.

Formulating an inclusive definition, or even a list of media and its instrumentalities is a herculean task, as media through its various means is so inseparably intertwined in our daily lives, that every medium of information, knowledge, entertainment and even communication comes under the umbrella of media. *From broadcasting media* like television, radio, blogs, podcasts; to print media like newspapers, magazines, periodicals and books; to *interactive and entertaining media* like internet, mobile, films, video games; to *outdoor media* like billboards, placards, blimps and pamphlets; to *communicative media* in the likes of letters, faxes, emails; to social media and so on; our everyday lives are saturated with media.

Dwelling into the multi-faceted impact of media on a democratic set-up, "Impact of Media - Pawned 'Democratic Psychology'" seeks to trace out the influence of Media on an individualistic psychology at the micro level; thereby impacting the social, economic and political fabric of a democracy at the macro level. Media is subsequently yet substantially occupying an irreplaceable position in the institution of democracy, playing a critically pivotal

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role in the effective execution of the democratic and constitutional framework. Comprehending the psychological effects of media on a society and its constituents, with the aid of various Media-Effects theories as propagated by media laws, and Sociological Theories of Communication;[1] the paper ponders upon the intertwined outcome of this psychological impact when placed in a developed democracy. Touching upon the changing horizons of media's impact, this review study looks down upon the reformative and strengthening role of media in its long-drawn idealistic partnership with democracy and; at the same time critically scrutinises the flawed performance of media as the fourth pillar of democracy in disseminating tainted and biased information, manipulating the naïve and fickle-minded masses under the controlling impression of political bigots and business conglomerates. The paper concludes by bringing out a well-sought equipoise between the under-acknowledged merits and overhyped demerits of media and suggesting some reforms in the decrepit status quo of media institutions in their interplay with the democratic institutions of the country.

TRENDING IN INDIA: MEDIA'S IMPACT

Studies expressing opinions about possibly significant effects of media are often seen in bad eyes for challenging individual respect and rationality; as if their pro-effects approach presupposes the public to be a credulous mass, cultural dopes and naïve beings lacking a sense of rational judgement and vulnerably prone to the ideological and sociological effects of media; and as if they propose media as the only factor behind the range of societal behaviours. However, such a stereotyped perspective leads to an equally stereotyped approach towards media and its impacts. Researches and articles often indicate the past seventy years of progress as alternating between two extremes – first was the phase of powerful and undeniable effects of media on society, then came the arguments proposing null effects and then bouncing back to strong effects etc. – a history whose paradox seems even clear when we review the old research through a cleaner new lens.[2]

As per the Internet World Stats of June 2017, there are 3.49 billion people around the world who are regular internet users. With around 8.5 billion people inhabiting the Earth, it

1. James E. Katz, Of Mutual Interest, 28(2) JC 133-141 (1978); James E. Katz, On Conceptualising Media Effects 1 SComS 119-141 (1980).
2. Hakim Khalid Mehraj & Akhtar Neyaz Bhat, "et.al.", Impacts of Media on Society: A Sociological Perspective 3(6) IJHSSI 56-64 (2014).

comes out that 41% of the total population of the world is interconnected by means of World Wide Web. And amongst these large numbers, despite it's unexplored potential, India has emerged as the second largest online market of the world having 462.12 million internet users and increasing.[3] Impressed by this expanding online market and it's phenomenal rate of growth, which is highest in the world; India has become the hottest investment destination of investors around the world, and owners and directors of topmost companies of the world like Naspers, McKinsey, and Apple have resolved to expand their investment base in India during the Global Business Submit, 2018 held in India.

Statistics provide that the number of internet users in India in the year 2017 touched 331.77 million. These findings are projected to scale upto 511.89 million internet users over the period of next five years, i.e. till 2022.The majority of this figure pertains to mobile phone internet users, especially those who have taken full advantage of the recent wave of cheap internet and cellular services in India, as compared to their former alternatives which were expensive and required updated infrastructure. 320.57 million of Indians were mobile phone internet users, as of 2016; which is forecasted to grow upto 492.68 million by 2022.[4]

Considering the time we spend immersed in the various means of media, especially the internet, and in the light of the variety of functions that internet serves in today's life; imagining a life without internet seems impossible. In a research by Ipsos, which surveyed 18,180 people across 23 countries of the world on the indispensability of internet; India had topped the charts with 82% of respondent Indians saying that they can't live without internet.[5] However, as these figures speak, this aid is on the verge of becoming a necessity, or say an addiction in India.

MEDIA EFFECTS & SOCIOLOGICAL THEORIES

In socio-media studies, there has always been a continuous tussle going on about the degree of impact of media on people. This impact is not just limited to the power that the media exercises on the audiences, who all are knowingly or unknowingly exposed to its influence; but also extends to the role of media within the broader economic, social, cultural and political

3. International Telecommunication Union, Internet World Stats (by as of June 2017), INTERNET WORLD STATS, (Feb. 13, 2018, 11:05 p.m.) http://www.internetworldstats.com.
4. Statista, Survey by Statista DMO in India over 2015-2017, STATISTA, (Feb. 16, 2018, 10:45 p.m.), https://www.statista.com/statistics/255146/number-of-internet-users-in-india.
5. Ipsos, Where people can't live without the internet'- Online poll of adults (Sept 09 – Nov 10, 2016), STATISTA, (Feb. 19,2018, 10:30 p.m.) https://www.statista.com/chart/10878/where-people-cant-live-without-the-internet/.

power structures of our society. Instead of limiting oneself to examine the power of media in general terms, the paper reviews the various positions in terms of their empirical claims; thereby inferring the social impact of media on democratic psychology.[6]

Over the years, there are various formulations and theories in which the social scientists and psychologists have tried to project their stands on the possible imprint that the media and its various forms can leave on the psychological mindset of people. Though, when viewed in isolation these theories may not necessarily present an all-encompassing picture of media effects and illuminate a particular aspect only, however when all these theories are considered unanimously, they address every possible effect that the media may have on the 'democratic psychology'. The relatively significant media-effect theories and sociological theories of communication which are relevant and can help in understanding the impact of media on the democratic fabrics of India have been discussed hereunder.

1. Direct Effects Theory

This theory propounded by Hanson in 2009 conceptualises that media comes out as the most dominant social force affecting an individual and can outweigh other stabilizing cultural influences, like family and community. It assumes that people passively absorb media content and exhibit predictable reactions in response to this exposure.[7] However, in 1940 *People's Choice Study* outrightly criticised this theory discrediting the direct effect's model and influencing a number of other theories as well. The study attempted to determine the effect of political campaigns on voter's choice, and it was found that people who were greatly exposed to media had already decided which candidate to vote, while the undecided ones get influenced by the opinions and decisions of their family and friends.[8]

The 2018 film 'Padman' which addressed the issue of lack of menstrual health in India, stirred quite a response amongst the females from illiterate and downtrodden strata of the society who came out of the orthodox and restrictive influences of their communities and spoke openly about this issue and also started using sanitary napkins. In line with this social impact, awareness

6. PANKAJ SETHI, MEDIA POWER: POLITICS AND PUBLIC INTEREST 61-69 (1st edn, Navyug Books International, Delhi, 2011).
7. JOSEPH B. MCFADDEN, UNDERSTANDING MEDIA AND CULTURE: AN INTRODUCTION TO MASS COMMUNICATION 61-72 (2010 edn., University of Minnesota Libraries Publishing, Minneapolis, 2016).
8. RALPH E. HANSON, MASS COMMUNICATION: LIVING IN A MEDIA WORLD 80-81 (CQ Press, Washington, DC, 2009).

about this neglected issue arose, and many raised their voice against the high tax imposed on sanitary napkins under the Goods and Services tax regime, forcing the government to look into the issue. Thus, media inspires people to come out of their social or cultural compulsions and spreads awareness about the issues that dared not be discussed.

2. Agenda Setting Theory

The agenda setting theory of media provides that rather than determining public opinion, media determines the matters that concern people. People discuss, criticise and are bothered about only those issues which are brought into light by the media. Consequently, media has the power to determine the issues and topics that the people would care about. And when media fails to discuss the matter, it remains unnoticed or neglected by the people[9] (Hanson).[10] This theory also provides that if media covers a particular story extensively and frequently, people start thinking of it as important, no matter how insignificant it would be. For example, social media trend of eye-winking made Priya Prakash Varrier, a debutant supporting actor in South Indian Cinema, an overnight international sensation.

Critics claiming particular media outlets and news houses of endorsing some specific agenda is a manifestation of this theory only. Agendas can range from news media having political allegiance with a party, to propagating a particular ideological stand to films promoting commercialism.[11] For example, advertisements, media relations campaigns and media outlets promoting an anti-smoking stand, like endorsements attached at the starting of a film, ad films informing about the ill effects of smoking on health and pack of cigarettes featuring warning about smoking being injurious to health have led to widespread awareness amongst the people about the impact of smoking on health and have also helped in the execution of complete ban on smoking in public places, with a significant reduction in smoking addiction amongst common masses. Thus, by bringing anti-smoking trance into public arena, media has helped in transforming smoking from a personal health issue into a public health danger.[12]

Media scholars working upon this theory study the prominence of an issue in the media coverage and then try to understand what makes this issue relatively important. The comparative

9. MCFADDEN, supra note 7 at 64-72.
10. *Supra note 8 at 92.*
11. HAKIM KHALID MEHRAJ & AKHTAR NEYAZ BHAT, supra note 2.
12. JAMES W. DEARING & EVERETT M. ROGERS DEARING, AGENDA-SETTING (4th edn., Thousand Oaks, CA: Sage, 1996).

salience of an issue determines whether it would be a part of the public agenda and thereby whether it would make it to public policy creation. This media effect theory traces out the roots of a public policy as an agenda promoted by the media before being converted into a law. For example, the intensive coverage of the 16th December Delhi Rape Case by both national and international media raised hue and cry amongst the public and led to numerous protests. This stirred response from the government and the law makers and, thus in 2015, Criminal Law Amendment Bill reducing the age of juvenile from 18 to 16 years in case of heinous crimes was passed.

3. Uses and Gratifications Theory

This theory conceptualised by Papacharissi in 2009[13]; focuses upon the ways people consume media. It assumes that consumers use media to satisfy their specific individualistic goals or needs and these needs would determine the impact that the media would have over people. Media is used by people for a number of reasons like entertainment, knowledge, communication, or to express themselves. All these uses gratify a particular need, and this need would in turn gauge the effect that media would have over a person's psychology. By studying the factors influencing the media choices of different groups, the impetus behind using of media by diverse groups can be determined.

A proper study under this theory would attempt to dwell upon the motives of people behind media consumption and the effects which are associated with those motives. For example, people use Facebook for a number of identified motives like interacting with friends, entertainment, remaining socially aware and informed, as a means of self-expression or show-off, and a host of other intrapersonal and interpersonal needs. This theory propagates that by trying to comprehend the motives or needs that a particular medium gratifies, we can understand the factors behind the popularity of a particular form of media as well as the role which that form plays in society.[14]

Applying the uses and gratification theory on the popularity of 'Whatsapp', there are a plethora of uses and needs that this app gratifies like free messaging, voice calling, video calling,

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13. ZIZI PAPACHARISSI "USES AND GRATIFICATIONS", AN INTEGRATED APPROACH TO COMMUNICATION THEORY AND RESEARCH, (Don Stacks and Michael Salwen (eds.), Routledge, New York, 2009).
14. *Ibid.*

greater social linking by syncing with phone contacts, story updates, self-expression through status and profile pictures, group discussions through easy group formations and the like. And since it satisfies the communication, interaction and entertainment motives of people to a great extent, thereby it plays an irreplaceable role in social media and has impacted social interaction amongst all age groups to a large extent.

4. Symbolic Interactionism

This theory propounded by Jansson-Boyd in 2010[15] ,highlights the important role that media plays in creating and propagating shared social symbols. It helps researchers to understand the ways in which media formulate and affects the society's shared symbols using its immense power and thereafter influencing the impact that these symbols cause on a person's psychology. By retracting a point again and again and through its manipulative representation, media makes people think of a particular thing as being symbolic of something.

The glaring example of this theory is how some luxury brands are being seen as status symbols. Anyone holding a latest I-phone in his hand is perceived to a rich and pompous fellow, irrespective of his other credentials. And this approach has been promulgated by media to this extend that every rich person is supposed to own the latest I-phone in order to prove his financial and social status, irrespective of whether he needs it or not, or whether the phone is even worth the exuberant price charged for it.

5. Spiral of Silence

Elucidating the role of mass media in forming and propagating dominant public opinions, the theory states that those who hold the minority opinion often refrain from expressing their view under the fear of being ridiculed, criticised or isolated. And as this minority opinion is silenced, the illusion of the majority opinion being the consensus of the entire public grows, thereby further pressurizing the minority class to accede into the dominant view.[16] Thus, this results in a self-endorsing loop in which the right of freedom of speech and expression of the weaker side reduces to null and the so called popular public opinion subsides completely with the majority view, with the minority having no say in public policy formulation. This adverse media strategy of propagating the dominant opinion as the popular opinion has long led to neglect of the minority's interests.[17] However, this has surely changed in the recent

15. CATHRINE V. JANSSON-BOYD, CONSUMER PSYCHOLOGY, 59-62 (McGraw-Hill, New York, 2010).
16. DOLF ZILLMANN AND JENNINGS BRYANT (eds.) PERSPECTIVES ON MEDIA EFFECTS (Lawrence Erlbaum Associates, Hillsdale, N.J., 1986).
17. GUY CUMBERBATCH & DENNIS HOWITT (eds.), A MEASURE OF UNCERTAINTY: THE EFFECTS OF THE MASS MEDIA (John Libbey & Company Ltd., London, 1989).

times, with a number of media houses having diverse ideological alignments focusing and projecting different versions of the story. And because of this wider and diversified viewer choice, although the majority opinions still retain the stronghold, the minority opinion doesn't go altogether unnoticed.

This theory captures the negative impact of media on the democratic decision-making process as the media by propagating the majority opinion as popular opinion doesn't present a true public opinion. For example, polls conducted by news channels during elections like opinion polls, entrance polls and exit polls are usually tainted by their political allegiance and hence they present a distorted public opinion. This false popular opinion affects the decision of those who have decided to vote against the popular opinion thereby influencing their opinion and somewhere forcing them to rethink their candidate choice; hence jeopardising the process of fair elections.

6. Media Logic

This is a relatively new and an understated concept in the realm of today's media spectrum; which states that the people see a thing as it is projected by the media. Altheide and Snow[18] , the propounders of this theory felt that the media concepts and formats become a lens through which the people see and perceive the world. And this media logic impacts the psychology of both the individuals as well as the institutions.

For example, newsroom discussions as being presented in the form of heated debates, have led the people into believing the aggressive and uncivilised debates as the popular and hence justified method of resolving dis-agreements, thereby sending a wrong message into the social psychology and worsening matters rather than solving them.

7. Cultivation Analysis

The cultivation analysis is the most recent and the most relevant media-effect theory in today's times. Propounded by George Gerbner in 1967, this theory provides that heavy exposure to media leads people to have an illusory perception of reality because of the pervasive and repetitive media messages.[19] Believing the media to be a mirror image of the society, the people are led into perceiving the media reality as the prevalent reality. A long persistent exposure to media leads to cultivation of common beliefs amongst the people, who unknowingly absorb the

18. DAVID ALTHEIDE AND ROBERT SNOW, MEDIA WORLDS IN THE POST JOURNALISM ERA 9–11 (Walter de Gruyter, New York, 1991).
19. Hermann Bausinger, Media, Technology and Daily Life 6 Media, Culture and Society: SAGE J. 343-351 (1984).

dominant thought process or opinion being conveyed.

The most accepted result of this theory is increase in violent and aggressive nature amongst small children and teenagers when exposed to violent media content like television shows and shooting video games[20]. Similarly, the pompous and lavish lifestyle of characters being portrayed in television and reality shows (which show the least reality) leads to an infestation of dissatisfaction amongst the people, especially the younger lot who resort to crimes to fund and afford such lifestyle. But at the same time, this impact can also be good when audiences expose themselves to informative, education or inspirational programs. Hence, regulation of Media viewership has a great role to play in this theory and thus, on the requisite effect that media may have on an individual; and hence society.

8. Social Learning Theory

This is a widely accepted concept in Mass Communication Studies, which brings light upon the significant but subtle role of media as educator and teachers. Leaving the educational and informative media like newspapers, news channels and knowledge channels aside, the study supports that every form of media teaches the listeners, viewers and readers something about the society even when it is for purely entertainment purpose[21] . The theory stresses upon how people can learn from observation alone and thereby, passively absorb the content to which they are exposed. For example, even a television reality show, which is meant purely for entertainment purpose show a glimpse of the way of living and the social opinion that a particular group of people, thereby broadening the audiences' perspective and thought process.

9. Play Theory

This theory of mass-communication propounded by William Stephenson, criticises the harmful effects of mass media by arguing that the primary function of media is providing 'play experiences' or serve entertainment purposes. All forms of media render some entertaining experiences, including newspaper which is read for pleasure, rather information and awareness.[22] It portrays media exposure as a relaxing buffer against all the constraints which are anxiety-inducing or stress-producing.

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20. DENIS MCQUAIL, MASS COMMUNICATION THEORY: AN INTRODUCTION (Sage Publishers Ltd., London, 1987).
21. Albert Bandura, Dorothea Ross & Sheila A. Ross, Vicarious Reinforcement and Imitative Learning 67(6) JASP 601-607 (1963).
22. HAKIM KHALID MEHRAJ & AKHTAR NEYAZ BHAT, *supra note 2*

THE LEGAL LIMITATIONS

The freedom to speak and express oneself is a fundamental right, as guaranteed under Article 19(1)(a) of the Constitution of India. Included within this fundamental freedom is the 'freedom of press', upheld by the Supreme Court in its innumerable decisions.[23] Any attack on the freedom of press amounts to a direct attack on the delicate fabric of a democracy. The media is the vital instrument for making the government accountable to its people. However, this freedom is not absolute and certain reasonable restrictions as enumerated under Article 19(2), in the larger interest of the nation and the public.

Included in the term media, is the new technology-based media which has become the driving engine for providing and propagating information especially amongst the youth. This medium of media is now being exploited by all and sundry for dispersal of information without any considerable control and regulation over the content. Social media has in fact become a storm in a teacup, in today's world of technology. To provide for its regulation, the Information Technology Act, 2000 was enacted to impose certain boundaries on the misuse of social media and to counter its challenges. This statute holds the social networking sites liable for omissions and acts violating the Indian laws. Section 66A of the Information Technology Act, 2000 provides for punishment for sending offensive or misleading messages through the use of any electronic or other communication services.[24] However, section 66A of the IT Act, 2000 was struck down by the Supreme Court in ***Shreya Singhal v. Union of India***[25] as being constitutionally invalid. It was held to be conspicuously vague and too wide and therefore being beyond and hence violative of the restrictions imposed by Article 19(2) on the freedom of speech.

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23. Indian Express Newspapers (P) Ltd. v. Union of India, AIR 1986 SC 515.
Information Technology Act, 2000, Section 66A. Punishment for sending offensive messages through communication service, etc.
24. Any person who sends, by means of a computer resource or a communication device-
(a) any information that is grossly offensive or has menacing character; or
(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device.
(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.
25. AIR 2015 SC 1523.

Despite section 66A, IT Act, 2000 being held invalid, the victim of misuse of social media is not left without a remedy. He can take recourse to better defined laws as mentioned in the Indian Penal Code, viz. voyeurism (section 354C); promoting enmity between different groups on grounds of religion, race etc. (section 153A); sedition (section 124A); intentionally insulting religion or religious beliefs (section 295A); defamation (section 499); statements amounting to public mischief (section 505); insulting the modesty of a woman (section 509); criminal intimidation (section 506) etc. These provisions of law cover a wide ambit under which legitimate restrictions are imposed on the freedom of expression, including media. However, social media still requires adequate guidelines.

Keeping in view the global access and reach that social media has, stringent and adequate measures for regulating social media is the need of the day. The Punjab and Haryana High Court went ahead even to say that *"collecting men on social media is akin to collecting weapons for waging war against the government"*[26] , and therefore unregulated social medium can have draconian effects for the unity and integrity of our country and detrimental in promoting social peace and order.

However, the other side of the coin can't be ignored; i.e. lack of properly framed laws gives state the discretion to prosecute people, especially youngsters under grave charges of sedition and waging war against the state, with punishment extending to life imprisonment and death penalty; on a mere pretext of any criticising message or text, bordering on instigation. Here also, the Supreme Court has come to the rescue with its judgement in ***Aseem Trivedi's***[27] case , where it has provided guidelines to curb the arbitrary and whimsical use of grave offences like sedition by the government, and has tried to create a balance between the freedom of expression and national integrity.

Various governmental authorities have tried to regulate and control the misuse of social media. For instance, candidates contesting elections are required to provide a detail of the social media accounts through an affidavit to the Election Commission of India. Every registered political party or a candidate is required to get a pre-certification from the Election Commission before issuing any kind of advertisements in the newspapers, television or electronic media.[28] However, there are still certain ambiguities present in the democratic processes and the legal

26. Arvinder Singh @ Ghoga v. State of Punjab, CRM-M No. 43622 of 2017.
27. Sanskar Marathe vs. State of Maharashtra, 2015 SCC OnLine Bom 587.
28. Election Commission of India, Model Code of Conduct for the Guidance of Political Parties and Candidates, (Oct 2, 2018, 1:00 p.m.) https://eci.nic.in/eci_main/faq/faq_mcc.pdf.

regulation of social media. For example, it is yet not clear if the Model Code of Conduct for elections is also applicable to online content.

Social media is the new ubiquitous platform of communication. However, as demonstrated, it is not adequately subject to legal regulation and control. Consequently, there is rampant misuse of this aspect of freedom of expression.

A CRITICAL APPRAISAL

Gone are the days when candidates and their campaign workers relied primarily on public rallies, road shows and knocking on the door to talk to people. These practices are being replaced by broadcast speeches and appeals on radios and televisions or newsroom interviews and debates; and even when such practices take place today they are merely staged by the politicians for the benefit of the media[29]. This development no doubt highlights the role of media in mass-dissemination of political agendas and manifestos as well as in making the general public aware about the political ideology and allegiance of a particular candidate. But at the same time, the interpersonal touch between the people and their representative whom they vote for stands lost. This pretentious show by politicians to woo the naïve and gullible voters does not has the same effect as the genuine effort which a candidate makes while coming amongst the people, listening to their grievances and assuring them of their redressal. Similarly, the newsroom debates and interviews are also usually pre-planned and staged to make impact in favour of a particular party.

Television has become an 'electronic hearth' around which the entire family gathers during meal times and spends some 'together-time' from their busy schedules. However, this 'together-time' is devoid of any personal interaction and is usually spent staring at the screen of the idiot box.[30] Had not been for some shared liking of reality show or cricket match, the families no longer bother to sit together; but this unifying force of media is also the divisive factor which has replaced quality family time with 'Prime Time News' and cherished meals with 'Koffee with Karan'. Similarly, where social media has replaced friends' hangouts and chit-chats, at the same

29. DAVID CROTEAU & WILLIAM HOYNES, MEDIA/SOCIETY: INDUSTRIES, IMAGES AND AUDIENCES (5th edn., Sage International, U.S.A, 2014).
30. SONIA LIVINGSTONE - "The Meaning of Domestic Technologies: A Personal Construct Analysis of Familial Gender Relations (1992)", CONSUMING TECHNOLOGIES: MEDIA AND INFORMATION IN DOMESTIC SPACES, (Eric Hirsch and Roger Silverstone (eds.) Routledge, London,1st edn., 2003).

time people from all age groups are bonding with their childhood friends spread across the world over 'Facebook' and 'Whatsapp'.

Hence, every influence that media exercises over people has a dual aspect. One which reaffirms its irreplaceable role in society and the other which brings out how this 'mean development' is rotting our social ties and the quality of democratic living.[31] This perennial effect that media has envisaged over the human society is difficult to comprehend as a clear boon or bane, as a beneficiary asset or a destructive and burdensome liability for a democracy, especially when this point of contention lies in India featuring as the largest democracy of the world. Our national democratic grasp and its infiltration till the grass-root level would never have been in its majestic demeanour had not been for the innumerable contributions of the Indian Media, but what can't be agreed upon more is how this 'influence' is misusing the entire state machinery and social functionaries for achieving a propaganda beneficial to and advertised by the few elite groups and political conglomerates of the society but thanks to the humongous psychological influence and democratic power of media which present these selective wimps as 'Will of the Masses'.

As can be inferred from the various media effects theories discussed earlier, the impact of media on an individualistic psychology is extensive and multi-faceted which regulates his social behaviour and thought process, thus determining the democratic decision making at the micro level and macro policy formation at the national level. On one hand, the functions and roles that media plays in a democracy cannot be undermined while on the other hand, the monopolistic exploitation that it is doing with the people's perspective and opinions can't be ignored. A tasty poison or a bitter medicine?..... Media seems to be both and none at the same time.

CONCLUSION

Media is the expression of the society and the voice of the democracy. Without its voice, the democratic institutions would be nothing but mute spectators. Media monitoring is the disinfectant that ensures cleanliness and transparency in the activities of the government. The

31. WILLIAM J. MCGUIRE - "The Myth of Massive Media Impact: Savagings and Salvagings" PUBLIC COMMUNICATION AND BEHAVIOUR 175-257 (1st edn., Academic Press) (1986).

voice of the people is as integral for the democratic setup as it is for the holistic growth and development of our nation and society. Hence, it has to be well preserved and strengthened so that it can take the problems of the common public to those in power. Consequently, it falls upon this fourth pillar of democracy to provide such a platform to its people.

Inspite of all its demerits and negative influences, if this pillar of democracy is struck down, the entire splendid structure of democracy would come crashing down and cause destruction. Still the 'cracks' of prejudiced ideological and political allegiances within this 'media pillar' cannot be ignored as these are not only dwindling the support that this pillar is giving to the democratic structure but is also bringing the strength of this great institution into question. It is this aspect which needs urgent attention and improvement.

For this, laws barring media tycoons and bigots from contesting elections or having political allegiance must be formed and implemented at the earliest. At the same time strict action should be taken to curb commercially driven activities and money minting campaigns undertaken by media houses. Media lobbying is also emerging as a grave threat affecting the efficiency and functioning of media and democratic institutions, and firm steps need to be taken in this direction as well. Strict laws must be made for discouraging the practice of media trials, which has become rampant these days and is affecting the judicial competence and independence. The new world of people is driven and influenced to a great extent by the impact of social media. It is this arm of media which requires control and regulation as unbridled and unrestrained, it can cause havoc in a democracy. Clearly, the legal control is lacking with respect to imposing reasonable restrictions on this medium of expression. This inadequacy needs rectification at the earliest.

Media must be made to realise the huge responsibility that rests on its shoulders as a propagator of democracy and as the voice of the people. For this, self-regulatory institutions can be formed within the media circles which prescribe certain ethics and imposing standards to be followed by the media groups in their course of business. The interplay between media and democratic institutions must be promoted to the maximum possible so that effective use of the media institutions and infrastructure can be made in the democratic machinery.

Hence, the gist of the entire discussion lies in striking a balance between media's illustrious merits bolstering the democratic progress of the nation; and its abysmal demerits

deterring the world's largest democracy from occupying the global position that it is capable of. Amongst its undermined benefits and overhyped flaws, media emerges as an enigma to the soul of democracy, a panacea to all the evils plaguing it and a catalyst in its growth.

ADULTERY – OFFENCE TURNED INTO AN ACT: A MILESTONE FROM ORIGINAL INTENT TO LIVING INTENT

Shikha Dhiman*

INTRODUCTION

The status of women in Indian current scenario was not as same as in the initial years of framing of Indian Penal Code. The provisions in Indian Penal Code with reference to offences against women were made keeping in mind the conditions of women prevailing at that time. However, it cannot be denied that women have always been the victim of one or the other offences in society. One such offence is 'adultery'. The offence has been expressly provided under Section 497 of Indian Penal Code. Adultery is an offence which is done by a third male person (adulterer) against the wife (adulteress) of another man and in which only the adulterer can be made liable. To simplify, adultery means an act of committing sexual intercourse with someone else's wife without the consent of her husband. This leads to an infringement of the rights of a husband towards his wife and hence, the law of the country regards it as an offence. The intent of the law makers was to inflict punishment on those who intrude with the sacred relation of marriage, the reason being that adultery is an anti-social as well as illegal act, no peace loving citizen or person of good morals would bare anyone to be indulged in his life[1] . It is pertinent to note that the provision of 'adultery' under the penal legislation has been a matter of biggest controversy since its inception. The main drafter of Indian Penal Code, Sir Lord Macaulay, was not at all in favour of inserting Section 497 in the Code and even the original first draft of Indian Penal Code has no mention about it and remained silent. According to him, such inclusion will unnecessary and unwarranted and shall be left to the society to take care for. He further observed, "there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of women"[2] . The basic objective of keeping adultery out of the penal provisions was the social norms which has already provided the values and norms which take care of such instances. Hence, Macaulay advised that it would be enough to treat it as a civil wrong. Therefore, the framers of the Code did

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1. Hatim Khan v. State, AIR 1963 J&K 56.
2. K.D. GAUR, THE INDIAN PENAL CODE 732 (Universal Law Publishing Co. Pvt. Ltd., 2011).

not include adultery as a criminal offence; it was only added after the recommendation of Second Law Commission Report [3]. The members of Second Law Commission agitated that it would not be proper to leave adultery out of the purview of penal code and suggested that only the man should be punished under this offence. This was opined on the argument that the condition of the women of this country is, unhappily, very different from that of the women in England and France[4] . They further stated :[5]

"We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain, operation of education and of time. But while it exists, while it continues to produce its never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of penal law".

Since then adultery has been declared as a criminal offence and also a civil wrong by making it one of the grounds of divorce.

SECTION 497: ORIGINAL INTENT

The offence of adultery as stated under Indian Penal Code was scanned by judiciary number of times and was declared to be constitutionally valid every time. Adultery was considered as an offence from the date when it was inserted in the penal statute. The idea of declaring adultery as constitutionally valid was to protect the original intent of the framers of the Constitution.

It was first time in the year 1951 when ***Yusuf Abdul Aziz***[6] judgment came out wherein the constitutional validity of Section 497 was challenged. The constitutional validity was challenged by Yusuf Aziz (who was charged with an offence of adultery) on a point that Section 497 is ultra-vires of Article 14 and 15 of the Constitution of India. He argued that an offence operates unequally by discriminating on the basis of sex which cannot be said to be a reasonable classification under Article 14. The Bombay High Court held that Section 497 is constitutionally valid because it was drafted in penal law by keeping in mind the social conditions and societal

3. Law Commission of India, 2nd Report on Law relating to Marriage and Divorce amongst Christians in India (March, 1960) p.63.
4. *Ibid.*
5. *Ibid.*
6. Yusuf Abdul Aziz v. State of Bombay and Husseinbhoy Laljee, AIR 1951 Bom. 470.

oppressions against the women. Furthermore, the court added that the alleged classification is justified by the provision of Article 15(3) which permits the State to make 'any special provision for women and children'. Yusuf Aziz then filed an appeal to Supreme Court alleging on the issue that such immunity may allow the adulteress for a willing adulterous activity. The Constitutional Bench was not impressed by appellants' contention and upheld the decision of Bombay High Court by observing that Section 497 is saved by Article 15(3) which cannot make women liable for the offence of adultery. So this is how the Supreme Court preserved the original intent of the Constitution by interpreting Article 15(3) in the light of intention of framers of the Constitution by reading it in consonance with Section 497 of Indian Penal Code.

In another Supreme Court judgment of 1985[7] , the same issue was involved. Sowmithri and Vishnu were the wife and husband and disputes arose between them. She went away from the matrimonial home and started living with the one named, Dharma Ebenezer. Resultantly, she filed a divorce petition before the District Judge on the grounds of desertion. On the other side, the husband filed a criminal case against Dharma Ebenezer for adultery with his wife. However, later the husband appealed to the High Court agitating that the divorce was given on the ground of desertion but it should be given on the ground of adultery. This was so because that if the divorce was given on ground of adultery then Dharma Ebenezer would also be punished. Thereafter, wife appealed to the Supreme Court challenging the validity of Section 497 of Indian Penal Code. She contended that it is gender discrimination and against the spirit of equality given by our Constitution[8]. Furthermore, she added that Section 497 is a flagrant instance of 'legislative despotism' and 'male chauvinism'. She argued that Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman. The Supreme Court after analyzing the entire story concluded that the framers of the Code strongly believe that it is the man to seduce the woman but not woman and if the Section 497 is re-defined the right of action to the third person's wife, several Sections of the Code shall have to be re-structured[9] . It is for this reason that the offence had been placed under the special head i.e. "Offences relating to Marriages". If a married man enters into sexual relations with any unmarried girl or widow, there are several other remedies available to the wife of that husband

7. Sowmithri Vishnu v. Union of India, AIR 1985 SC 1618.
8. Pragati Ghosh, Essay for Law Students on 'Adultery', SHARE YOUR ESSAYS (Oct. 16, 2018, 10:50 PM), www.shareyouressays.com/essays/essay-for-law-students-on-adultery/115789.
9. *Ibid.*

and hence Section 497 does not infringe the provisions of Article 14 and 15 of the Constitution of India. Therefore, in this case also the Supreme Court preserved the original intent of framers of the Code as well as the original intent of framers of the Constitution.

It was in the case of V. Revathi v. Union of India[10] wherein the Supreme Court aspired to guard the matrimonial tie between the couple. The court further stated that under the provisions of Section 497 of Indian Penal Code neither the husband of adulterous can prosecute her for an offence of adultery nor the wife of adulterer can prosecute him for an offence of adultery. Therefore, both husband and wife are safeguarded under criminal law to strike a weapon against each other. It is once again wherein Supreme Court reiterated and saved the original intent of the Indian Penal Code as well as of the Constitution of India thereby maintaining a balance between Section 497 and Article 14 and 15.

SECTION 497: LIVING INTENT

Enlightening upon the original intent of the framers, it is crystal clear that judiciary has, as of now, always supporting the concept of 'originalism' and 'intentionalism' with regard to the provisions of Penal Code as well as Constitution of India. Section 497 of Indian Penal Code has always been a controversial provision. With the intent with which it was inserted in the penal statute has never been fulfilled. The courts have tried to interpret the provisions of Section 497 along with the provision of Article 14 and 21 of the Constitution of India. The interpretation of the constitutional provisions is done in a way to construe them in a more remodelled manner. The Constitution of India supports the 'living constitutionalists' theory of interpretation thereby interpreting the Constitution in the context of varying needs of society. It is for this reason that why Constitution of India is known as a 'Living Document'. This 'living constitutionalist' theory implies that the provisions of Constitution are not be interpreted in a way as it was interpreted at the time when it was inserted by framers of the Constitution. The intent of Constitution makers is to be protected but however, because it is such a document which is made by the people, so it needs to be interpreted accordingly whenever any change comes within the people. In order to maintain a living jurisprudence between Section 497 and Article 14 as well as 21, the former has been given different interpretations with the changing time and circumstances

10. AIR 1988 SC 835.

of the society. Whenever Section 497 has been interpreted variedly, it has impacted on Article 14 and 21 of the Constitution of India in a different manner. Because of the varying needs of the society, it is always better to interpret the constitutional provisions in the light of current status. This is so because the Constitution is made by the people and it is the people in society who affect the working of the Constitution. So the other legislative provisions are to be understood and interpreted in the light of living Constitution of India. The same happened with Section 497 of the Indian Penal Code. Earlier it was interpreted in the light of Article 14 and 21 of Constitution according to the circumstances prevailing in the society at that time. Now with the changing dimensions, its requirement has been questioned. It is crystal clear that an offence of adultery was in the wake of Article 14 and 21 of Constitution since couple of years back. Joseph Shine, an Italy based Indian businessman and non resident Keralite filed a writ petition under Article 32 of the Constitution. The petition was filed to challenge the constitutionality of Section 497 read with Section 198(2) of Code of Criminal Procedure. Section 497 defines adultery thereby making the person (adulterer) liable and Section 198(2) of Code of Criminal Procedure empowers the husband of adulteress to file a complaint for an offence of adultery. The court while reviewing this petition revised three landmark precedents in this regard, namely: ***Yusuf Abdul Aziz***[11] **case,** ***Sowmithri***[12] **case,** ***V. Revathi***[13] **case.** This petition[14] was initially heard by a bench of three judges headed by Chief Justice of India. But however, later the matter was referred to five judge constitutional bench wherein it was noted [15]:

"Prima facie, on a perusal of Section 497 of IPC, we find that it grants relief to the wife by treating her as a victim. It is also worthy to note that when an offence is committed by both of them, one is liable for the criminal offence, but the other is absolved. Ordinarily, the criminal law proceeds on gender neutrality, but in this provision, as we perceive, the said concept is absent".

Thereafter an affidavit was filed by the Centre on 11th July 2018 agitating on the point that decriminalizing adultery will affect the institution of marriage. Resultantly, five judge bench started hearing the matter from 1st October 2018. While the facts were put up from both

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11. Yusuf Abdul Aziz v. State of Bombay and Husseinbhoy Laljee, AIR 1951 Bom. 470.
12. Sowmithri Vishnu v. Union of India, AIR 1985 SC 1618.
13. V. Revathi v. Union of India, AIR 1988 SC 835.
14. Joseph Shine v. Union of India, 31(2018) 7 SCC 192.
15. Decriminalisation of Adultery, THE SUPREME COURT OBSERVER (Oct. 11, 2018, 12:34 PM), www.scobserver.clpr.org.in/court-case/constitutionality-of-adultery-law.

sides, the court framed three main legal issues. Firstly, whether exemption granted to married woman under Section 497 violates the right to equality under the Constitution?; secondly, whether Section 497 should be made gender neutral by including women as offenders? and whether Section 497 is an excessive penal provision which needs to be determined?. The Centre on the other side argued that the petition is filed with an intent to treat men and women equally and not with an intent to scrap down the law. The law should remain valid with required amendments as it preserves the sanctity of marriage. Dealing with these law points, the court consisting of five judges (Chief Justice Dipak Misra, Justice Khanwilkar, Justice DY Chandrachud, Justice Indu Malhotra and Justice RF Nariman) unanimously observed that adultery can no longer be treated as an offence and adultery law itself is arbitrary. The bench further added, "any provision treating women with inequality is not constitutional and it's time to say that husband is not the master of woman. Adultery will remain a ground for divorce. Section 497 is unconstitutional as it is violative of Article 14 and 21 of the Constitution of India". Chief Justice Dipak Misra said that a man having extra marital relationship with a married woman is no longer a criminal offence. Justice Khanwilkar stated that adultery law is arbitrary, creates dent on individuality of women but there can be no shadow of doubt that it can be ground for divorce. Justice DY Chandrachud opined that women could not be treated as commodity by leaving them to the discretion of their husbands in giving consent in matters of adultery. Justice Indu Malhotra cited that Section 497 institutionalizes discrimination and State cannot interfere by punishing man alone. Justice RF Nariman observed that man being the seducer and a woman being the victim no longer exists.

It can be articulated from the recent judgment of the Hon'ble Supreme Court of India that for the purpose of keeping the provisions of the Constitution living and dynamic with changing demands of society, it has overruled its own decision with respect to Section 497. Article 14 and 21 of the Constitution has been interpreted in the light of current scenario and hence, the offence of adultery has been converted into a mere social act.

GLOBAL PERSPECTIVE

The law on adultery varies from country to country and is not uniform. It differs according to the religious norms, attitude of the people and many other factors. Key highlights of the law of adultery in different nations are given below:

1. United States of America – There are three different formulations of adultery that exist in state laws of United States. Firstly, according to the common law view, adultery takes place only when the woman is married and both husband and wife are held liable. Secondly, according to the canon law (i.e. laws of a church), adultery is the voluntary sexual intercourse of married person with a person other than the offender's husband or wife and only the married person is held liable. Thirdly, according to the hybrid rule, if either spouse commits sexual intercourse with a third party, both transgressors are guilty of adultery[16]. This view is commonly followed in nearly twenty stated of United States. Furthermore, there are eight states which makes both adulterer as well as adulteress liable on a condition if women is married, but if she is single then only the man is guilty. However, six states in America does not criminalize adultery at all.
2. Germany – If a marriage is dissolved as a result of adultery, the guilty spouse as well as the guilty partner shall be punished with an imprisonment for a term of not less than six months, but prosecution has to be initiated by the aggrieved spouse by means of a petition[17].
3. Philippines – This country provides for an entirely different legislation with respect to adultery. It is catholic dominated Christian country. The law prescribes punishment for a married women and not the adulterer who commits an offence of adultery.
4. South Korea – Adultery was a criminal offence till 2015. However, in 2015 South Korean's Constitutional Court over turned the law of the country on adultery and decriminalised it. This was done so because the judges opined that adultery is a private matter of the spouse and the state have right to intervene in it.
5. Malaysia and Singapore – Malaysia, which is Muslim dominant nation does not makes adultery as an offence under its penal legislation. This may be

16. K.D. Gaur, supra note 2, at 735.
17. *Ibid.*

because of Singapore influence where also adultery is not criminalised.

6. Saudi Arabia, Pakistan and Iran – These are the countries where adultery is punished severely even upto death sentence. In Pakistan, it is considered as a heinous crime and both man and woman are subject to punishment which may extend to death sentence[18] . Such a severe sentence for adultery in Pakistan was introduced by *Huddod Ordinance* (Islamic Penal Law) in 1980.

Most of the western countries have decriminalized adultery. It is no more considered as an offence in most countries of the European Union, including Austria, Netherlands, Belgium, Finland, Sweden, and even Britain from where we have borrowed most of our laws. Moreover in China as well, adultery is not a crime but just a ground for divorce.

LAW COMMISSION REPORTS

In the 42nd Report of Law Commission of India, two major aspects were highlighted with respect to the offence of adultery. Firstly, whether adultery should be made punishable as an offence? and secondly, if yes- then whether it is restricted to men alone?. Thereafter, considering these two questions detailed conversations took place and the Commission finally suggested to revise the provision under the Penal Code. The Commission was of the view that the offence should be penalised for both men and women thereby making it gender neutral. It recommended for a revised provision of Section 497 which was as follows:

"If a man has sexual intercourse with a woman who is, and whom he knows or has reason to believe to be the wife of another man, without consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, the man and woman are guilty of offence of adultery and shall be punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both".

The Report (1971)[19] , with some hesitation, recommended retention of adultery provision as in its view, the time was not yet ripe to repeal it but it did recommend making the law gender neutral and reduction of punishment of imprisonment from five years to two years. Furthermore in 156th Report[20] , the Commission inclined towards favouring the initiative of legislators in remodelling adultery provision, but however, it preferred to retain the punishment

18. *Ibid.*
19. Law Commission of India, 42nd Report on The Indian Penal Code (June, 1971) p.79.
20. Law Commission of India, 156th Report on The Indian Penal Code, Vol. II (August, 1997) p. 146.

upto five years instead of two years. Apart from these Law Commission Reports, few other reports intended to modify Section 497 of Indian Penal Code. The Justice Malimath Committee in 2003 too strongly favoured preservation of matrimonial sanctity and thus justified retention of gender neutral adultery law[21] . In 2006 also, the National Commission for Women recommended for decriminalising adultery.

It could, however, be proclaimed that various Commissions and Committees have their own perceptions with regard to the offence of adultery. Few wanted to make it gender neutral, whilst others wanted to decriminalise it. None of the Commissions or Committees favoured the existence of offence as prevalent in the legislation.

RECOMMENDATIONS AND SUGGESTIONS

The Supreme Court of India has given a very vibrant and earth-shaking judgment on 27.09.2018 thereby striking down Section 497 of Indian Penal Code. After this decision, there has been too many deliberations supporting and agitating the decision of Supreme Court. Few are in favour of the decision, but many are against the decision. It is believed by many that looking at the present circumstances prevailing in the society, the judges should have better amended the law and not removed the law itself. No doubt, the law has been struck down by giving various justifications but however, the same is not acceptable by majority. The law was struck down on the ground that it is not gender neutral. Analysing Section 497 of Indian Penal Code in consonance with Section 198 of Code of Criminal Procedure, it can be said that the law provides only the husband of adulteress with the right to prosecute the adulterer, which prima facie seems to be gender biased. However there are few of the suggestions in this regard which could have made the offence as gender neutral. They are stated as follows:

1. In one of the Supreme Court's verdict it was mentioned that women cannot be held guilty because it is the man who is the seducer and not the women. But it should be borne in mind that we are living in a society where women, nowadays, are more inclined towards criminal act and actually seduces the man to commit adultery. So the provision for punishing the adulteress should have been added. By doing so, it could have also made the offence as gender neutral.

21. Faizan Mustafa, Not a criminal act, THE HINDU, January 11, 2018, at P4.

2. Just like the husband of adulteress has the right to file a suit against the adulterer, similarly rights should also have been given to wife of adulterer to file a suit against adulteress.
3. The law should have amended the word 'wife of another man' and added the word 'wife of another man, unmarried woman, divorced woman and widow'. This would have increased the ambit of the term 'woman' thereby prosecuting the man who commits adultery with any woman. This would however, make an offence gender neutral as it makes no sense by classifying married, unmarried, widow or divorced woman.
4. There should be no such concept like 'consent'. Women are not the tools of men to be used as and when required. She is not an instrument to be used at the consent her husband. On bare reading of the law, it could be inferred that adultery would not be an offence if the same is done by a man with another woman by taking the consent of her husband. The provision itself was gender discriminating by giving upper hand to the husband for using his wife, which is legally and ethically wrong.

Therefore, it can be articulated that this concept of adultery had been against the fundamental principle of sexual equality. The provision tends to give rise to plentiful of questions, the solutions to which remains unanswered and controversial.

EPILOGUE

The present judgment[22] cannot be said to be a justified and good decision on part of judiciary, for the reason, that it transformed a criminal offence into an act. This act is only left as a ground for divorce and hence just a civil wrong. Viewing the decision of Supreme Court, it could be enunciated that the opinion of Lord Macaulay of 1850's – 1860's has been restored. This is so because Lord Macaulay, at initial stage, never wanted this act to be made as an offence. the second Law Commission headed by John Romilly did not agree with Macaulay but spared women from punishment for adultery due to their deplorable condition. But on the other side, the decision is criticised that the offence should have made gender neutral instead of decriminalising it. Even in the Malimath Committee Report it was declared that, "there is no

22. Joseph Shine v. Union of India, 31(2018) 7 SCC 192.

good reason for not meeting out similar treatment to a wife who has sexual intercourse with a married man" [23]. This means that the Committee too was in favour of criminalising both men and women instead of decriminalising the offence. 42nd Law Commission Report also suggested the same for criminalising both men and women in this regard and 156th Law Commission Report suggested for decriminalising the same. The judgment of Supreme Court has taken into consideration the situations and circumstances prevailing in the society as well as the opinions of various Commissions and Reports in this regard. This depicts that how with the changing scenario of our country, the law is changing and when the law is changing, it tends to change its interpretation as well. Keeping the 'originalist approach' of adultery in mind, it is crystal clear to understand that it was an offence according to the circumstances existing in the society at that particular time and was always in line with the provisions of Constitution of India. With the change in time and change of conditions in society, law changes. The same happened with adultery. Bearing the 'living approach' of adultery in mind, it is articulated that the offence (as added in 1860) has no relevancy in today's scenario. Because the aura of women has been entirely changed in society, the offence cannot make only man punishable and hence it is said to be violative of Article 14 and 15 of the Constitution of India. Therefore, in order to meet the dire needs of country, the court was left with two options; either to make it gender neutral or to decriminalise it. Following the latter option, the Supreme Court gave its verdict in September 2018 by decriminalising adultery and just making it as a ground for divorce. The Court opined that the marriage is a civil contract and hence adultery should have only civil consequences and not any criminal impact. Therefore, it implies that the offence (as was prevailing in the statute) was not justified in any of its sense and hence either needs to be altered or deleted.

23. Himanshi Dhawan, Why India is still not adult about adultery, TIMES OF INDIA (Jan. 21, 2018, 06:15 PM), www.google.co.in/amp/s/m.timesofindia.com/home/sunday-times/why-india-is-still-not-sdult-aout-adultery/amp_articleshow/57 349750.cms.

THE PLIGHT OF MENTALLY ILL UNDER-TRIAL PRISONERS: AN UNTOLD MISERY

Dr. Shipra Gupta*

INTRODUCTION

The judicial systems all over the world have developed legal imprisonment both as punitive as well as a corrective method. Imprisonment entails curtailment of various freedoms and liberties; and is thus looked down upon in the civilised societies for being associated with confinement. Nonetheless imprisonment serves a significant purpose as a 'legal process' in the administration of criminal justice. The criminal justice system is however, marred with two very crucial problems, firstly, inexplicable delay in the disposal of cases and secondly, unreasonable detention of the accused pending trial. Detention of the accused pending trial takes place in two situations- where the person is detained because he is alleged to have committed a non-bailable offence; or where the accused is unable to produce sufficient sureties in case of bailable offence. Such prisoners are referred as the 'under-trial prisoners'[1] (UTPs) who have been detained in the prison pending trial or investigation. Basically, an arrest for an alleged offence followed by non grant of bail leads to such detention. In the majority of cases, undertrials remain in judicial remand more than half of the term of imprisonment for the criminal charges for which they have been remanded to jails.[2] According to the latest Prison Statistics prepared by the National Crime Records Bureau (NCRB), 5203 inmates out of 4,19, 623 (i.e., 1.2% of total such inmates) lodged in various jails at the end of 2015 are suffering from mental illness. Out of them 52.7% (2744) have been convicted and 46.4% (2415) are under-trials.[3] This figure highlights the plight of mentally ill UTPs because ignoring the mental illness of the prisoner/UTP diverts the focus from 'treatment' to 'punishment' due to the mechanical working of the entire system, where the prisoner is treated only as a prisoner and not the one in need of treatment. Due to the pathetic

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1. Under trial prisoner has been defined as a person who has been committed to judicial custody pending investigation or trial by a competent authority. See Prison Statistics India 2015, National Crime Records Bureau Ministry of Home Affairs, available at http://ncrb.nic.in/StatPublications/PSI/Prison2015/Full/PSI-2015-%2018-11-2016.pdf accessed on 7.11.17.
2. Implementation of the Recommendations of All-India Committee on Jail Reform (1980-83), Vol. I, Prepared by Bureau of Police Research & Development Ministry of home affairs New Delhi, 2003.
3. Available at http://ncrb.nic.in/StatPublications/PSI/Prison2015/Full/PSI-2015-%2018-11-2016.pdf accessed on 7.11.17.

state of prisons the UTPs remain in pitiable condition, and are even deprived of the basic amenities for a decent survival. The mentally ill UTPs are at the receiving end, and suffer doubly due to their mental state coupled with lack of proper medical care that they need most, the structural and social prison conditions and impersonal technical procedures.

MENTALLY ILL PRISONERS AND THE LEGAL FRAMEWORK

The standards of treatment with the prisoners in jails have been clearly enunciated in the Constitution of India, the Universal Declaration of Human Rights (UDHR) and the Standard Minimum Rules for the Treatment of Prisoners.[4] These Standard Minimum Rules require detection and treatment of mental illness/disorder in specialised institutions which may hamper a prisoner's rehabilitation.[5] Therefore, an incarcerated person should not be deprived of the right to life provided under Article 21 of the Constitution of India that encompasses within itself right to health; both physical and mental.

A project of World Health Organisation has regarded prisons as wrong place for people in need of mental health treatment since the criminal justice system emphasizes deterrence and punishment rather than treatment and care. It suggested introduction of legislation which allows for the transfer of prisoners to general hospital psychiatric facilities at all stages of the criminal proceedings (arrest, prosecution, trial, imprisonment). It further suggested to introduce a mechanism to divert people with mental disorders who have been charged with committing minor offences, towards mental health services before they reach prison so that those in need receive treatment. This will also help in reducing the prison population.[6]

Position under the Code of Criminal Procedure, 1973

As per the fundamental principles of criminal law a person cannot be convicted until his guilt is proved on the successful completion of trial. However, if a person is not competent to

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4. Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, available at https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf accessed on 24.10.17.
5. See Rule 62 &82, Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955.
6. The WHO MIND Project: Mental Improvement for National Development, Department of Mental Health & Substance Abuse, WHO Geneva, Mental Health Legislation & Human Rights, Denied Citizens: Including the Excluded at 3.

stand trial, till he resumes sanity, trial has to be suspended.[7] Sadly, if he never resumes sanity or his condition keeps deteriorating, there is no provision for the release of such a person in the Criminal Procedure Code. That is the position in law which emerges from the provisions of Sections 328 to 339 of the Code of Criminal Procedure, 1973. There is no provision in the code which permits abatement of trial if a person becomes insane during the pendency of the trial. Therefore, as per these provisions, trial is to be kept in abeyance. However, if this state of affairs continues, the accused shall have to remain in judicial custody till his death; without trial and without charges having been established against him.

This pushes many lives into oblivion due to the mechanical and callous attitude of the concerned officials, who rather than taking appropriate measures for providing health care to such UTPs, just keep on taking these cases as routine matters who are eventually exposed to sheer neglect.[8] Lack of coordination between government, judiciary and prison authorities add hay to fire. Such UTPs either keep lying uncared for in the psychiatric ward of the jails or chained in the prisons.

Position under the Mental Healthcare Act, 2017

The Mental Healthcare Act, 2017[9] , has replaced the Mental Health Act, 1987 and has come into force[10] from 29th May 2018. Taking forward the concerns of the 'mentally ill prisoners'[11], this Act specifically provides for the 'transfer' of prisoner suffering from mental illness from the place of his detention to a suitable mental health establishment or to the psychiatric ward in the medical wing of the prison depending upon the availability, for care and treatment.[12] In order to fix the accountability of the medical officer of a prison, he is required to certify that there are no prisoners with mental illness in the prison or jail and send a quarterly

7. Sections 329 read with Section 331, the Code of Criminal Procedure, 1973.
8. Such circumstances have been highlighted in various cases dealt with by the courts resulting in unreasonably prolonged detention in the prison. See infra .
9. This Act received the assent of the President on 7th of April 2017 and came into force in January 2018.
10. GOI, Ministry of Health and Family Welfare Notification , S.O. 2173(E).
11. The Mental Healthcare Act, 2017, Section 2 (w)- "prisoner with mental illness" means a person with mental illness who is an under-trial or convicted of an offence and detained in a jail or prison.
12. *Ibid.,* Section 103 (1). Such an order may be given under section 30 of the Prisoners Act, 1900 or under section 144 of the Air Force Act, 1950, or under section 145 of the Army Act, 1950, or under section 143 or section 144 of the Navy Act, 1957, or under section 330 or section 335 of the Code of Criminal Procedure, 1973. Such an order directing the reception of a mentally ill prisoner into any mental health establishment shall be sufficient authority for the admission of such person in such establishment). Section 29, Mental Health Act, 1987 is the corresponding provision.

report to the Board. In case a mentally ill prisoner is found in the prison, the medical officer would be answerable to the Board.[13] It is mandatory for the medical officer in-charge of a mental health establishment to make a special report, once in every six months, regarding the mental and physical condition of the person with mental illness to the authority under whose order such person is detained.[14] Such establishment shall be registered with the Central or State Mental Health Authority and shall conform to such standards and procedures as may be prescribed.[15]

HUMAN RIGHTS VIOLATIONS OF THE MENTALLY ILL PRISONERS- ROLE OF JUDICIARY

Mentally ill prisoners account for an insignificant percentage of the population, whose concerns are largely ignored and forgotten, not only by the outside world but also by the ones who are inside the prison.[16] The vulnerability owing to the nature of their illness and passive social attitudes expose them to human rights violations. However, such unfortunate incidents have drawn the attention of the judiciary as well as the Human Rights Commission warranting positive action for their better life.

Judicial Initiatives

In ***Veena Sethi v. State of Bihar,***[17] a public interest litigation was filed in the Hon'ble Supreme Court seeking action against illegal detention of sixteen mentally ill prisoners in the Jail who had been detained for more than two decades without any justification. This case highlighted the plight of unfortunate prisoners, who had been deprived of two inalienable rights of a human, i.e., freedom and liberty. Directions were issued to the jail superintendent to have such patients examined by some psychiatric specialist once every six months and submit half yearly reports about their mental condition[18] and the state government was directed to have an adequate number of institutions for looking after the mentally sick. The Court did not approve of the practice of sending the lunatics or persons of unsound mind to the jail for safe custody noting it to be an unhealthy practice. [19]

13. *Ibid.,Section 103 (4).*
14. *Ibid., Section 103 (5).*
15. *Ibid., Section 103 (7).*
16. Mentally ill prisoners constituted 0.1% of the total prison population for the year ending in 2000, Prison Statistics 2000 at 21.
17. (1982)2 SCC 583.
18. *Id. at 586.*
19. *Id. at 585.*

Another case of judicial intervention has been a public interest litigation filed in 1989 by Sheela Barse, a social activist that challenged the unconstitutional practice of locking up 'non-criminal mentally ill persons in jails in West Bengal. In ***Sheela Barse v. Union of India***[20] the fact of 'excessive deprivation of liberty' in case of mentally ill prisoners was highlighted.[21] The Hon'ble Supreme Court appointed a commission[22] to evaluate the situation in the prisons. It was observed that a mentally ill person is sent to jail for 'security' considerations- that is for securing the society from the dangerous person and safety of inmates from each other. Hence, they are only managed as dangerous individuals and not as sick persons resulting in excessive deprivation of liberty is several ways.[23] The Court noted with concern an important issue from the perspective of human rights that is the issue of "fitness to stand trial". The trial against an accused, who is found to be suffering from mental illness "at the time of trial", remains in suspension and can only be resumed when he becomes mentally fit to stand trial.

However, there is no clear provision in the laws relating to mentally ill with regard to further proceedings in case he never resumes normalcy, is chronically ill, or has become treatment resistant, thus never likely to be fit to stand trial.

On an anxious consideration of the matter, the Hon'ble Court declared the admission of non-criminal mentally ill persons to jails as illegal and unconstitutional and issued directions to stop admitting such persons to jails, with immediate effect. Judicial Magistrate was further directed to get the mentally ill person examined by a Mental Health Professional/Psychiatrist on being produced before him, and send quarterly report to the High Court stating in detail the action taken thereon.

20(1993) 4 SCC 204.

21. *Id. at 207*.

22. As to the concept of Non-criminal Lunatics, the report submitted by the Commission appointed by the Court to evaluate the situation defined as under:
"The mentally ill housed in jails are referred to as 'Non-criminal Lunatics'. This term is meant to include persons who are sent to jail for medical observation to determine the state of mind of the individual (Section 16, Indian Lunacy Act, 1912 hereinafter ILA) and persons who are to be kept in a place of safe custody pending removal to a mental hospital (Section 23, ILA). The procedure of medical observation is either required for wandering and dangerous mentally ill (Section 13, ILA) or for mentally ill persons who are cruelly treated and not under proper care and custody (Section 15, ILA). Apart from these statutory categories any mentally ill person who is admitted in jail and is not a criminal lunatic is in prison terminology referred to as 'Non-criminal lunatic'."

23. Sheela Barse v. Union of India, (1993) 4 SCC 204 at 209.

Further directions were issued to take steps for:

1. Immediate upgradation of mental hospitals.
2. Making provision of psychiatric services in all teaching and district hospitals and also filling up the posts of psychiatrists therein.
3. Integrating mental health care with the primary health care system.[24]

Such a state of affairs brings out a collusive nexus between the judiciary, the police and the administration, resulting in the negation of the very basis of the existence of human life to these prisoners.

Another startling case was of a UTP, Machang Lalung, who languished in the mental institute as UTP for fifty-four years. He was detained at the age of twenty-three but he could secure his release only after the intervention of the Hon'ble Supreme Court of India, at the age of seventy-seven. His ordeal continued even after he was declared fit by the hospital in 1967, as he still remained in a psychiatric hospital for a period of thirty-eight years after that, suffering solely due to the nonchalance of those who were responsible for his release.[25] Such like incidents result in gross violation of human rights and should be addressed on an urgent basis. It has been reported that in a number of cases mentally ill persons needing medical care and rehabilitation, instead of being sent to rehabilitation centres, have been admitted to forensic wards in various mental hospitals and wards inside prisons. In reality, they continue to remain in 'detention'[26].
Keeping in view the large number of mentally ill under-trial prisoners in various psychiatric hospitals/nursing homes, the Hon'ble Court in ***Machang Lalung's case***[27] issued general directions to avoid such mentally ill persons languishing in psychiatric hospitals for long periods as follows:

1. Medical report to be submitted with the concerned Court/Magistrate periodically. In case of delay in the receipt of such reports, the

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24. *Id. at 211-12.*
25. Re: News Item "38 yrs. In Jail Without Trial published in Hindustan Times dated 6.2.2006" v. Union of India, Writ Petition (CRL.) NO(s). 296 of 2005 available at http://courtnic.nic.in/supremecourt/temp/wr%2029605p.txt accessed on 20.5.15. in this case one Machal Lalung had been languishing in the mental institute in Tejpur, Assam for 54 years. This Court noted with concern the fact of a number of prisoners languishing in the prisons and passed an order on 24.10.2007 and issued directions to see that the trial of these undertrial prisoners be expedited or to see whether they could be released from the jails or from mental hospital as per law.
26. Aruna M & Sam Paul A, Shakled and lost, justice eludes mentally-ill undertrials, The New Indian Express, Saturday, February 6, 2016 ENS – KOZHIKODE Published: 18th October 2013 08:43 AM Last Updated: 18th October 2013 08:43 AM available at http://www.newindianexpress.com/states/kerala/Shackled-and-lost-justice-eludes-mentally-ill-undertrials/2013/10/18/article1841422.ece accessed on 7.2.16.
27. *Supra note 24.*

Court/Magistrate shall call for such reports and pass appropriate orders wherever necessary.

2. If the UTP remains in jail beyond the maximum period of imprisonment prescribed for the offence he is charged with, except for those offences which are punishable with life imprisonment or death, the Magistrate/Court shall treat the case as closed and report the matter to the medical officer in charge of the psychiatric hospital, to enable such medical officer to consider his discharge as per law. In case such UTPs have completed five or more years as inpatients, they may be considered for release in accordance with sub-section (1) of Section 330[28] of Cr.P.C.
3. Periodical examination of the UTPs charged with grave offences (punishable with life imprisonment or death); the reports of same to be sent to the court as to whether the undertrial prisoner is fit enough to face the trial to defend the charge.
4. With respect to pending cases the Sessions Courts should also seek periodic reports from such hospitals and every three months such cases shall be given a hearing at least once. The trial of such cases shall be commenced by the Sessions Judge as soon as it is found that such mentally ill person has resumed fitness to face trial.

The Supreme Court has intervened in jail administration on number of occasions whenever constitutional rights or statutory prescriptions have been found to be transgressed to the injury of a prisoner.[29] There is an urgent need to interpret the constitutional rights of the prisoners in such a manner that maintains balance between the larger public interest and the prisoners' rights, while maintaining soft and considerate attitude towards prisoners. It needs to

28. The Code of Criminal Procedure, 1973. Section 330(1). Release of person of unsound mind pending investigation or trial.---(1) Whenever a person is found under Section 328 or Section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case maybe shall, whether the case is one in which bail may be taken or not, order release of such person on bail:
Provided that the accused is suffering from unsoundness of mind or mental retardation which does not mandate in-patient treatment and a friend or relative undertakes to obtain regular out-patient psychiatric treatment from the nearest medical facility and to prevent from doing injury to himself or to any other person.
29. See eg, Charles Shobhraj v. Supdt. Central Jail, Tihar, (1978) 4 SCC 104; Sunil Batra (I) v. Delhi Administration, (1978) 4 SCC 494; Sunil Batra (II) v. Delhi Administration, (1980) 3 SCC 488; Prem Shankar Shukla v.Delhi Administration, (1980) 3 SCC 526; Kadra Pahadiya v. State of Bihar, (1981) 3 SCC 671; Veena Sethi v. State of Bihar, (1982) 2 SCC 583; Sheela Barse v. Union of India, (1993) 4 SCC 204.

be ensured that the prisoner should not be subjected to more injury than is necessary. [30] Neglect of health has been identified as one of the major problems in the prisons.

Another case of such atrocious human rights violations in the history of jails in Kerala was highlighted where eighty eight mentally challenged under-trial prisons were found to be languishing in prisons in the State for very long periods - spanning up to four decades - without being given a chance for a fair trial.[32] A recent case of continued detention of an under trial prisoner for twenty years, that came before the Delhi High Court, was found to be mentally unstable; his physical and mental condition prevented him to defend himself in the trial pending against him as he was seventy years of age, mentally ill, but non violent besides suffering from multiple problems such as schizophrenia, senile dementia, renal failure and carcinoma of the urinary bladder. The Hon'ble High Court, took into consideration his overall medical condition and decided to terminate the proceedings because due to the exceptional situation that had arisen in the case the trial had not even begun and there was no chance of his resuming normalcy and thus no chance of initiation of trial in future.[32]

In another positive development, the Hon'ble Supreme Court concerned with expediting the process of releasing the prisoners/convicts in deserving cases as per the provisions of law has issued some positive directions in ***Re: Inhuman Condition in 1382 Prisons*** [33]. The Court noted that sixty-seven per cent of the prisoners in the jails were under-trials. The Court impressed upon the need for effective implementation of Section 436 and Section 436A[34] of the Code of Criminal Procedure so that under trial prisoners are released at the earliest and those who cannot furnish bail bonds due to their poverty are not subjected to incarceration only for that reason. [35] In order to ensure the constitutional mandate of speedy

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30. Rama Murthy v. State of Karnataka , (1997) 2 SCC 642 at 648.
31. Dhinesh Kallungal, "Official Apathy Gives Mentally Ill Prisoners in State a Raw Deal", 30th January 2016 05:27 AM (Last Updated: 30th January 2016 05:27 AM) available at The New Indian Express, February 6, 2016, available at http://www.newindianexpress.com/cities/kochi/Official-Apathy-Gives-Mentally-Ill-Prisoners-in-State-a-Raw-Deal/2016/01/30/article3251965.ece accessed on 6.2.16.
accessed on 7.2.16.
32. See Charanji Singh v. State, 4 March 2005(DB) Delhi High Court available at http://indiankanoon.org/doc/1230647/ accessed on 6.2.16.
33. Re: Inhuman Condition in 1382 Prisons, Writ Petition (Civil) No.406/2013.
34. In the wake of number of instances where the UTPs overstayed their period of detention beyond the maximum period of imprisonment provided for the alleged offence, a new Section 436- A has been inserted in the Criminal Procedure Code to provide that under-trial prisoners could be released on completion of half of the sentence prescribed for their alleged offence for release on his personal bond, with or without sureties.
35. Re: Inhuman Condition in 1382 Prisons, Writ Petition (Civil) No.406/2013.

justice, the Supreme Court in another recent case ***Hussain v. Union of India,***[36] has gone a step ahead requiring the under trial to be released on personal bond in line with the spirit of Section 436A of the Code of Criminal Procedure, if he has completed the period of custody in excess of the sentence likely to be awarded in case conviction is recorded. Such an assessment must be made by the concerned trial courts from time to time.

Recommendations of National Human Rights Commission

The Mulla Committee[37] has noted the fact with concern that mentally ill people not facing any criminal charges have been incarcerated in some places. The Committee recommended the enactment of National Prison Legislation with a provision of right of the prisoner to be released on due date and right to be treated as a human being and a person.[38]

The National Human Rights Commission, concerned with an increasing number of initially sane under trials and convicts becoming mentally ill after being sent to jail, has undertaken necessary exercise by preparing the guidelines to deal with cases of those who are mentally ill and in jail. In view of the Mulla Committee Report and the Supreme Court Judgements[39] in this regard the NHRC has summarised the following recommendations :[40]

1. For prevention and early detection of mental illness, psychological or psychiatric counselling to prisoners should be provided by making collaborations with local psychiatric and medical institutions and also with NGOs.
2. Facilities for preliminary treatment of mental disorder, with visiting psychiatric facilities should be provided in jails and all jails should be formally affiliated to a mental hospital.
3. Mentally ill person should be taken for observation to the nearest psychiatric centre/Primary Health Centre rather than sending/detaining him in the prison, if he is not accused of committing a crime.
4. It should be obligatory on the state to provide adequate medical support to an undertrial or a convict undergoing sentence, if he becomes mentally ill while in prison. This affirmative responsibility of the State to provide medical support

36. Criminal Appeal No. 511 of 2017 (Arising out of Special Leave Petition (Crl.) No. 348 of 2017).
37. *Supra note 2.*
38. *Id. at 47.*
39. Rama Murthy v State of Karnataka, (1997) 2 SCC 642 & Veena Sethi v. State of Bihar, (1982)2 SCC 583.
40. As quoted in Charanji Singh v. State, 4th March 2005 available at http://indiankanoon.org/doc/1230647/ accessed on 6.2.16.

continues until recovery of the undertrial/convict in state assisted hospitals/private hospitals depending upon the availability.

5. Each mentally ill undertrial prisoner should be sent to the nearest prison having the services of a psychiatrist. A psychiatrist attending the mentally ill undertrial prisoner should be sending a periodic report to the Judge/Magistrate through the Superintendent of the prison regarding his condition and his fitness to stand trial. The psychiatrist shall certify the undertrial as 'fit to stand trial' on his recovery from mental illness.
6. All the prisoners with mental illness and also those who are under observation of a psychiatrist should be kept in one barrack.
7. On finding an undertrial to be mentally unsound and unfit to stand trial, the trial court must comply with the procedure under Chapter 25 Cr.P.C. as well as the provision of Mental Health Act 1987[41] , relating to progress report of undertrial; and must ask for periodic progress report of the undertrial.
8. In case of suspension of the trial of a mentally ill person for a period longer than fifty per cent of the possible sentence (subject to a maximum of three years) the matter should be reported to the Registrar of the High Court of Delhi to be put up to the Hon'ble Chief Justice for information and appropriate action. A copy of this report should be sent to the NHRC. Such reports should be made on a six-monthly basis.

CONCLUSION AND SUGGESTIONS

The most crucial problem in this regard appears to be one of 'non identification' of the mentally ill residing in the prisons. There is sufficient provision in law for mandatory periodical reporting of medical status of the prisoner by the medical officer charged with such duty for the purpose of identifying and assessing the mental health/condition of the prisoners. There is provision in Cr.P.C. to provide medical treatment for mental illness to a person undergoing inquiry and to be released on bail in case found to be incapable of entering defence. There is however, no clear provision under the Mental Healthcare Act, 2017 or under the Code of Criminal Procedure, 1973 to deal with situations where there is almost no chance of recovery

41. Now the Mental Health Care Act, 2017.

from the illness.

In majority of cases the mentally ill under trial prisoners belong to the weaker segment, are poor and illiterate; have been shunned by their families, hence there is no one to furnish surety for them. Secondly, they remain invisible, their voices unheard and injustices unheeded because of being cut off from the human world.[42] Thirdly, inadequate medical services further aggravates their plight as they continue to be in such a state, 'not fit to stand trial', thus go on languishing within the four walls for a number of years in violation of their human rights. It may be concluded that non adherence of laws and the directions of the Apex Court in letter and spirit has resulted in the existing state of affairs. Coordination of all concerned with human touch is the need of the hour. The judicial intervention has succeeded in alleviating the misery of mentally ill UTPs to a great extent and it is hoped that these initiatives will go a long way in safeguarding the human rights of such persons.

In regard to the mentally ill under-trial prisoner/prisoners following steps must be taken:

1. Need for detection of mental illness at the earliest possible, so that the mental health status of any prisoner from the time of detention is properly followed up with periodical check-ups and reporting for assessing mental fitness.
2. Accountability of the medical officer in-charge of the prison for not reporting the mental health status to be fixed strictly.
3. For expediting grant of bail as per law in appropriate cases, the jail authority or the concerned mental health authority should promptly move an application in the court for bail for the release of such prisoners.
4. In addition to the specific provisions dealing with mentally ill prisoners, Section 436 A should also be invoked for the release of such UTPs. Such an assessment must be made by the concerned trial courts from time to time in consultation with the medical board, if necessary.
5. Need to amend the laws and insert a provision for the immediate release of mentally ill UTPs after certification by the appropriate medical board to the effect that there is no chance of recovery from illness.
6. Prisons to be mandatorily attached to mental health establishments.

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42. See Sunil Batra (II) v. Delhi Admn., (1980) 3 SCC 488.

THE FARCE OF CABINET FORM OF GOVERNMENT IN DELHI: TIME TO REVISIT ARTICLE 239AA

Mr. Subhaprad Mohanty*
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INTRODUCTION

Democracy originally refers to "power" in the sense of 'capability to do things', which can be referred to as political capacity. It is the collective capacity to do things in the public realm, to make things happen.[1] It presupposes specific form of powers and perceptions of the Authority. However the elected Delhi Government in the NCT of Delhi is sans powers with respect to the affairs which a modern state carries in its day to day administration. The Government of NCT of Delhi has no authority over Police, Public Order and Land which constraints the state's ability to deliver on public services. The three entries, i.e. Police, Public Order and Land therein have been kept outside the purview of the legislature of NCT of Delhi and vests solely with the Central Government which exercises these functions through the Lieutenant-Governor appointed by the Centre by the virtue of Art.239AA of the Constitution of India.[2] *The de facto* authority over these functions are considered sine qua non of a state to effectively discharge its obligation to the electorate, to deliver on public safety, women's safety, housing and so on.

This constitutional conundrum has become a governance stalemate between the Central Government and Government of NCT of Delhi over Art. 239AA resulting in the complete administrative paralysis in the national capital. The Central Government has vehemently defended its stance of Delhi being subservient to the Centre due to its status as a Union Territory, and therefore the power to be exercised by the Central Government through Lt. Governor. On the other hand, the elected Delhi Government has cried foul over the continuance meddling of the Central Government in the administration of Delhi through the appointed Lt. Governor, restricted not only to the three entries, but to the other matters as well which includes *inter alia* transfer, posting, and matters ancillary to these three items.

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1. Josiah Ober, Epistemic democracy in classical Athens: Sophistication, diversity and innovation (Princeton/Stanford Working Papers in Classics, 1.0).
2. INDIA CONST. art. 239AA.

The Constitution of India conceives a Westminster style Cabinet Government in respect to both the Centre and the states.[3] Cabinet Governments are a pivot around which the whole administration revolves. It exercises all the power vested in it and carries on administration of the state in the real sense.[4] However, the National Capital of India is a perfect example of the farce of the cabinet form of Government in Delhi. The legislature and Westminster cabinet form of government has been provided by the Parliament but the real power centre is the Lieutenant Governor, appointed by the Union Government under Art. 239AA, and not the elected Council of Ministers headed by the Chief Ministers.

The NCT of Delhi is not a state in the constitutional sense, nor is it purely a union territory. It has a council of ministers, headed by a chief minister, and an elected legislature, but is also governed by the Parliament and Union Government, which enjoy concurrent powers over all matters in the State and Concurrent lists.[5] It has a peculiar federal architecture.[6] The *sui generis status* of the NCT involves a complicated dance between the Centre, the state and Municipal Corporations.[7]

The Delhi Government knocked on the door of Delhi High Court in 2016 to thwart the continuous interference from the Central Government through Lt. Governor in the NCT of Delhi. The Court further complicated the issue by quashing the status quo of Article 239AA by rendering that the Council of Ministers' advice will not be binding on the Lt. Governor, who may act in his discretion on any matter.[8] The Hon'ble Apex Court has recently maintained the status quo, by providing that Council of Ministers' advice will be binding on the Lt. Governor, except three entries.[9] The Supreme Court's verdict tried to resolve the power struggle between the government of the National Capital Territory of Delhi and the Lieutenant Governor but all it has done is restore the unsatisfactory status quo.

The conflict between the Union Government and the Government of NCT of Delhi over jurisdiction in Delhi has been due to the unworkability of Article 239AA, which has given

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3. INDIAN CONST. art. 164; INDIAN CONST. art. 74, cl. 2.
4. Parliamentry Government cabinet And The Prime-Minister, P.G.G.C.G., http://cms.gcg11.ac.in/attachments/article/259/PARLIAMENTRY%20GOVERNMENT%20CABINET%20AND%20THE%20PRIM.pdf.
5. Alok Prasanna Kumar, Statehood for Delhi: A Legitimate Demand, 53 EPW. 12-13 (2018).
6. Rajshree Chandra, The 'Jung' Between Modi and Kejriwal and the Travails of a Quasi State, THE WIRE, (Aug. 06, 2018), https://thewire.in/law/the-jung-between-modi-and-kejriwal-and-the-travails-of-a-quasi-state.
7. Niranjan Sahoo, Statehood for Delhi: Chasing a Chimera (Observer Research Foundation, Occasional paper, 156).
8. Government of National Capital Territory of India and Ors. v. Union of India and Ors, 2016 (158) D.R.J 29.
9. Government of NCT of Delhi v. Union of India and Ors., 2018(8) S.C A.L.E 72.

sweeping powers to the Lt. Governor to interfere in virtually every matter in the administration of NCT of Delhi. In the author's view, Article 239AA is a badly framed provision precisely because it highlights a constitutional anomaly about Delhi's special status.

HISTORICAL OUTLOOK OF ARTICLE 239AA

Every political activity in the country traces its roots to Delhi. This was true even of the mythological era. The Pandavas of the Mahabharata had their capital at Indraprastha, which is believed to have been geographically located in today's Delhi.[10]

The history of Delhi in British India goes back to 1803 when English army led by Lord Lake captured Delhi and the adjoining area after a hectic campaign, reducing the last Mughal Emperor Shah Alam's status, to merely a English pensioner.[11] Before the shifting of the capital from Calcutta, Delhi was still a very important territory because within it was the seat of power where the king resided.[12]

The capital of the India was shifted from Calcutta to Delhi with the proclamation of King George V on 12th December 1911.[13] On 12th December 1911, Delhi Tehsil and area under the Police Station of Mehrauli was carved out from the Province of Punjab and declared as a separate province with the declaration of Delhi as a capital of India.[14] However for all purposes of legislation, the laws of Punjab were applicable to Delhi as such.[15] The Delhi Laws Act, 1912 was enacted to provide for the administration of the Province of Delhi to be exercised by the Chief Commissioner. Delhi remained under the administration of chief commissioner till 1950 along with British Baluchistan, the Andaman and Nicobar Island, Ajmer-Merwara, Coorg, and Panth Piploda.[16]

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10. DELHI TOURISM, http://www.delhitourism.gov.in/delhitourism/pdf/Book1-complete.pdf (last visited Jul. 21, 2018).
11. John Richardson, The expansion of British India during the second Mahratta war, UNIVERSITY OF CANTERBURY, https://ir.canterbury.ac.nz/bitstream/handle/10092/10027/JohnRichardsonHist480Submission2014.pdf;sequence=1.
12. *Id.*
13. Nayanjot Lahiri, Delhi's Capital Century (1911-2011): Understanding The Transformation Of The City, YALE MACMILLAN CENTER, https://agrarianstudies.macmillan.yale.edu/sites/default/files/files/colloqpapers/20lahiri.pdf
14. Introduction: Administrative Set up, DELHI GOVERNMENT, http://delhi.gov.in/DoIT/DoIT_Planning/ES2012-13/EN/Introduction.pdf (last visited Sep. 03, 2018).
15. *Id.*
16. B SHIVA RAO ET AL., THE FRAMING OF THE INDIAN CONSTITUTION A STUDY (The Indian Institute of Public Administration, 1968).

On 31st July 1946, a Committee chaired by the Congress Stalwart Dr. Pattabhi Sita Ramayya was set-up to study the administrative and legislative reform of the Chief Commissioners' Provinces. October 21, 1947, the committee submitted its report and recommended absorption of Ajmer into Rajasthan, Coorg (present day Kodagu district) into Karnataka but Delhi was left untouched. However the Committee proposed for a co-existing and cooperative administrative set up for Delhi with Lieutenant Governor appointed by President and an elected legislature to administer Delhi.[17] Subsequently on the recommendation of the committee, Delhi was made Part-C state under Article 239 and 240 which was to be functioning through Lieutenant-Governor as Punjab was made a Lt.-Governor's province on the transfer of Delhi to it in 1859.[18]

The Reorganisation Committee, set up by the Home Ministry in December 1953, recommended that Delhi, must remain under the control of the Union Government. Subsequently on the recommendation of the Reorganisation committee, the Council of Ministers and Legislature ceased to exist from November 1, 1956 and Municipal Corporation of Delhi (MCD) was formed as per the recommendation of the Reorganisation Committee with elected members in 1958. Thus Delhi became a Union Territory with the passing of Constitution (Seventh Amendment) Act, 1956.

Voices had been raised in favour of representation of people and democratic set-up in the National Capital ever since the legislature ceased to exist in 1956. Accordingly the Parliament on the recommendation of Balakrishnan Committee progressively amended the Constitution by the Constitution (Sixty-ninth Amendment) Act, 1991 incorporating Article 239AA in the Constitution and the passage of Government of National Capital Territory of Delhi (GNCTD) Act, 1991, providing for Council of Minister and Legislature in Delhi.[19] Thus Delhi became National Capital Territory which was to be administered through Lieutenant Governor.

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17. Assembly Member of The Week : Dr. B. Pattabhi Sitaramayya, CONSTITUENT ASSEMBLY DEBATES, https://cadindia.clpr.org.in/blogs/assembly_member_of_the_week___dr__b__pattabhi_sitaramayya (last visited Jul. 21, 2018).
18. Report' Of The States Reorganisation Commission 1955, MINISTRY OF HOME AFFAIRS,mhttps://mha.gov.in/sites/default/files/State%20Reor ganisation%20Commisison%20Report%20of%201955_270614.pdf.
19. DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA (Lexis Nexis, 8th ed., reprint 2012).

CONSTITUTIONAL DIMENSIONS OF ARTICLE 239AA

Article 239AA has been added by the Constitution (Sixty-ninth Amendment) Act, 1991, to declare that the UT of Delhi shall be called the National Capital Territory of Delhi. It provides for an Assembly with legislative powers. All the powers under the State List *except* with respect to Entries 1, 2 and 18 have been conferred on it.[20] It provides for a council of ministers, with the Chief Minister at the head to aid and advise the Lieutenant Governor except in so far as he is required to act in his discretion.[21] In the case of difference of opinion between the Lieutenant Governor and his Ministers, the matter is to be referred to the President for decision and the decision given thereon by the President shall be binding. However pending the decision of the President, the Lieutenant Governor shall be competent to take action or to give such direction, if in his opinion the matter is so urgent that it is necessary for him to take immediate action.[22] These provisions are supplemented by the Government of National Capital Territory of Delhi Act, 1991.

However the most contentious provision in this regard is Article 239AA (4) over which the State and Central Government have been at loggerheads and each have interpreted it in their own way. It states that:

"there shall be a Council of Ministers in the Legislative Assembly, with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has the power to make laws, except in so far as he is, by or under any law, required to act in his discretion".[23]

The term 'aid and advice' to the Governor is understood in common parlance as a term which signifies the inference of the cabinet form of government, inscribed in the pages of our Constitution. Under the system of cabinet form of government, it is the well-established principle of law that the exercise of the executive function entrusted upon the administrator has to be on the aid and advice of his Council of Ministers which implies that it is the body of the Ministers that should take decisions on such matters. However this is not the case with the Central Government which has been repeatedly asserting its authority over the Government of

20. INDIA CONST. art. 239AA, cl. 3a.
21. INDIA CONST. art. 239AA, cl. 4.
22. *Id.*
23. *Supra note 21.*

NCT of Delhi through Lt. Governor, by including other matters in the sphere of its action even after it having been recently decided by the Apex Court.

JUDICIAL DECISIONS VIS-À-VIS ARTICLE 239AA(4)

Recently, the Hon'ble Supreme Court rendered a decision maintaining the status quo of Article 239AA, thus reverting to its existing framework. On the other the Delhi High Court made decision per *incuriam* disturbing the existing framework of Article 239AA leaving it at the whim & caprice of the Central Government.

1. Delhi High Court's Judicial Adventurism

The Delhi High Court decision in ***Government of NCT v. Union of India,***[24] opened Pandora's box, by giving expansive powers to the Union Government, thus reducing the Chief Minister and Council of Minister to being mere advisors and not an elected executive that is accountable to the legislative assembly. The High Court was dealing with the question of exercise of legislative power and executive control in the administration of NCT of Delhi. It held it incumbent on the Council to communicate the decision to the Lt. Governor on each and every matter, even in relation to the matters in respect of which the legislature has power to make laws.[25] The Delhi Court interpreted Article 239AA and Part IV of the Government of National Capital Territory of Delhi Act, 1991 heavily bending it in the favour of Lt. Governor who shall have final say in every matters whatsoever by narrowing interpretation of Article 239AA(4) and Section 41 and 45 of the GNCTD Act. [26]

Section 41 of the GNCTD Act requires the Lieutenant Governor to act in his discretion in a matter which falls outside the ambit of the powers conferred on the Legislative Assembly.[27] Therefore he cannot meddle in other matters which are within the legislative domain of the state legislature. However, in contrast to the constitutional scheme, the Delhi High Court virtually conferred sweeping powers on the Lt. Governor to interfere in the matters which are very well within the legislative domain of NCT of Delhi.

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24. Government of National Capital Territory of India and Ors. v. Union of India and Ors, 2016 (158) D.R.J 29, Para. 300, Pg. 107.
25. *Id.*
26. Privy Council through Lord Sankey LC in Edwards v. Attorney General for Canada, [1930] A.C 124, 136.
27. § 41 The Government of National Capital Territory of India Act, No. 1 of 1992, Acts of Parliament, 1991 (India).

Nonetheless the Delhi High Court expanded the scope of 'aid and advice' in Article 239AA(4) by implying that Lt. Governor is not bound by the aid and advice of the Council of Minister under Article 239AA(4),[28] diverging significantly from the view taken by the Supreme Court in ***Samsher Singh v. State of Punjab.***[29] The requirement of the Governor to act on the aid and advice of the Council of Ministers is squarely applicable to the NCT of Delhi since Delhi is governed by an elected Government.[30]

2. Setting The Status Quo Right

The Apex Court in the case of ***Government of NCT of Delhi v. Union of India and Ors.***[31] overturned the decision of the High Court wherein, it had held that the Lt. Governor is not bound to act on 'aid and advice' of the Council of Ministers. The Court while interpreting Article 239AA(4), construed to mean that Lieutenant Governor of NCT of Delhi is bound by the aid and advice of the Council of Ministers under Article 239AA(4).[32] The Court held simpliciter that the State Legislature has power to make laws, barring certain entries therein, which is co-extensive with the executive power of the Government of NCT. Further it held that the word 'any matter' enumerated in Clause 4 of the Article 239AA cannot be inferred to mean 'every matter'.[33]

The Court observed that:

"The exercise of establishing a democratic and representative form of government for NCT of Delhi by insertion of Articles 239AA and 239AB would turn futile if the Government of Delhi that enjoys the confidence of the people of Delhi is not able to usher in policies and laws over which the Delhi Legislative Assembly has power to legislate for the NCT of Delhi."[34]

However the Court did not touch upon the questions of three entries on which the State Legislature has no power to make laws as those questions were not for consideration before the Court.

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28. *Supra note 24, at 100.*
29. Rajendra Singh Verma v. Lt. Governor, (2011) 10 S.C.C 1.
30. INDIA CONST. art. 163.
31. Government of NCT of Delhi v. Union of India and Ors., 2018(8) S.C A.L.E 72.
32. *Id.*
33. The Court relied on Workmen of Dimakuchi Tea Estate v. The Management of Dimakuchi Tea Estate, A.I.R 1958 S.C 353. See also In Shri Balaganesan Metals v. M.N. Shanmugham Chetty and Ors, (1987) 2 S.C.C 707.
34. *Supra note 31, at 204.*

The Supreme Court was not in favour of the obstructionist Lt. Governor, but the constructionism of the idealistic smooth stream of governance in NCT of Delhi by the Lt. Governor. The Court while maintaining the existing framework of the Article 239AA of the Constitution did not deal with *'services'* issue which has snowballed into further controversy between both the governments.

The elected representatives and the Council of Ministers of Delhi, being accountable to the voters of Delhi, must have the appropriate powers so as to perform their functions effectively and efficiently. The conflicts are bound to arise in the future between the Centre and State due to the faulty provision of Article 239AA of the Constitution which is ambiguous in nature.[35]

5. Implications of Being A Federal Capital

With the according of special status to the National Capital of India, Delhi, under Article 239AA of the Constitution, the State Legislature has power to legislate with respect to all the entries, except three; *Public order, Police and Land.* The legislative powers conferred upon the Assembly by 69th Amendment to the Constitution are 'qualifying' in nature, excluding the three entries from the legislative purview of the state government. The most serious limitation, however, is that by falling under the category of a union territory, the elected government has to share powers with the Lieutenant Governor (LG), a Central Government appointee who is designated as 'Administrator'.[36] Thus, Lt. Governor is the real power centre.

The electorates of the state expect from the Government of the day to deliver on the services, but the government cannot do so without appropriate institutions to enable remedies to be implemented.[37] The stripping off the Land, Police power's from the elected government in Delhi has resulted in the complete apathy towards the electorate of Delhi. Apart from the power solely vested with the Union, there has been constant friction between the Centre and State over other matters such as services, transfer, postings and so on. [38]

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35. It's Arvind Kejriwal vs Delhi LG Anil Baijal Again. This Time Over CCTVs, NDTV (Jul. 31, 2018, 09:15), https://www.ndtv.com/delhi-news/its-arvind-kejriwal-vs-delhi-lt-governor-anil-baijal-again-this-time-over-cctv-cameras-1892449.
36. *Supra note 7.*
37. Senate Harry Evans, Constitutionalism, Bicameralism, and the Control of Power (Parliament of Australia, working paper, 2006).
38. Jatin Anand, MHA notification lands major blow on Delhi Government, THE HINDU, Mar. 23, 2016, https://www.thehindu.com/news/cities/Delhi/mha-notification-lands-major-blow-on-delhi government/article7234669.ece.

The existing administrative set-up in National Capital Territory is impacting the functioning of the democratically elected government in a variety of ways.

1. *Public Order*

Public order implies the absence of unruliness, lawlessness, revolt, riot and disturbance. Maintenance of public order is considered as one of the prime functions of the modern State, irrespective of the nature of a polity– autocratic or democratic, unitary or federal.[39]

In the case of ***Romesh Thapar v. State of Madras***, Patanjali Sastri J. observed:

"Public Order is an expression of wide connotation and signifies that state of tranquility which prevails among the members of a political society as a result of the internal regulations enforced by the government which they have established".[40]

The maintenance of public order is conducive to maintain economic development and social harmony as it is not only confined to external aggression but also internal strife such as rebellion.[41]

However in the case of National Capital Territory, Delhi, the State Legislature cannot make laws with respect to Public order which falls in the legislative sphere of the Central Government. Democracy and constitutionalism are the two pillars of the Indian Constitutional system. The Government is to be carried on by the democratically elected responsible Governments at the Centre and in the States.[42] The elected legislature is responsible to the people in a democracy. The Central Government which handles public order is not answerable to the people of Delhi. It is the State Government which is often held responsible for everything in Delhi. For People do not have much patience for a Chief Minister trying to explain the areas which fall outside the state's jurisdiction every time a gruesome crime occurs in the National capital. Thus, the state government has no say in the running of administration whatsoever.

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39. SECOND ADMINISTRATIVE REFORMS COMMISSION 5TH REPORT, MINISTRY OF ADMINISTRATIVE REFORMS & PUBLIC GRIEVANCES (2007), https://darpg.gov.in/sites/default/files/public_order5.pdf.
40. Romesh Thapar v. State of Madras, A.I.R. 1950 S.C. 124.
41. Rex v. Wormwood Scrubbs Prison, L.R (1920) 2 K.B 305.
42. LARRY ALEXANDER, CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, (Cambridge University Press) (1998).

The NCT has a Commissionerate system, which means the Police Commissioner possesses punitive power. Accordingly the power of Executive and District Magistrate under Section. 144 of the Code of Criminal Procedure within Delhi has been given to Commissioner of Police.[43] Thus, in practise the Public Order lies in the hands of the Police Administration over which the State Government has no jurisdiction.

Public order is largely a product of efficient general administration, effective policing and a robust criminal justice system.[44] The general administration, Police is not in the hands of the Government of NCT, which constraints the government's ability to effectively deliver on law and order, public safety and so on.

With enhanced citizen awareness and assertion, failure in the delivery of services by the State often leads to frustration manifesting itself in public disorder. The representative of Delhi are accountable to the public and Public turns to the state for public safety, policing. The Government is responsible in a parliamentary democracy to the people through the elected representatives as the representative at a local level best understand the needs of their electorates.[45]

2. *Police*

State is a social institution that has a *"monopoly on the legitimate use of physical force"*.[46] The role of Police as a law-enforcing agency and as an institution to protect the rights enshrined in the constitution cannot be undermined.[47]

The Delhi Government has no control over its own Police, not even *'consultative'* one. For the purpose of Policing, law & order, the Nodal Agency is the Home Ministry. Accordingly, the Chief of the Police need not report to the elected Chief Minister, but to the appointed Lt. Governor. It is to be noted that an appointed Lt. Governor is less susceptible to pandering local sentiments while dealing with a situation pertaining to public order.[48] Though Delhi has been

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43. Delegation of Powers to the Police Officers, MINISTRY OF HOME AFFAIRS, http://59.180.234.21:8787/Notification_Detail.aspx?cid=M4uKzXvFv7Q= (last visited Jul. 23, 2018).
44. KC Verma, The Challenge of Maintenance of Public Order, ANANTA ASPEN CENTRE (2017), http://www.anantaaspencentre.in/pdf/The-Challenge-of-Maintenance-of-Public-Order.pdf.
45. Ravi Yashwant Bhoir v. District Collector, Raigad, (2012) 4 S.C.C 407; P.V. Narsimha Rao v. State, (1998) 4 S.C.C 626.
46. Albrecht Funk, The Monopoly of Legitimate Violence and Criminal Policy, SPRINGER LINK 1057 (2003).
47. Prakash Singh v. Union of India, (2006) 8 S.C.C 1.
48. Maintenance of Public Order, VIVEKANANDA INTL. FOUNDATION, https://www.vifindia.org/article/2012/september/maintenance-of-public-order (last visited Aug. 11, 2018).

given an Assembly, but it is *sans* power in regard to matters related to its own police. Further NCT of Delhi does not have its own State Public Service Commission, unlike other States who have their own State Public Services under Entry 41 of the State list of the Seventh schedule.[49] Therefore, NCT of Delhi does not have its own Police Cadre and the IPS officers and Officers of the Delhi, Andaman and Nicobar Islands Police Service cater the feeding police force in Delhi whose posting and transfer matters solely rest with the Central Government, acting through Lt. Governor. It is for his reason the Delhi police is not accountable to the people of Delhi.

The deteriorating law and order situation in the NCT of Delhi needs a serious consideration. There is a clear conflict in the handling of the Delhi Police; as the Union Government controls it, often it is the Delhi Government which is held accountable about the functioning of Delhi Police.[50] The abuse and misuse of Delhi Police has reduced its status as a mere tool in the hands of unscrupulous Bureaucratic bosses sitting in the Home Ministry. The control and supervision of Delhi should be such that it ensures that the Police serves the people without any regard.

3. *Land*

The 74th Constitutional Amendment Act rendered obligatory upon states to incorporate certain functions to be entrusted to the municipalities into their local municipal Acts.[51] The State government has the power to legislate on matters pertaining to the Local Government i.e. Municipal Corporations, district board so on.[52] Thus in many ways the NCT of Delhi is similar to any state level government- it manages health, power generation, family welfare, food and civil supplies, revenue administration, industrial development and transport etc. While the State legislature has power to make laws on any subject in the State list, the legislature of NCT of Delhi cannot legislate on land as it remains under the purview of the Parliament of India. The manifold complexities involved in the planning and implementation of the programmes at the local level are inconceivable due to the keys of many local corporations working at the same level lies with different governments. Many of the complexities of governance in Delhi arise

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49. INDIA CONST. sch. 7, Entry 41.
50. *Supra note 43.*
51. An illustrative list of functions that may be entrusted to the municipalities has been incorporated as the Twelfth Schedule of the Constitution.
52. INDIA CONST. Sch.7, Entry 5.

from its place at the intersection of national, state, and local jurisdictions.[53]

The Delhi Development Authority (DDA) was established by the Union Parliament in 1957. DDA is responsible for all the physical planning, development of land and housing in the NCT of Delhi. It has remained under the de facto control of the Union Government since Delhi became GNCTD in 1992[54] and it continues to be answerable to the Ministry of Urban Development of the Government of India. Delhi has a population of over 1.9 million and is suffering from intractable problems such as land use, pollution and other problems that are faced by all the megacities.[55] Yet, the Delhi government cannot regulate land use. The nodal agency is Ministry of Housing and Urban Development.

The current scenario in Delhi is complicated for the citizen, and is ineffective as the people do not know which authority should be approached in the existing framework of corporations wherein for example, Roads are looked after by six agencies: DDA, NDMC, MCD, PWD under the Delhi Government, DCB (under the Ministry of Defence) and NHAI (under the Union Government). It is in this context, where no one is sure who is leading and not everyone is reading from the same sheet.

Efficient and equitable acquisition of land by the state for economic development projects, including industry and infrastructure is important to deliver the services to the people of Delhi. However confusion, inaction and contradiction prevail in the existing framework in NCT of Delhi.

4. *Other Matters*

Democracy is ordinarily understood as a political system designed to expand the participation of ordinary citizens in government, the powers of which are clearly defined.[56] The Hon'ble Apex Court has restored the power of the Council of Ministers in the letter and spirit of the law to deliver on public services without unnecessary meddling from the Lt. Government in

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53. The intersection of governments in Delhi, CENTRE FOR POLICY RESEARCH, http://www.cprindia.org/sites/default/files/policy-briefs/The-Intersection-of-Governments-in-Delhi.pdf (last visited Jul. 29, 2018).
54. The Government of National Capital Territory of India Act, No. 1 of 1992, Acts of Parliament, 1991 (India).
55. Don't blame CM, 'Superman' LG doing nothing on Delhi garbage issue: SC, THE BUSINESS STANDARD (Jul. 12, 2018, 22:36), https://www.business-standard.com/article/current-affairs/don-t-blame-cm-superman-lg-doing-nothing-on-delhi-garbage-issue-sc-118071201005_1.html.
56. Concepts And Principles Of Democratic Governance And Accountability, KONRAD-ADENAUER-STIFTUNG, http://www.kas.de/wf/doc/kas_29779-1522-2-30.pdf?11121919022 (last visited Jul.4, 2018).

the administration. However nothing seems to have changed drastically after the Apex Court ordered that Governor cannot be an obstructionist in the NCT of Delhi.[57] The Court did not particularly deal with the matters ancillary to the, three entries outside the scope of Governor of NCT of Delhi. Services, transfer, posting and other matters ancillary to the Public Order, Police and Land have not been dealt by the Hon'ble Court continuing the power struggle between the Central Government and State Government and the administrative logjam in the capital city.[58]

STATEHOOD OR CHASING A CHIMERA?

Since Delhi's incorporation as a Union Territory, it has been the hotbed of statehood demand brought by different political parties from time to time. However, ever since the Aam Admi Party (AAP) came into power in 2015, the statehood demand has come into the forefront with AAP taking up this issue on a very frequent basis with the Central Government. Almost all of the political parties having stake in Delhi have brought at fore the statehood demand in their election manifesto to seek vote in the name of statehood. However the parties claiming to be supporting the cause of people of Delhi for their statehood demands have *volte-face* when they got into power, irrespective of what they declared in their election manifesto.

The legitimate demand of statehood, if fulfilled will help the transition of Delhi Police, Land power to the State Government, fixing the accountability of the officials towards the electorate and the ability of the government of NCT of Delhi to efficiently and effectively deliver on public services, such as women's safety, CCTVs cameras, housing facility et cetera. The bottom line is that full statehood or not, to the people of Delhi, it should signify the face of good governance.

The continuing power struggle between governments due to the faulty provision of Article 239AA has completely paralysed the administration, resulting in the violation of Right of good governance to the people.

In the case of Goberdhan Lal v. State of U.P, Markandey Katju., J observed:

"the citizens have a fundamental right to good governance, and this right to have good governance is part of Article 21 of the Constitution. Article 21 has been interpreted by the

57. Another showdown between Delhi govt and Lt Governor in Supreme Court today, HINDUSTAN TIMES (Jul. 26, 2018, 08:26), https://www.hindustantimes.com/delhi-news/another-showdown-between-delhi-govt-and-lt-governor-in-supreme-court-today/story-NBZvLTnBuevSD6l37myEBP.html.
58. Centre Deliberately Misinterpreting Supreme Court Verdict: Manish Sisodia, NDTV (Aug. 9, 2018, 22:56), https://www.ndtv.com/delhi-news/manish-sisodia-centre-deliberately-misinterpreting-supreme-court-verdict-1898069.

Supreme Court in several decisions to mean that the citizens have a right to a dignified and civilized life, and not merely an animal life. Unless the citizens get good governance it is not possible for them to have a dignified and civilized life." [59]

The demand for full-statehood from partial statehood can be fulfilled by the Parliament to put an end to the constitutional struggle between the Centre and NCT of Delhi, by making an amendment to the Constitution. Article 3 of the Indian Constitution enables Parliament to effect by law reorganisation *inter se* of the territories of the States constituting of the Indian Union.[60] The power of the Parliament is this regard is exclusive and plenary.[61] The term "State" in Art. 3 includes a 'Union Territory'.

The basic premise of the Union Government to reinforce its argument buttressing the subservient nature of NCT of Delhi to the Central Government has been the concern for vital institutions, security installations, Foreign Embassies' security located in the NCT of Delhi. This concern of the Union Government can be allayed by separating the areas currently under the control of the Delhi Cantonment Board and the New Delhi Municipal Council (which can continue to be directly under the union government) which administers the central zone of the city, i.e. Union Government Departments, Supreme Court, Parliament, 'Lutyens Delhi' and, several foreign embassies from the future state government. The concern expressed in the Balakrishnan Committee can also be addressed by the geographical exclusion of the area which houses the vital national installations.[62]

It can be done to clear the muddle power structure and streamline them for the benefit of the people of Delhi, and facilitate the smooth transition of Delhi Police, DDA, MCD, Creation of separate cadre for state of Delhi for State Government services, powers related to taxation from Central Government to State Government.

CONCLUSION

It is no doubt that National Capital Territory of Delhi enjoys a sui generis status among

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59. Goberdhan Lal v. State of U.P, (2000) 40 A.L.R 290.
60. M.P JAIN, INDIAN CONSTITUTIONAL LAW, (Lexis Nexis, 7th ed. 2015).
61. Mullaperiyar Environmental Protection Forum v. Union of India, (2006) 3 S.C.C 643; State of Orissa v. State of Andha Pradesh, (2006) 9 S.C.C 591, 595.
62. KLAUS-JÜRGEN NAGEL & CAROLINE ANDREW, THE PROBLEM OF THE CAPITAL CITY: A NEW RESEARCH ON FEDERAL CAPITALS AND THEIR TERRITORY (Institut d'Estudis Autonòmics, Barcelona, 2013).

Indian federation. The recent stalemate over Article 239AA of the Constitution of India between the Centre Government and Government of NCT of Delhi has taken a toll on the administration of NCT. It is the people who are the ultimate sufferer due to the ensuing power struggle between the Lt. Governor and Government of NCT. The Court has restored the unsatisfactory status quo between governments over the 'aid and advice' clause of Article 239AA(4) which shall be binding on the Lt. Governor on the matters on which the state legislature has power to make laws. The conflicts are bound to arise between the governments over other issues which have not been dealt by the Court which includes inter alia services, posting, transfer. The Supreme Court's judgment has not clearly articulated the set out standards for review of the Lt. Governor's actions. In the context of other states, the hierarchies between administration has been clearly down in the Constitution itself which leaves little space for manipulation. The problem is expected to persist between the Lt. Governor and Government of NCT of Delhi if it is not resolved for the smooth stream of governance in the national capital. The demand of statehood for the NCT of Delhi is a legitimate demand which should be heeded to by the Central government to put an end to the tussle, hampering the governance in the National Capital, Delhi.

CORRUPTION IN INDIA VIS-À-VIS VIOLATION OF HUMAN RIGHTS: ESTABLISHING RELATIONSHIP THROUGH CAUSE, EFFECT AND CONSEQUENCE

Ms. Supreet Gill Sindhu*

& Ms. Naina**

INTRODUCTION AND PURPOSE

Etymologically speaking, the word "corruption" finds itself shrouded with a lot of disagreement as to what really the term means and stands for, as its use is more general than particular, which in popular usage is a "catch-all" term. The word corrupt when used as an adjective literally means "utterly broken"[1] and its origin can be traced back to Aristotle who is generally credited for coining the term.[2] There is also considerable disagreement over which specific acts constitute corruption. Experts from various fields have made attempts to define corruption in context of their areas of expertise. The famous economist Robert Klitgaard defines Corruption as a formula exclaiming that C (Corruption) = M (Monopoly Power) + D (Discretion) – A (Accountability).[3] Morris, a professor of politics, defines corruption as, *"the illegitimate use of public power to benefit a private interest".*[4] Economist I. Senior defines corruption as, *"an action to (a) secretly provide (b) a good or a service to a third party (c) so that he or she can influence certain actions which (d) benefit the corrupt, a third party, or both (e) in which the corrupt agent has authority."*[5] Kauffman, from the World Bank extends the concept

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1. Jomon Mathew, 'The Linkage of Corruption with Economic Backwardness and Poverty in India' in V.N. Vishwanathan, Corruption and Human Rights (Allied Publishers 2012) 125.
2. Dhirendra Verma, Word Origins (Sterling Publishers Pvt. Ltd? , 1999) 91.
3. Robert Klitgaard, 'A Holistic Approach to the Fight against Corruption' (January 29, 2008) <http://www.cgu.edu/PDFFiles/Presidents%20Office/Holistic_Approach_1-08.pdf> accessed 19 January, 2018.
4. Inge Amundsen, 'Political Corruption: An Introduction to the Issues', WP 1999: 7, Chr. Michelsen Institute Development Studies and Human Rights <http://www.cmi.no/publications/file/1040-political-corruption.pdf> accessed 18 January, 2018.
5. Dr. Juan J. Segovia 'Incorporating Activity-Based Costing/Management into the Results- Based Budgeting Technique: A Bulletproof Anti-Corruption Management Control Tool: A Case Study', The 2014 WEI International Academic Conference Proceedings, Bali, Indonesia <http://www.westeastinstitute.com/wp-content/uploads/2014/06/Juan-J.-Segovia.pdf> accessed 17 January, 2018.

to include 'legal corruption' in which power is abused within the confines of the law - as those with power often have the ability to shape the law for their protection.[6]

Such differing ideas about what constitutes corrupt practices have resulted in different definitions of corruption. Today, probably the most used definition is the one adopted by the non-governmental organization Transparency International: *"corruption is the abuse of entrusted power for private gain."*[7]

CORRUPTION AND HUMAN RIGHTS: A RELATIONSHIP LESS-UNDERSTOOD AND NOT MIS-UNDERSTOOD

"Power corrupts and absolute power corrupts absolutely."

- Lord Acton

Initially corruption was understood as a problem of a "governmental disposition", which plagued only the public officials due to their red-tapism, misuse of discretion, favoring the powerful/influential/royalty etc. Eventually, with the growth of global economy and transnational/international trade relations it came to be perceived as an "economic problem". But in the present scenario with political parties contesting elections as eradication of corruption on their agenda, it has come to be seen as a problem, which is of social nature potentially threatening the entire social fabric. This change in outlook is mostly due to the shifting perspective of the society at large.

The abovementioned famous adage by Lord Acton demonstrates clearly the relationship between corruption and economics. However, the relationship between human rights and corruption is much less-understood and is only beginning to be seriously researched at the initiation of United Nations agencies.[8] A major reason why the relationship between

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6. Daniel Kaufmann1, Pedro C. Vicente, 'Legal Corruption' (October, 2005) <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Legal_Corruption.pdf> accessed 19 January, 2015; see also <http://www.worldbank.org/wbi/governance/pubs/legalcorporate corruption.html> accessed 19January, 2018.
7. Julio Bacio-Terracino, 'Corruption as a Violation of Human Rights' (January 2008) <http://ssrn.com/abstract=1107918; see also http://www.transparency.org/cpi2011/in_detail> accessed 19 January, 2018.
8. V.N. Vishwanathan, Corruption and Human Rights (Allied Publishers 2012) 1. Also the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) have acquired greater legitimacy in the last few decades as more and more nations have realized the importance of these human rights as instruments for better governance.

corruption and human rights has been less well understood is because the primary impetus of the anti-corruption agenda came from the World Bank in light of its mandate in development policy.[9]

It is pertinent here to draw attention to one of the most significant and rare instruments to be signed by the Civilised World in the recent times against corruption i.e. United Nations Convention against Corruption (UNCAC)[10] which is a multilateral convention negotiated by members of the United Nations. It is considered a landmark in its own right, as it is the first global "legally binding" international anti-corruption instrument with far-reaching approach. The mandatory character of many of its provisions makes it a unique tool for developing a comprehensive response to a global problem. The UNCAC covers five main areas:

1. prevention,
2. criminalization and law enforcement measures,
3. international cooperation,
4. asset recovery,
5. technical assistance and information exchange.

The United Nations Office on Drugs and Crime (UNODC) promotes the convention and its implementation. The UNCAC covers many different forms of corruption, such as trading in influence, abuse of power, and various acts of corruption in the private sector and its was given teeth by way of Conference of the States Parties to the United Nations Convention against Corruption which was established pursuant to article 63 of the Convention, to improve the capacity of and cooperation between States parties to achieve the objectives set forth in the Convention and to promote and review its implementation.[11] UNCAC was adopted by the United Nations General Assembly on 31 October 2003 by Resolution 58/4. It was opened for signature in Mérida, Yucatán, Mexico, from 9–11 December 2003 and thereafter at UN headquarters in New York City where 140 countries signed it. As of November 2014, there are 173 parties, which include 170 UN member states, the Cook Islands, the State of Palestine, and

9. In fact, Peter Eigen, the founder of the leading global anti-corruption non- governmental organization, Transparency International, was a manager of World Bank Manager Programs in Africa and Latin America. Based on his experiences at the World Bank, he founded Transparency International to promote accountability and transparency in international development. See Peter Eigen. <http://www.transparency.org/content/download/4651/27528> accessed 19 January, 2018.
10. 'UNOCD's Action against Corruption and Economic Crimes' <http://www.unodc.org/unodc/en/corruption/index.html> accessed 19 January, 2018.
11. 'Conference of the State Parties to the United Nations against Corruption' <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP.html> accessed 19 January, 2018.

the European Union and 23 UN member states that have not ratified the convention.[12] There is no one single comprehensive list of acts that is universally accepted as constituting corruption. However, the United Nations Convention against Corruption (UNCAC) gives an idea of what has generally been accepted as "corrupt acts." The following is the list of core corrupt acts. It is important to note, however, that this is not an exhaustive list. Progressive development could enlarge this list to include other acts in the future;

1. Bribery
2. Embezzlement
3. Trading in Influence
4. Abuse of Functions
5. Illicit Enrichment

Some find the relationship difficult to fathom and be seen as related in context of each other. Endless research in the recent times has been conducted to establish and demonstrate a distant, but sometimes a direct relationship between corruption and human rights violations. For instance the *Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* has mentioned corruption as part of the abuses on human rights committed by transnational corporations[13]. It is now well established and accepted that there exists a causal connection between the two and researchers have toiled to establish it from innumerable angles. However, this concept needs to be viewed from a multidimensional prism, a power-relation perspective, as it reflects an asymmetric relationship between the subject and object of power, which ranges from State Liability to Private Sector. However, not limited to both because the nexus arguably extends beyond demonstrating that corruption disables states from meeting their human rights obligations, infact, human rights can be used in support of or against corruption.[14]

It is argued by some that the idea of corruption being synonymous with violation of human rights is farfetched. One may be able to demonstrate a cause and effect relationship but these two concepts can under no situation be called synonymous. The present research paper

12. 'United Nations Convention against Corruption Signature and Ratification Status as of 12 November 2014' <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> accessed 19 January, 2018.
13. United Nations Commission on Human Rights, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (U.N. Doc. E/CN.4/2006/97, 22 February 2006) paras 25-27.
14. James Thuo Gathii, 'Defining The Relationship Between Human Rights And Corruption', Vol. 31 Issue 1 University of Pennsylvania Journal of International Law, 125.

analyses when and how a corrupt practice entails a human rights violation by indicating how an ordinary corrupt practice may violate several fundamental human rights in the long run. Corruption in these cases is a factor fuelling human rights violations and can be clearly linked to the infringement of human rights, as the corrupt practice is an essential factor in the chain of events that eventually violates the human rights. It is viewed that corruption and the violation of human rights from a connection as one leads the way for another.

CORRUPTION AND HUMAN RIGHTS: THE INDIAN PERSPECTIVE

In the pre-independence India, the main aim of the British was business and not good governance. In order to accomplish this, aim they did everything that they could within their power, under the veil of "rule of law". Endless example could be quoted to demonstrate rampant corruption that India suffered at the hands of British Officers, majority of who saw India as an opportunity amass wealth and return "rich" to England. In the post-independent India, the political leadership failed to fulfill the promise of "bright India" as during the socialist phase of Indian economy from 1950 to 1990 politicians and the civil servants thrived well by swindling money from the industrialist and other entrepreneurs under the garb of License Raj, which crippled economic growth and fueled poverty. Understanding the failure of socialistic economic development and pressure exerted by the World Bank and IMF, the Government of India shifted to liberalisation policy. Thereafter India saw a complete overhauling of its economy by visionary zealous leaders who opened floodgate of infrastructure development that only played the role of a catalyst in ever escalating corruption.

India stands ranked at 94 on the Global Corruption Perception Index, complied by Transparency International in the year 2013.[15] On the surface, India might be perceived as one of the progressive countries in the sub-continent region, which, in less than 100 years of its Independence from the foreign rule has made an impression on world economy. However, if one dwells deeper to examine the way of functioning, one finds a distressing picture where corruption, bribery and nepotism have plagued even the routine facets of life. Presently there are

15. Transparency International, 'Global Corruption Index', <http://www.transparency.org/country#idx99> Last accessed on January 4, 2018; See also 'India ranks 94th on Global Corruption Perception Index', The Economic Times (India, 4 Dec 2013) <http://articles.economictimes.indiatimes.com/2013-12-04/news/44757314_1_corrupt-countries-graft-watchdog-transparency-international-index> accessed on January 4, 2018.

152 members in the Indian Parliament with criminal background and the number of tainted officers in the civil services is unaccounted for. The unabated growth in corruption is evident of a complete collapse of governance at all levels of democratic setup. Owing to this, the frustrated youth of the country have reached saturation point where they are often stepping into the shoes of police and taking up responsibilities ought to be fulfilled by the government. Maoist movement and many insurgency movements in the north-eastern part of India and rising to power of AAP- Aam Aadmi Party stand as a clear indication of how fed up the general public is of rampant corruption in our system.

Corruption in Indian System of Governance can be viewed from angles that may be political, judicial and administrative. Politically speaking, denial of the right to political participation as seen in the year 1975 by way of infamous Amendments to the Constitution brought out by Mrs. Indira Gandhi's government after she suffered defeat in elections.[16] Political and bureaucratic corruption in India is a major concern. A 2005 study conducted by Transparency International in India found that more than 15% of Indians had first-hand experience of paying bribes or influence peddling to successfully complete jobs in public office.[17] In the same way, when judiciary becomes corrupt when it violates the rule of law and equality before law[18] . Corruption in public administration endangers the right to life when it allows the manufacture of hazardous products. Hence it would not be inappropriate to say that a consequential link may be established between failure of State to curb the spread of corruption and human rights violation in so far as, it may be concluded that the government has in effect failed to fulfill its obligation to protect human rights.[19]

CORRUPTION AND HUMAN RIGHTS VIOLATIONS: SPECIFIC INSTANCES ESTABLISHING CAUSE AND EFFECT

Politics, Corruption and Human Rights

In any form of organisation, it is said that, the best way to lead is by example. It is upon

16. Pursuant to Indira Nehru Gandhi v. Shri Raj Narain anr. AIR 1975 SC 2299.
17. Rahul Sharman and Anshul Shrtivasta, 'Jan Lokpal Bill: Combating against Corruption', International Journal of Social Sciences and Interdisciplinary Research, (June 2012) Vol. 1 no.6 ISSN 277 3630. <http://www.indianresearchjournals.com/pdf/IJSSIR/2012/June/1.pdf> accessed on January 10, 2018.
18. Chandrani Banerjee interviews V.N. Khare, 'Corruption Is Rampant In The Lower Courts' The Outlook (July 9, 2012) <http://www.outlookindia.com/article/Corruption-Is-Rampant-In-The-Lower-Courts-/281457> accessed on January 18, 2018; See also Markandey Katju, 'Tapping of 3 Mobiles Revealed Corruption of HC Judge', The Times of India (August 11, 2014) <http://timesofindia.indiatimes.com/india/Tapping-of-3-mobiles-revealed-corruption-of-HC-judge-Justice-Katju-says/articleshow/40020234.cms> accessed on January 15, 2018.
19. NACC Research Center, NACC Journal, Special Issue, (July 2010) ISSN 1906-2087 Vol. 3, No. 2.

the shoulders of parents and teachers to set an example for the young children to follow their footsteps. As human beings we are biologically programmed to ape what we see. From this premise flows the idea that politics and political leadership in any country is measured from the same yardstick. The top leadership in the country has to set an example as well as lay down a benchmark for performance for the politburo down the hierarchy. However, in Indian scenario, barring few political leaders, we have scanty example to quote, either because they engage in acts of corruption or, as is more often the case, because they condone such acts on the part of relatives, friends, or political associates, it cannot be expected that the employees in the public administration will behave differently. Politics cannot be expected to be corruption free if their heads do not provide the best examples of honesty.[20]

Political corruption may be understood to mean the misuse of legislative power entrusted upon members of the political class, in order to serve a personal motive, political propaganda or sometimes plainly for financial gains. However, one has to dwell deeper in to the psyche of a political leader in order to understand why a politician indulges in such disgraceful activities. The corruption in politics in India is a vicious circle which starts at the root of election process when a political aspirant spends obscene amount of money to get elected to a particular office. Upon being elected his agenda is to recover all the money that he had spent on being elected. In the process of doing so he ends up deviating from the ethical norms attached to a public office and uses his position of power to divert funds to his personal bank accounts rather than spending money on public good. Corruption charges in cases like Mudgal case (1951), Mundra deals (1957–58), Malaviya-Sirajuddin scandal (1963), and Pratap Singh Kairon case (1963) were leveled against the Congress ministers and Chief Ministers but no Prime Minister resigned. As of December 2008, 120 of India's 522 parliament members were facing criminal charges. Many of the biggest scandals since 2010 have involved very high levels of government, including cabinet ministers and Chief Ministers, such as the 2G spectrum scam and the Adarsh Housing Society Scam.[21]

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20. Vito Tanzi, 'Corruption Around the World - Causes, Consequences, Scope, and Cures', International Monetary Fund (May 1, 1998), 20.
21. Dhananjay Mahapatra, PMO Played Key Role in Kalmadi Heading OC, The Times of India (August 8, 2011) <http://timesofindia.indiatimes.com/india/PMO-played-key-role-in-Kalmadi-heading-OC/articleshow/9522899.cms> accessed on January 15, 2018.

A very simple example is quoted by G. Venkatesana and M. Thamilarasan in their article Indian Political Corruption- a Sociological Analysis, that,

"if you want to register some land to your own name, for this purpose you have to go to court for registration and this registration process requires so much interaction with government officials and employees which is so time consuming process because the employees and officials neglect their duties and uses the unfair means according to which they demand some finance from the customer (who want to register his land with his/her own name) and due to this reason only, they neglect their work and if all requirements of government officials are fulfilled by the customer then only it will be provided with complete register documents otherwise the customer has to wait for the approval of documents. Not only this if any unfair means is adopted by the government officials after neglecting their duty then it is referred as Corruption."[22]

However, it would be unfair to generalise and assume that all political leaders belong to the same class. Just like the general public, a quarter of political class has also expressed strong concern over criminalization of politics and some of them have gone so far as to introducing a private members bill Article 17A, under which every Indian citizen will be entitled to corruption free government. This was also not vigorously pursued.

Justice, Corruption and Human Rights: A Judicial Take

Fortunately, Judiciary is one organ of the Indian System where corruption is not as rampant as it is in the other two organs of the State. This may be owing to the respect and integrity attached to the office and responsibility to uphold justice that rests on the shoulders of a judicial officer. Despite stating the above one may not be eluded by the statement and live in denial from the fact that judiciary in India is absolutely untainted. The cases may be few and far between, the blight of corruption plagues Judiciary nonetheless.

The extent of corruption in Indian judiciary can be revealed through the ***Jessica Lal case and the Priyadarshini Mattoo case***.[23] In the former case, a model named Jessica Lal was shot and

22. G. Venkatesan and M. Thamilarasan, 'Indian Political Corruption- A Sociological Analysis'; See also Chirag Sachdeva, 'Realation of India With Political Corruption' (2011) <http://www.indiastudychannel.com/resources/136058-Relation-India-with-Political-Corruption.aspx> accessed on January 19, 2018.
23. See Anamika Ajay, "Understanding Corruption from a Human Rights Perspective" in V.N. Vishwanathan (eds.), Corruption and Human Rights (Allied Publishers, 2012) 11.

killed at a private party in South Delhi on April 30, 1999. Three eye witnesses identified Manu Sharma, son of a senior party politician and Union Minister. After a few days the main accused surrendered to the authorities in Chandigarh. However, in a few days, the accused and the key eye witnesses retracted the statements and the plea of non-guilty was filed for trial. In the year 2006, the main accused and eight other co-defendants were acquitted of all charges. Due to huge public outcry that followed this decision, the President of India promised action. The decision was appealed in the Delhi High Court which reversed the lower court decision with respect to the main accused, Manu Sharma, who was convicted of murder and sentenced to life imprisonment. This judgment has also been appealed to the Supreme Court.

In the ***Priyadarshini Mattoo case***, a 25 years old girl was brutally raped and murdered at her residence in New Delhi in 1996. All the physical and circumstantial evidences and also DNA tests pointed towards Santhosh Kumar Singh, a son of a Senior Police officer. However, the nation was shocked with the judgment that acquitted the main accused. Like in the Jessica Lal case, a huge public outcry at the acquittal resulted in the appeal to the Delhi High court in 2000. The pressure on the judiciary built on by the verdict with respect to Jessica Lal case in 2006, which resulted in the Delhi HC to convict Santosh Kumar Singh for murdering Priyadarshini Mattoo, and was sentenced to death and later commuted to life imprisonment by the Supreme Court. A look at both these cases reveals a few similarities. Both these cases involved high profile individuals, the trial of both the cases were influence by political or other official powers, both led to public outcry after an active civil society campaign which resulted in appeals to higher courts. While in the Jessica Lal case, the witnesses retracted their statements under influence of political power possessed by the defendants, in the Priyadarshini case the defendant's father abused his official power to influence the police and the court processes. Abuse of official power for private gain in both these cases makes corruption in judiciary a reality in India.[24]

Impeachment of judges is unheard of in the Indian context. However, recent cases of Justice Dinakaran and Justice Ganguly have raised the issue of integrity of Judicial Officers as well. Dinakaran was the Chief Justice of the Sikkim High Court who resigned from the post following allegations of corruption and subsequent impeachment proceedings. In September

24. Brendan O'Flaherty and Rajiv Sethi, 'Public Outrage and Criminal Justice: Lessons from the Jessica Lal Case' (2009) <http://www.columbia.edu/~rs328/Jessica.pdf> accessed on: January 20, 2018.

2009, allegations were made against Dinakaran by several members of the Bar Council of India including Former Union Law Minister Ram Jethmalani stating that he had huge assets and land acquisitions in his Hometown Arakkonam more than what was fixed by the Tamil Nadu Land reforms.[25] In a rather shocking and one of its kind incidents, a legal intern accused a sitting judge of the Hon'ble Supreme Court, Justice Ganguly, on charges of sexual harassment which lead to a lot of controversy and outcry from the civil society.[26] Fundamental Rights enshrined in the Constitution are considered as the basic Structure of the Constitution, which is also the very foundation of our democratic system. Article 14 of the Constitution provides in very clear terms, Equality before Law and Equal Protection of Law and Article 21 provides for Right to Life and Personal Liberty. However, when corruption stands in the way of everyday functioning of democracy and due to illegal and improper use of discretion, equals are treated unequally or vice versa, or a person's right to life is adversely affected, the very rule of law is violated. The Hon'ble Supreme Court in plethora of cases directly links to the violation of principles of Article 14 and 21 linked to violation of human rights as lad down.[27] In ***Maneka Gandhi case,*** Justice Bhagwati explains that a law cannot be fair until it fulfills the *audi alteram partem* rule also says that. In the international human rights framework, Article 14 of the International Covenant on Civil and Political Rights (ICCPR) states that right to fair trial is one of the fundamental and inalienable rights that the State has to respect, protect and ensure at all time.

Administration, Corruption and Human Rights

There is a general agreement on the fact that if there is any other stream of the government which is as corrupt or sometimes more corrupt than the political class, it is the administration. The same logic of vicious circle applies even here, when we find civil services scams like the Ravi Sidhu Scam in the 90's where each civil services aspirant was willing to pay as much as one Crores rupees just do secure the post. Now once that is done, the starts the businesses of making all that money. Here numerous rights are violated in the process. First is

25. R Sedhuraman, 'Judge's Integrity in QuestionProposed Elevation of Karnataka CJ to SC draws ire of senior Advocates' The Tribune (New Delhi, September 14, 2009). <http://www.tribuneindia.com/2009/20090915/main3.htm> accessed January 19, 2018.
26. 'Sexual Harassment Case: Justice AK Ganguly Mulls Quitting as WBHRC Chief' (January 6, 2014) <http://zeenews.india.com/news/nation/sexual-harassment-case-justice-ak-ganguly-mulls-quitting-as-wbhrc-chief_901690.html> accessed January 19, 2018.
27. Mrs. Maneka Gandhi? v. Union of India AIR1978 SC 597, See also Sharda v. Dharmpal AIR 2003 SC 3450; Vishakha v. State of Rajasthan AIR 1997 SC 3011.

that of the co-aspirant who was more hard working, more intelligent may be but could not arrange the money to warm the palms of corrupt officers and hence will not be favoured in the interview, which is a highly arbitrary and subjective process with no transparency. Secondly, the rights of the person who will fall prey to this person once he becomes an officer of the government will also be violated as this officer will have "legitimate expectation" to be bribed for even lifting a finger. Time and again governments have promised the electors to free them from the cancer of corruption and voice is also raised on an international level. For this purpose India upon ratifying the UN Convention, introduced a Bill titled 'The Prevention of Bribery of Foreign Public Officials of Public International Organizations Bill, 2011' in the Lok Sabha with the objective to prevent corruption relating to bribery of foreign public officials. Similarly, another Bill titled 'The Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010' was also introduced in the Parliament of India.

The objectives of this Bill indicate that the Bill is introduced

"to establish a mechanism to receive complaints relating to disclosure on any allegation of corruption or willful misuse of power or willful misuse of discretion against any public servant and to inquire or cause an inquiry into such disclosure and to provide adequate safeguards against victimization of the person making such complaint and for matters connected therewith and incidental thereto." [28]

This Bill refers to the UN Convention Against Corruption and observed in the preamble that:

"the Convention expresses concern about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardising sustainable development and the rule of law; and about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States."[29]

Police, Corruption and Human Rights

Police is rather infamous and has a reputation of much notoriety in our country. A

28. The Whistle Blowers Bill, 2011 <http://www.prsindia.org/billtrack/the-public-interest-disclosure-and-protection-of-persons-making-the-disclosures-bill-2010-1252/> accessed January 19, 2018.
29. See Vigilance Magazine Vol. ix Issue 2 (October 2014).

layman would rather settle the matter by himself or keep tolerating any act criminal nature but to go to the police. The Indian police is famous for its rough handling and lack of empathy. Police Corruption is also violation of human rights as it denies some very basic rights to the citizens. The fundamental right of being protected by a law enforcing agency, mainly constituted for this purpose is being denied by the prevailing corruption.[30] With the present day situation worsening, the basic Right to life granted under Article 21 of the Constitution is being denied and cases of fake encounters, rising death toll in the prisons, and unnecessary delay in investigation makes one feel insecure and vulnerable.[31]

Despite an attempt to eliminate corruption by ways like increased salaries, upgraded training, incentive for education, and developing policies that focus directly on factors leading to corruption, it still exists.[32] Among the reasons most persistently authoritatively advanced to explain corruptions in the police force are the following:[33]

1. Economic causes include craze for higher living standards, profiteering tendencies.
2. Social causes include materialistic outlook of life, erosion in social values, illiteracy, acquisitive cultural traits and exploitive social structure.
3. Legislative factors include inadequate legislation, loopholes in law, and callousness in implementation of laws.
4. Corruption can be traced to ineffective administrative organisation.

Elections, Corruption and Human Rights

As pointed out earlier, one cannot expect the end to be clean when the means are not. Election process is India is tainted by rampant bribery, flouting code of conduct norms and open hooliganism. Politicians have been seen to stoop to unimaginable levels of moral obligations when it comes to securing votes. Illiterate voters are influenced and blackmailed on issues ranging from caste, color, religion and paid bribes in cash and kind to vote in favour of a particular candidate, violating a basic and rights which is fundamental to a democracy, i.e. the

30. J.T. Panachakel and P.G. Thomaskutty, 'Economics of Corruption' paper presented in International Conference on a Decade of Decentralization in Kerala (Trivandrum, India 9 October 2005).
31. Dr. D.D. Basu, Introduction to the Constitution of India (Prentice Hall of India Pvt. Ltd. 2000) 15.
32. Jack Donnelly, Universal Human Rights in Theory and Practice (Cornell University Press, 2003) 150.
33. *Ibid 145.*

right to elect out of choice. The Election Commission also feels helpless in curbing this despite stringent measures.

According to the former Chief Election Commissioner of India, Qurashi, India must:

1. Ban politicians accused of serious crimes from contesting elections if it wants to eradicate the root cause of official corruptions.
2. Party spending money should be made more transparent in order to make a stop to the practice of giving money in return of vote.
3. Under the existing system politicians on trial or who have appealed against their conviction are free to contest in elections.
4. Whereas the most criminal cases last for more than 10 years.

CONCLUDING REMARKS: PRESENT MECHANISM AND SUGGESTIONS FOR FUTURE

As has been mentioned earlier, there are several international and now national agreements both formal and informal in nature to check the cancer of corruption. In India alone time and again several governments in power have set up high level committees to measure the extent of corruption and make recommendations to combat it eg. the S.S. Vohra committee and Santhanam committee. Alongside this; there are is various commissions in place to check corruption in administration eg. Election commission, central vigilance commissions etc. However, the question still remains that despite these mechanisms in place, why have successive governments failed to check and eradicate corruption from our system. Unfortunately, the answer lies with us, we the people. A major factor responsible for corruption is "we the people of India" who pay bribes. Unless there is a change of perception and a mass movement lead from the citizens of India where there is zero tolerance to corruption and bribery, this social evil will not be eradicated from our system. Giving a human face to corruption may lead to more effective anti-corruption strategies through better awareness of the destructive effects of corruption, which should no longer be tolerated. Considering the issues of corruption and human rights through the lens of power relations enables us to see them as relationship between different social groups or individuals who are able to access power differently. Public

support for combating corruption will create demands and put pressure on the government to be committed more seriously to this cause and generate the true political will to eradicate corruption.

It is a timely coincidence that 9th December, International Anti-Corruption day is followed on 10th December by International Human Rights day, because corruption is a human rights issue.

TERRORIST VICTIMISATION- A NEW DIMENSION TO VICTIMOLOGICAL PERSPECTIVES

Dr. Varinder Kaur*

INTRODUCTION

When a person encounters a sudden, unexpected, unpredictable and violent onslaught he/she is stated to be a victim. When such an attack is made by terrorists the person is a victim of terrorism. Terrorists generally maintain that in their kind of struggle there is no innocent person expendable material, a wasteful commodity, which can be conveniently disposed off whenever desired. For terrorists every human being represents a government or a social order and can be a victim of terrorism. He/ she can be killed, kidnapped or taken hostage[1].

Terrorist victimisation adds a new dimension to victimological perspectives. In terms of meaninglessness, wanton, cruelty and depth of trauma there are no offences to compare with terrorists' crimes which victimise innocent people. Terrorism has a very real and direct impact on the enjoyment of the right to life, liberty and physical integrity of victims. In addition terrorism can destabilize governments, undermine civil society, jeopardize peace and security and threaten social and economic development. Attacks by terrorists and armed groups which are indiscriminate or which deliberately target civilians are grave Human Rights abuses and also crimes under International law. Such attacks can never be justified. Security of the individual is a basic Human Right and the protection of individuals is, accordingly, a fundamental obligation of government. States, therefore, have a commitment to ensure the Human Rights of their nationals and others by taking positive measures to protect them against the threat of terrorist acts and bringing the perpetrators of such acts to justice[2]

Terrorism emerges as a major source of victimization in the contemporary world. Impact and manifestation of victimization in terrorists' activities become highly divesting for the victims. Indiscriminate bombing, firing and explosions leave scores of people behind. Some lose their life immediately and some are left maimed and crippled forever. In case the family

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1. D. P. SHARMA. VICTIMS OF TERRORISM (New Delhi: APH Publishing Corporation, 2003) 4.
2. Shruti Bedi, "Human Rights: The Sacrificial Lamb at the Altar of Terrorism", Punjab University Law Review, Vol. 51 (2010) 134.

loses their earning members, the brunt becomes still more severe. The victims are forced to evict. Disposed and displaced, the communities develop a serious vulnerability. These unsecured people continue to live in state of fear, shock and anxiety. Several develop neurosis and similar psychological symptoms. Terrorism does not affect people as individuals alone. The impact is visible in the groups and community. Depending on the situation, the likely targets are found as particular ethnic or cultural groups or people living in a definite geographic location. The impact is not only psychological. The areas afflicted with terrorism are the worst looser in terms of economy. The whole process of development comes to stand still. Educational institutions fail to work properly. Rise of unemployment and migration assume serious proportions.[3]

Human Rights constrain State responses to terrorism more directly than they govern the conduct of terrorists. As a result, the international Human Rights regime is disadvantaged rhetorically and politically. For controlling the menace of terrorism the governments have rushed through problematic laws formulating new and often vaguely-defined crimes, banning organizations and freezing assets without due process, undermining fair trial standards and suspending safeguards aimed at protecting Human Rights. It is unfortunate but States have also made use of the climate of fear created by terrorism to enhance powers to suppress legitimate political dissent, to torture detainees, subject them to enforced disappearances, or hand them over to other States in violation of the principles of non-refoulement and undermining laws governing extradition.[4]

"The purpose of Criminal Justice System is to protect the rights of individual and the State against the intentional invasion of criminals who violate the basic norms of society. In a modern welfare state this protection is sought to be achieved and ensured by punishing the accused in accordance with the provisions of law. To ensure that innocent persons may not be victimized, accused has been granted certain basic rights and privileges to defend himself before he is condemned. In case the accused is found guilty he is punished and kept in prison with the objective of reforming him. Courts have time to time directed the State authorities to provide all

3. G. S. Bajpai, "The Insecured People- A Tale of Victims of Terrorism", Journal of the Institute of Human Rights, Vol. 5 (June 2002) 143.
4. Shruti Bedi, "Human Rights: The Sacrificial Lamb at the Altar of Terrorism", Punjab University Law Review, Vol. 51 (2010) 134.

necessary facilities and ensure that Human Rights of criminals are not violated."[5]

Criminal Law, which reflects the social ambitions and norms of the society, is designed to punish as well as to reform the criminals. But unfortunately, the law and establishment hardly take any notice of the by-product of crime- its victim. And the poor victims of crime are entirely overlooked in misplaced sympathy for the criminal. The guilty man is lodged, fed, clothed, and entertained in a model cell at the expense of the State, from taxes that the victim pays to the treasury. And the victim, instead of being looked after, is contributing towards the care of prisoners during their stay in the prison.[6]

TERRORISM AND HUMAN RIGHTS

Human Rights emanate from human feelings. They grow out of the feeling of injustice which human beings experience when their rights are being abused or denied. Human Rights introduce the idea of justice in the natural order of the world, thereby giving human existence a higher sense of purpose. The first and foremost human right is the right to existence or right to life.[7]

There is a close link between Human Rights and terrorism. Terrorism obviously abuses the fundamental Human Rights of its victims, whether it is individual terrorism or state terrorism. The victims of terrorism are arbitrarily deprived of the fundamental Human Rights of life and liberty. Acts commonly covered under "terrorism", whether committed by states or individuals are in fact, violations of fundamental Human Rights of those against whom they are perpetrated. But the dilemma of the situation is that those resorting to terrorism themselves call in aid the notion of Human Rights to support their claims for actions resorted to by them.[8]

TYPOLOGY OF VICTIMS AND MAGNITUDE OF VICTIMIZATION

There are two types of victims of terrorism depending on the nature of harm suffered by them:

1. Primary victims of Terrorism, (Direct)
2. Secondary victims of Terrorism. (Indirect)

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5. D. K. Basu v. State of West Bengal, AIR 1997 SC 610.
6. K. D. Gaur, "Justice to Victims of Crime", Allahabad Law Journal, Vol. VII (2) (2003) 73.
7. B. N. Chattroraj, "Combating Global Terrorism: A Human Rights Perspective", Indian Journal of Criminology & Criminalistcs, Vol. 26, Issue no. 1 (January to April- 2005) 3.
8. J.N. Saxena,"Relationship between International Terrorism, State Terror and Human Rights in the world Order", in Verinder Grover(ed.). Encyclopaedia of International Terrorism, Vol. 1 (New Delhi: Deep and Deep Publications Pvt. Ltd, 2002) 215.

Primary (Direct) Victims of Terrorist Acts[9]

Primary victimization refers to the victimization that occurs as a direct result of the terrorist activities as bombing, hostage, kidnapping etc.,:

1. Who are killed by terrorist kidnappers, hostage - takers, gunmen or bombers;
2. Who are injured, mutilated or mentally tortured by terrorists but are ultimate released or liberated;
3. Who are wounded or die in a counter - terrorist (rescue) operation at the hands of terrorists;
4. Who become mentally or physically handicapped or die (e.g. in a Post Traumatic Stress Disorder - based suicide) in a causal sequel to one or several terrorist events in which they were involved or of which they were direct witnesses.

Secondary (Indirect) Victims of Terrorist Acts[10]

Secondary victimization refers to the victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victims such as:

1. "Who close to persons in the four categories of primary and direct victims: family, dependents, friends and colleagues";
2. "whose names appear on terrorist 'death lists' and have to fear for their lives";
3. "Who have otherwise a well - founded reason to fear that they might be a victim in the future";
4. "Who first responders to acts of terrorism who have suffered harm in intervening to assist victims or to prevent their victimisation";
5. "Who experience income loss or property damage due to acts of terrorism";
6. "Whose personal well - being and normal lifestyle is changed in a negative way by terrorist threats and counter - terrorist measures."

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9. Dr. Alex P. Schmid, "Strengthening the role of Victims and incorporating victims in efforts to Counter Violent extremism and Terrorism" (The Hague: International Centre for Counter-Terrorism, 2012) 4.
10. *Ibid.*

JUDICIAL TRENDS IN COMPENSATORY JURISPRUDENCE UNDER INDIAN CONSTITUTION

Terrorism is the price of freedom. States have both a right and a duty to protect individuals under their jurisdiction from terrorist attacks. This stems from the general duty of States to ensure respect for the right to life and the right to security. Experience says that the real threat to the life of the nation, in the sense of the people living in accordance with its traditional laws and political values, comes not from terrorism but from laws which do not respect the Human Rights. That is the real and true measure of what terrorism may achieve.[11]

All Fundamental Rights and Human Rights are guaranteed against the State. The State is absolutely bound to protect all the Fundamental Rights, if fails then State has to compensate the victims of the fundamental right. The State unconditionally has to provide compensation in case any of such right is violated by its employees. Even, this liability extends where such right is violated by any person. In fact, the compensation has to be paid on the principle that State is failed to protect Fundamental Right of that person guaranteed against the State. India has internationally committed by ratifying many of the International Instruments, those established minimum norms for the protection of the Human Rights[12].

The Indian Constitution which has guaranteed certain Fundamental Rights to the citizens in Part III against the actions of the State, also equally provides for the Constitutional remedies by way of writs under Article 32 of the Constitution to the Supreme Court and under Article 226 to move the High Court for the enforcement of Fundamental Rights. Under these articles the victim can not only get his rights enforced in an expeditious manner but also he can even claim compensation for the alleged violation of Fundamental Rights by the State. This claim in public law or compensation for unconstitutional deprivation of the guaranteed Fundamental Rights is a claim based on strict liability and is in addition to the claim available in private law for damages to the victim.

The principle of payment of compensation to the victim of crime was evolved by Hon'ble Supreme Court on the ground that it is duty of the Welfare State to protect the Fundamental Rights of the citizens not only against the actions of its agencies but is also

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11. Shruti Bedi, "Human Rights: The Sacrificial Lamb at the Altar of Terrorism", Vol.51, Punjab University Law Review (2010) 135.
12. Dr. Krishna Pal Mali. Penology, Victimology and Correctional Administration in India (Delhi: Allahabad Law Agency, 2011) 235.

responsible for hardships on the victims on the grounds of humanitarianism and obligation of social welfare, duty to protect its subject, equitable Justice etc. It is to be noted that compensation by the State for the action of its official was evolved by the Hon'ble Court against the doctrine of English law: "King can do no Wrong" and clearly Stated in the case of ***Nilabati Behra v State of Orissa***[13] , "that doctrine of sovereign immunity is only applicable in the case of tortuous act of Government servant and not where there is violation of Fundamental Rights and hence in a way Stated that in criminal matters this doctrine is not applicable."

Diagram 1: Different Modes of Rehabilitation of Victims of Terrorism

This diagram shows the different modes of rehabilitation of victims of terrorism. Firstly there should be proper laws to deal with such cases and be given a fair treatment; secondly they should be provided assistance through police and courts, thirdly Courts or States should provide such victims with monetary help and fourthly restitution means any other measure they need for their rehabilitation as, medical services, mental counselling or employment etc,. etc.,

The carelessness on the part of Indian legislature is so much so that India has not made any legislation to give compensation to victim of crime when accused is acquitted despite of its obligation under various International Covenants. In this regard even Hon'ble Supreme Court in

13. (1993) 2 SCC 746.

the case of ***Delhi Domestic Working Forum v Union of India***[14] , "has shown its concern in these words: It is necessary, having regard to the Directive Principles contained under Article 38(1) of "the Constitution of India to set up Criminal Injuries Compensation Board. Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape".

CASES REGARDING VIOLATION OF HUMAN RIGHTS

Kartar Singh v State of Punjab[15] , "the Supreme Court of India has observed that, The country has been in the firm grip of spiralling terrorist violence and is caught between deadly pangs of disruptive activities. Apart from many skirmishes in various parts of the country, there were countless serious and horrendous events engulfing many cities with blood-bath, firing, looting, mad killing even without sparing women and children and reducing those areas into a graveyard, which brutal atrocities have rocked and shocked the whole nation. Deplorably, determined youths lured by hard core criminals and underground extremists and attracted by the ideology of terrorism are indulging in committing serious crimes against the humanity."

Hitendra Vishnu Thakur v State of Maharashtra[16] , "Terrorism' is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are a revolt against a civilised society. Terrorism has not been defined under TADA nor is it possible to give a precise definition of terrorism or lay down what constitutes terrorism. It may be possible to describe it as use of violence when it's most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or terrorise people and the society and not only those directly assaulted, with a view to disturb even tempo,

14. (1995) 1 SCC 14.
15. (1994) 3 SCC 569.
16. (1994) 4 SCC 602.

peace and tranquillity of the society and create a sense of fear and insecurity. The sovereign remedy of granting compensation has become a judicial commonplace in all kinds of Human Rights violations."

Punjab and Haryana High Court Bar Association v. State of Punjab [17], "in this case a Punjab advocate along with his wife and two year old child was abducted. Later he was killed. The lawyer fraternity in general and the advocates practising at the High Court and the District Courts in the States of Punjab, Haryana and the Union Territory of Chandigarh were not satisfied with the police investigation. The Punjab and Haryana High Court Bar Association demanded a judicial inquiry. The substantial evidence goes to prove that Ropar Police is responsible for the brutal killing of Mr Kulwant Singh, his wife and his two years old son. SC observed that, "to do complete justice in the matter and to instil confidence in the public mind it is necessary, in our view, to have fresh investigation in this case through a specialised agency like the Central Bureau of Investigation." In a series of orders given in 1994 and 1996 the Supreme Court directed the Punjab Government to pay as compensation Rs. 1,00,000 to the parents of the deceased.

Navkiran Singh and 16 other advocates practising in the Punjab and Haryana High Court at Chandigarh and various other places in Punjab voicing their concern over the kidnapping/elimination of advocates in the State of Punjab was addressed to the Chief Justice of India. In ***Navkiran Singh v. State of Punjab***[18] , SC observed that "the State of Punjab must provide security to all those advocates who genuinely apprehend danger to their lives from militants/anti social elements in the State of Punjab. If the request for security is recommended by the district judge of the district or the Registrar of the High Court it may be treated as genuine and the State Government may consider the same sympathetically."

RESPONSIBILITY FALLS ON THE VIOLATOR IN CASE OF VIOLATION OF HUMAN RIGHTS

Primarily it is the terrorist who was assembling the bomb. Next, it is the State as it failed in living up to its guarantee that "no person shall be deprived of his life and liberty except according to the procedure established by law". The State failed to prevent the terrorist from harming innocent citizens. Terrorism itself is indication of the inability of the State to curb

17. (1994) 1 SCC 616.
18. (1995) 4 SCC 591.

resentment and to quell fissiparous activities. Social malaise in itself is a reflection of the State's inefficiency in dealing with the situation in a proper manner. Apart from the general inability to tackle the volatile situation, in these circumstances, the State agencies failed in their duty to prevent terrorists from entering India. It was their responsibility to see that dangerous explosives such as RDX were not available to criminals and terrorists. The incidents occurred as there was a failure on the part of the State to prevent it. There was failure of intelligences; they did not pick up the movement of these known and dangerous terrorists. So, it would be extremely difficult even to say that the State did not fail in its duty towards the victims and their family. A crime has been committed, a wrong has been done and a citizen has lost his life because the State was not vigilant enough. A Fundamental Right has been violated. But, mere declarations such as these will not provide any succor to the victim.[19]

In ***D. K. Basu v. State of W. B***[20] , "the SC has held that the Court, where the infringement of the Fundamental Right is established, therefore, cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the Fundamental Right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience. The SC cleared the ground for the grant of compensation under Article 226 in situation where there was a dereliction of public duty on the part of the State."

POSITION OF VICTIMS OF ACTS OF TERRORISM UNDER THE CRIMINAL PROCEDURE CODE, 1973

"Section 357 of Criminal Procedure Code"

Section 357 deals with two types of circumstances, where compensation may be awarded, namely, (1) where only a sentence has been imposed; and (2) where fine also forms part of the sentence. When a fine is imposed simplicitor, section 421 read with section 424 would be applicable, and fine will be recovered. This section provides that when a Court imposes a sentence (of fine or a sentence including a sentence of death of which fine forms a part, the court may, when passing judgment, order the whole or any part of the fine recovered to be applied in

19. Dr. Krishna Pal Malik. Penology, Victimology and Correctional Administration in India (Delhi: Allahabad Law Agency, 2011) 241.
20. (1997)1 SCC 416.

the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion, of the court, recovered by such person in a civil court; or when, any person is convicted of any offence for having caused the death of another person or of having abetted the commission of an offence. In paying, compensation to the persons who are, under "the Fatal Accidents Act, 1855" (13 of 1855) entitled to recover damages from the person sentenced for the loss resulting to them from such death; or when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of stolen property knowing or having reason to believe the same to be stolen, in compensating any bonafide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

Sub-section (3) of this section is another interesting provision but courts have seldom invoked it, perhaps due to ignorance of its objective. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the Criminal Justice System. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes.

If the fine is imposed in a case, which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an appeal be presented before the decision of the appeal.

The payment by way of compensation must, however, be reasonable. What is reasonable may depend upon the facts and circumstances of each case may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonably period for payment of compensation, if necessary by instalment, may also be given. The court may enforce the order by imposing sentence in default.

Section 357, provides some reliefs to the victims as the court is empowered to direct payment of compensation to any person for any loss or injury caused by the offence. But in

practice the said provision has not proved to be of much effectiveness. Many persons who are sentenced to long term imprisonment do not pay the compensation and instead they choose to continue in jail in default thereof. It is only when fine alone is the sentence that the convicts invariably choose to remit the fine. But those are cases in which the harm inflicted on the victims would have been far less serious. Thus the restorative and reparative theories are not translated into real benefits to the victims.

Sarwan Singh v State of Punjab [21], in this land mark case where, "the Supreme Court not only retreated its previous stand point but also laid down, in exhaustive manner, that what all should be taken in to account while imposing fine or compensation. The Hon'ble Court Observed that, "The objective of the section, therefore, is to provide compensation payable to the persons who are entitled to recover damage from the person sentenced even though fine does not form part of the sentence. Though section 545 enabled the court only to pay compensation out of the fine that would be imposed under the law, by section 357(3) when a Court imposes a sentence, of which fine does not form a part, the Court may direct the accused to pay compensation. In awarding compensation it is necessary for the court to decide whether the case is a fit one in which compensation has to be awarded. If it is found that compensation should be paid, then the capacity of the accused to pay compensation has to be determined. In directing compensation, the objective is to collect the fine and pay it to the person who has suffered the loss. The purpose will not be served if the accused is not able to pay the fine or compensation for, imposing a default sentence for non-payment of fine would not achieve the objective. If the accused is in position to pay the compensation to the injured or his dependents to which they are entitled to, there could be no reason for the court not directing such compensation. When a person, who caused injury due to negligence or is made vicariously liable is bound to pay compensation it is only appropriate to direct payment by the accused who is guilty of causing an injury with the necessary mens rea to pay compensation for the person who has suffered injury. And also : It is the duty of the court to take into account the nature of the crime, the injury suffered, the justness of the claim for compensation, the capacity of the accused to pay and other relevant circumstances in fixing the amount of fine or compensation. After consideration of all the facts of the case, we feel that in addition to the sentence of 5 years' rigorous imprisonment, a

21. AIR 1978 SC 3779.

fine of Rs. 3500 is to be paid by appellants."

"Section 357A of Criminal Procedure Code, 1973"

Another remarkable feature which was added by Amendment in 2009 is provision for establishing compensation fund. Victim compensation as now made applicable by Criminal Procedure Code does not require the apprehension and conviction of the offender to provide financial relief to the victims. Section 357A of the code provides that every State Government in co-ordination with the Central Government shall prepare a Scheme for providing funds for the purpose of compensation to the victim or his dependences who have suffered loss or injury as a result of the crime and who require rehabilitation. Whenever a recommendation is made by the court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the Scheme referred to in sub-section (1). It also provides that if the trial court, at the conclusion of the trail, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation. In special cases where the offender is not traced or identified, but the victim is identified and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Service Authority for award of compensation. The District Legal Service Authority, on receipt of recommendation or on the application, after due enquiry, must award adequate compensation within two months. District Legal Service Authority or State Legal Service Authority may make an order to alleviate the suffering of the victim , on the certificate of Police Officer not below the rank of officer in charge or Magistrate of area concerned , to be made available free of cost: first aid facility or any medical facility or any other interim relief. Thus under section 357 A (4), Cr.P.C, compensation has to be awarded by District Legal Service Authority or State Legal Service Authority. [22]

DIFFERENCE BETWEEN COMPENSATION UNDER SECTION 357 AND SECTION 357A, CR.PC

1. Under Section 357A, compensation is payable out of funds created by the State

22. Section 357A, the Criminal Procedure Code of India.

Government and under Section 357; it is payable out of fine recovered from convict.

2. Under Section 357A, compensation is payable even if offender is not traced or identified but under Section 357, it is payable only upon conviction of offender.
3. Under Section 357A, compensation is payable in addition to compensation awarded under Section 357 and under Section 357, there is no such provision.
4. Section 357A is a mandatory provision for compensation whereas section 357 is discretionary.
5. Under Section 357A, order for compensation is made by District Legal Service Authority or State Legal Service Authority and under Section 357 by the Court.
6. Section 357A empowers District Legal Service Authority or State Legal Service Authority to make Order for interim relief and under Section 357, there is no such provision.
7. Under Section 357A, no criteria is specified for dependents of victim entitled to compensation under section 357 only dependents or heirs of victim who are entitled under Fatal Accidents Act can claim compensation.

"PROBATION OF OFFENDERS ACT, 1958"

The Court directing the release of an offender under section 3 or section 4 may make at the same time a further order directing him to pay such compensation as the court thinks reasonable for loss or injury caused to any person by the commission of the offence; and such costs of the proceedings as the court thinks reasonable.

"Probation of Offenders Act" vide its section 5 empowers the trail court to order for compensation. The plain reading of this section clearly shows that the power in case of this Act vests only with the trial court and none else. The whole discussion about legislative framework is incomplete until Section 431 and 421 of Code of Criminal Procedure, 1973 are read with above two substantive sections. Section 421 provides for means to recover the fine by attachment and sale of movable property of the offender and also from both movable and immovable as arrears of land revenue. Section 431 empowers the courts to recover any money (other than fine) payable by virtue of any order made under as if it were fine if method for its recovery is not expressly provided. Even under Part III or IV of the Indian Constitution, SC has

directed in many landmark judgments (under Articles 32, 136 and 142) fine or compensation to be recovered either from the State or accused.

There is no doubt that there exist many such provisions under the Criminal Procedure Code but these are seldom invoked by the courts. These provisions are discretionary in nature; it should be made mandatory so that every victim can take benefit out of it.

WELFARE STATE VIZ-A-VIZ VICTIMS OF TERRORISM

In modern times, the concept of State has undergone a radical change. The individualistic view of the functions of the State and the laissez faire theory has been rejected and are considered to be out-dated. The concept of welfare State has emerged and has gained wide recognition. Every State is tending to become a welfare State. The social and economic uplift of the masses has become their avowed objectives. In India, even before the independence the nation clearly underlined its objectives of the socio-economic development of the people.[23]

The nature and character of State activities is rapidly changing. Almost every State, be it socialistic, communist or capitalist wishes to pursue the ideal of a Welfare State. The modern State is no longer a police State. The growth of industrialisation has increased the functions of the State manifold. It is too much concerned with the betterment of the condition of living of its members. Its functions are becoming wider and wider. The objective of modern State is to establish an atmosphere in which moral development of the individual becomes possible. Its objective should be the complete development of man in social, political, economic and moral spheres. The State is an instrument of socio-economic change.[24] It encourages the State to undertake enormous tasks towards the welfare of its citizens. It is essentially a social service State. The idea of Welfare State is based on certain essentials. Firstly, it should clearly be understood that welfare is not a matter of charity, but of right. Secondly, the minds and attitudes of men must be attuned to the idea of a welfare State. The people must work for it. They must not remain passive. [25]

The concept of welfare State exercised a tremendous influence on the minds of the framers of the Indian constitution. The chapter on the Directive Principle of State Policy is

23. Dr. B.N. Mani Tripathi. An Introduction to Jurisprudence- Legal Theory (Faridabad: Allahabad Law agency Law Publishers) 377.
24. Dr. S.R. Myneni. Political Science (Faridabad: Allahabad Law Agency, 2013) 97.
25. L.S. Rathore and S.A.H. Haqqi. Political Theory and Organisation (Lucknow: Eastern Book Company, 2012) 20.

nothing, but a reflection of the ideals of a Welfare State. Article 38 says, "The State strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life".

In modern societies, the states have assumed the responsibility to protect its citizens from crime and have taken over the exclusive right, in the collective interest of the community, to punish offenders. However, the State accepts no responsibility for injury to the victim. Through retribution occupies a subordinate position in the present day administration of Criminal Justice, its importance is undesirable. The mention of retributive is even now the main spring of Criminal Law. Therefore, it is clear that the victim who was once central point of whole Criminal Justice System has now become a forgotten person. No special treatment is given to him rather he is looked down in society during whole legal process instead of 'victim' of unfortunate circumstances. There have been lot of reforms for accused and they have been considered as patient who needs clinical treatment. But there is no victim restitution programmed ever proposed to look into the plight of victim of the crime. India is lagging far behind in implementing the United Nations Charter of 1985 which provides substantial rights to victim of crime and India has ratified this declaration. So India is bound to observe the principles underlined under this declaration.[26]

Our Criminal Justice Delivery System emphasis more on accused and his rights that he should be given fair trial, speedy justice, free medical etc., but victims of crime has been always ignored. Rights of the victims of crime are highlighted by the strong efforts of Judiciary and some of the Public spirited people through many landmark judgments. But even then nothing worth has been done so far except few general provisions for the victims of crime. Many International Conferences and meeting had been held in the last decade but still there is no specific law for the rehabilitation of victims of terrorism made so far. Some of the parliamentarians also made efforts in this regard but still bills on victims of terrorism pending. It is a high time for the legislature to make laws for welfare of the victims of terrorism.

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26. GURPREET SINGH RANDHAWA. VICTIMOLOGY AND COMPENSATORY JURISPRUDENCE (Allahabad: Central Law Publications, 2011) 25.

TECHCOUNT 2.0: ERA OF BIOBANKING AND RIGHT TO PRIVACY

Trisha Mukherjee*

INTRODUCTION

"Science is beautiful when it makes simple explanations of phenomena or connections between different observations. Examples include the double helix of Biology and fundamental equations of physics"

~ Stephen Hawking

The introduction of genomic technology has led to a biomedical revolution. Whole-genome sequencing and genome-wide association studies have become powerful tools to investigate environmental, genetic, social and behavioural determinants of human diseases. Many countries have set up biobanks[1] to collect human biological samples and their associated data for genomic research and public health purposes[2]

To maximize the utilization of biobanking resources, regional and transnational biobank networks, such as the BBMRI-ERIC (Biobanking and Biomolecular Resources Research Infrastructure), the International HapMap Project and the International Cancer Genome Consortium, have been established.[3] Although genetics and genomics have contributed to better understanding of causes and mechanisms of human diseases, some researchers are concerned that genetic research conducted to date has mainly focused on the health needs of high-income countries, thus increasing health inequity between people in poor and rich nations. Low- and middle-income countries are benefiting less than high-income

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1. The term "biobank" first appeared in the scientific literature in 1996 and for the next five years was used mainly to describe human population-based biobanks. In recent years, the term has been used in a more general sense and there are currently many different definitions to be found in reports, guidelines and regulatory documents. Some definitions are general, including all types of biological sample collection facilities. Others are specific and limited to collections of human samples, sometimes just to population-based collections.
2. Singer PA, Daar AS. Harnessing genomics and biotechnology to improve global health equity. Science. 2001 Oct 5;294(5540):87–9.
3. Vaught J, Kelly A, Hewitt R. A review of international biobanks and networks: success factors and key benchmarks. Biopreserv Biobank. 2009 Sep;7(3):143–50.

countries from the applications of epidemiological and genetic research.

It has been suggested that the disadvantage could partly be attributable to the lack of biobanks and large cohort studies in poorer countries. To find indigenous solutions to health improvement, biobanks have recently been set up in several developing countries. For e.g, India[4]

The establishment and proper running of a biobank can be perceived as an overwhelming task, since researchers have to consider a series of ethical, legal and social issues, such as informed consent, benefit sharing, confidentiality, ownership, commercialization and public participation. [5] Building transnational biobank networks is even more difficult, as these require sharing of samples and interoperability of data in a mutually-applicable ethical and legal framework. However, such frameworks differ between countries. Compared with the situation in high-income countries, where the ethical, legal and social issues of biobanks have been debated, researchers in low- and middle-countries are less experienced in coping with these issues.[6] The fear of exploitation – i.e. unfair distribution of risks and benefits makes many low to middle-income countries hesitant about foreign researchers accessing and using their human biological samples and associated data. These issues may have a negative impact on international research collaborations.

AIM OF THE RESEARCH PAPER

The paper firstly deals with an importance to develop a governance framework at the global level to guarantee equity, fairness and justice in biobank collaboration between developing and developed countries.

Secondly, the paper aims at dealing with relational view of privacy, which takes as its basis a general discussion of several concepts of privacy and attempts at grounding privacy rights. In promoting and protecting the rights of participants in biobank, question of privacy has been also taken. Rather than just granting participants an exclusive right to or ownership of their health information, which must be waived in order to make biobank research possible, the

4. Rosenberg NA, Huang L, Jewett EM, Szpiech ZA, Jankovic I, Boehnke M. Genome-wide association studies in diverse populations. Nat Rev Genet. 2010 May;11(5):356–66.
5. Scott CT, Caulfield T, Borgelt E, Illes J. Personal medicine–the new banking crisis. Nat Biotechnol. 2012 Feb;30(2):141–7.
6. BJ, Séguin B, Goodsaid F, Jimenez-Sanchez G, Singer PA, Daar AS. The next steps for genomic medicine: challenges and opportunities for the developing world. Nat Rev Genet. 2008 Oct;9 Suppl 1:S23–7.

privacy aspect of health information should be viewed in light of the moral rights and duties that accompany any involvement in a research based system of health services.

BIOBANKS: A CROSSBORDER ISSUE AND NEED OF GLOBAL GOVERNANCE

"Our world is built on biology and once we begin to understand it, it then becomes a technology."

~Ryan Bethencourt

A WAKE ON CROSS BORDER ISSUES OF BIOBANKS

The establishment of biobanks is an important step towards establishing national genomics research programmes. However, development of biobanks can face challenges. Maintaining these biobanks and producing effective scientific outcomes based on the biobanking resources are not easy without a proper framework and the capacity to manage biobanks.[7] In addition, some countries – such as China, India and South Africa – lack adequate legislative structures and governance frameworks that regulate the use and development of biobanks.[8]

Facilities in high-income countries conducting human genetic research may see an advantage in examining human samples from populations with rich genetic diversity in low-and-middle income countries. The samples can either be shipped from the biobank in the low- or middle-income country to the research facility or researchers can come and collect the samples from the biobank. These cross-border flows of biological samples and data are troublesome for low- and middle-income countries, since many of these countries have poor or absent medical and patents laws and/or regulatory frameworks. The lack of legislative structures makes both countries and their people vulnerable to exploitation.

In December 2000 *"The Washington Post"* published a six-part series titled *"The body hunters"*[9] that surveyed research subjects in China, Africa, Southern Asia including India and Latin America. The research subjects claimed they did not receive the expected benefits – such as health care services – when participating in medical research led by high-income countries.

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7. Abayomi A, Christoffels A, Grewal R, Karam LA, Rossouw C, Staunton C, et al. Challenges of biobanking in South Africa to facilitate indigenous research in an environment burdened with human immunodeficiency virus, tuberculosis, and emerging noncommunicable diseases. Biopreserv Biobank. 2013 Dec;11(6):347–54.
8. Wonkam A, Kenfack MA, Muna WFT, Ouwe-Missi-Oukem-Boyer O. Ethics of human genetic studies in sub-saharan Africa: the case of Cameroon through a bibliometric analysis. Dev World Bioeth. 2011 Dec;11(3):120–7.
9. Stephens J, Nelson D, Flaherty MP. The Body hunters. The Washington Post, 2000 Dec 17.

There have also been reports of researchers from high-income countries collecting blood samples from Hagahai people in Papua New Guinea, Havasupai people in Arizona, United States of America, and the Karitiana people in Brazil without securing proper informed consent. The participants reported that they were disappointed not to receive the benefits they expected and felt they deserved, such as financial compensation and medicines.[10]

In India, although the government issued regulations against biopiracy in 2002, this was poorly implemented and biological samples are still shipped abroad for studies without the proper approval from authorities.[11]

In genetic research, benefit-sharing issues are usually central when it comes to possible exploitation cases. In general, benefits can be shared at two levels:

1. at an individual level; and
2. at a community, tribe or
3. national level.[12]

Benefits can also be shared directly and indirectly. Direct benefits include access to medical care for the participating research subjects and/or communities. Indirect benefits include research-capacity building, such as publications, fund-raising, research staff training and development of a stronger scientific culture. Data sharing in genomic research and human biobanks comprises one form of benefit sharing, even though there are issues with data sharing – such as who owns the data, which third parties can benefit and who decides what can be shared.[13] Researchers may also gain financial benefits, personal recognition and reputation through access to and commercialization of biobanking resources, which could potentially violate the interests of research participants. Unfair benefit-sharing with local participants and communities may constitute exploitation, and contribute to a public distrust of biomedical research. In addition, poor consent procedures and inadequate engagement, both at an individual and community level complicate the relationship between researchers and participants.

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10. Emerson CI, Singer PA, Upshur RE. Access and use of human tissues from the developing world: ethical challenges and a way forward using a tissue trust. BMC Med Ethics. 2011;12(2):2.
11. Kumar NK. India's preparedness in tackling biopiracy and biobanking: still miles to go. In: Sleeboom-Faulkner M, editor. Human genetic biobanks in Asia: Politics of trust and scientific advancement. London:
12. Knoppers BM, Abdul-Rahman MH, Bédard K. Genomic databases and international collaboration. Kings Law J. 2007;18:291–312.
13. Schüklenk U, Kleinsmidt A. North-South benefit sharing arrangements in bioprospecting and genetic research: a critical ethical and legal analysis. Dev World Bioeth. 2006 Dec;6(3):122–34.

Unfair benefit-sharing with local participants and communities may constitute exploitation, and contribute to a public distrust of biomedical research. In addition, poor consent procedures and inadequate engagement, both at an individual and community level complicate the relationship between researchers and participants. Unfair benefit-sharing with local participants and communities may constitute exploitation, and contribute to a public distrust of biomedical research. In addition, poor consent procedures and inadequate engagement, both at an individual and community level complicate the relationship between researchers and participants.[14]

A NEED FOR GLOBAL GOVERNANCE OF BIOBANKS

Low- and middle-income countries have weaker research capacity and governance mechanisms for biobanks than high-income countries. It is important to develop a feasible and equitable governance framework at the global level to guarantee benefit sharing in biobank collaboration. The potential commercial benefits resulting from access to the data of biobanks underscores the urgent need for such a framework.[15]

International initiatives – such as the Public Population Project in Genomics and Society, the International Society for Biological and Environmental Repositories and the International Agency for Research on Cancer have offered governance structures, best practices and guidelines to promote the internationalization and standardization of biobanks.

An international research group has created the ELSI 2.0 initiative to accelerate the translation of ethical, legal and social knowledge into policy and practice.[16] ELSI 2.0 invites people working with biobanks, policy-makers, funders, the public and other stakeholders to be engaged in ethical, legal and social research. In addition, international organizations should harmonize the multiple existing standards, best practices and guidelines, and consolidate these into a single global governance framework for biobank operation and collaboration.

These bodies have proposed a provisional global governance framework for biobanks that includes the following six key elements:

1. respecting participants and donors of biological samples, and protecting their

14. Lyon: International Agency for Research on Cancer; 2014.
15. Wonkam A, Muna W, Ramesar R, Rotimi CN, Newport MJ. Capacity-building in human genetics for developing countries: initiatives and perspectives in sub-Saharan Africa. Public Health Genomics. 2010;13(7-8):492–4.
16. Vancouver: International Society for Biological and Environmental Repositories; 2014.

privacy and confidentiality;

2. informing participants and donors of potential risks through initial consultations;
3. sharing samples, data and benefits in a fair, transparent and equitable manner;
4. ensuring quality and interoperability of samples and their associated data;
5. improving public awareness, trust and participation in biobanks; and
6. defining the role of the private sector in the use of knowledge derived from biobank operations.

The framework is currently available from http://genomicsandhealth.org/ and is open for comments, and provides a setting for further discussions among key stakeholders and interested parties.

COMBATTING IN CONSENT AND RIGHT TO PRIVACY FOR LIFE

"Humans have and amazing capacity to believe in contradictory things. For example, to believe in an omnipotent and benevolent God but somehow excuse him from all sufferings in the world. Or our ability to believe from standpoint of law that humans are equal and have free will"

~ Fyodor Dostoevsky

Biobanks are set up for different purposes, and biobanks of different kinds contain different types of biological material. However, the focal point of both ethical and legal attention has been medical research biobanks, which are set up and designed to study the health effects of genetic predispositions, environmental exposure, and the interplay between genetic and environmental factors. Biobank information is thus comprised of genetic data and health data as well as the health-related data in a broad sense that is provided by the participant in a questionnaire. Additional material can be obtained by linking biobank information to information contained in other registries, such as birth registries, cancer registries, family registries, and other medical and non-medical registries.[17]

17. Van den Hoven, J. ‚Privacy and health information: The need for a fine-grained account. International Journal of Quality in Health Care 12(1): 5–6 (2000)

Because biobanks contain information concerning both hereditary and environmental factors for a large number of individuals, they give researchers the ability to find factors that put groups of people at risk for—or may allow them to avoid—diseases with complex causes of development. Biobank research is thus group level research characterised by requiring a large number of participants, who take part mainly by providing information and information carriers—and by agreeing to the creation of, and further linkage to, information by the research institution.[18]

Participants in biobank research are not like participants in other kinds of medical research. Biobank research is not about measuring the effects of a medical intervention: it should leave the health of the participant's body and mind virtually untouched. Biobank research is most often conducted using de-identified information files, partly because it is concerned with relevant properties at the level of groups, not individuals, and partly to minimize the risk for sensitive information being leaked. Thus, participating in biobank research will not per se tell the participant anything more about his or her own present or future health. And the general health of those who choose to take part will not improve or be any better than the health of those who choose not to participate. Since participation in a biobank is restricted to the use of tissue already procured from medical treatment or minimally invasive procedures such as giving a blood sample, bodily harm is not a primary concern. The primary concern is rather that biobank research involves collecting sensitive health information about the participants and updating this through linkage to other medical and nonmedical registers. In biobank research, the primary concern thus is that there needs to be protection against infringements of the privacy of the research subjects.[19]

The information collected about an individual in a biobank is widely held to be private in some sense. It is not just gathered from those individuals: the idea is that it continues to belong to them. It is somehow still part of their personal sphere. The information contained in and by health registries and tissue samples in therapeutic and diagnostic biobanks, together with the information obtained when participants fill in a questionnaire and have their blood sample

18. Ingelfinger, Julie R., and Jeffrey Drazen, Registry research and medical privacy, New England Journal of Medicine 350(14), 1452–1453 (2004).
19. Norges offentlige utredninger, The Concept of "The Privacy", New Yorshire Journal of Medicine,1–255 (2005).

taken, are all taken to be information that somehow falls under the jurisdiction of the individual. The collecting and collating of this kind of information is seen as something the individual should have a right to be informed about, and which he or she can deny access to or otherwise control.[20]

ASPECTS AND CONCEPTS OF PRIVACY

The importance of privacy is emphasized in the story of Adam and Eve eating from the tree of knowledge and their subsequent realization and shame of standing naked before each other. As Milton Konvitz[21] points out, ''mythically, we have been taught that our very knowledge of good and evil—our moral nature, our nature as men—is somehow, by divine ordinance, linked with a sense and a realm of privacy''. Of course, a felt duty to hide parts of ourselves is not the same as an interest in or a right to hide parts of ourselves.[22]

There is a distinction between mandatory privacy—the duty not to engage in certain activities or to expose one's ''private parts'' in public—and a right to privacy—the right to engage in certain activities and to expose one's ''private parts'' out of the public eye. But the idea that we should have some kind of control over aspects of our own person in social life is a shared one. In this view, to control the social aspects of one's person is fundamental for understanding our nature as morally and aesthetically sensitive beings. Privacy is thus an aspect of dignity, which involves the mandatory privacy necessary to distinguish civilized humans from barbarians and animals, to which the parable of Adam and Eve in Genesis alludes.[23]

The concept of privacy is furthermore related to, but can be distinguished from, the concept of secrecy. That these two concepts are quite distinct can be illustrated by the courtesy we make use of in order to enable and sustain a social life. Keeping my opinion of your divorcing my sister to myself is something other than keeping it a secret. Likewise, that I have a naked body under my clothes is a private matter, but not a secret.

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20. Nagel, Thomas, Concealment and exposure: Philosophy & Public Affairs, 3–30 (1999).
21. Konvitz, Milton, Privacy and the law: A philosophical prelude. Law and Contemporary Problems, 272–280 (1996).
22. Allen & Anita, Genetic privacy: Emerging concepts and values. In Genetic secrets: Protecting privacy and confidentiality in the genetic era, 31–59 (1998).
23. Etzioni, Amitai, The limits of privacy 34-90 (1999).

THE RIGHT TO PRIVACY

If privacy is asserted to be not only an interest, but indeed a right, it could be argued to be a good intrinsic to valuable human life rather than just instrumental to it: the right to privacy can thus be justified in itself without involving a simple trade-off relation with conflicting goods. This perspective is promoted by Mary Anderlik and Mark Rothstein by linking privacy to autonomy: ''Genetic privacy has intrinsic value as a facet of autonomy, and respect for autonomy implies a duty to respect the genetic privacy of others. Within a legal framework, genetic privacy must be considered a fundamental right, and individuals should be able to block or seek redress for invasions of their genetic privacy by other people and by the government''[24] . Alternatively, the instrumental value (the desirable consequences) of a right to privacy must dwarf the value of conflicting interests. In order to argue for a right to privacy, the intrinsic value of privacy could be argued for philosophically, or the instrumental value of privacy could be argued for empirically. It should be shown that respecting the right to privacy clearly overrides or outweighs the social good or harm inflicted by not respecting such a right. If privacy of information is a right, individuals should not easily be asked to give it up even if this might be in the public interest.[25]

In Article 8 of the European Convention on Human Rights, the Council of Europe has aimed to provide a clear right to privacy. Paragraph 1 states,

"everyone has the right to respect for his private and family life, his home and his correspondence".

According to the Convention, this right to privacy is to be balanced against quite wide-ranging interests, like the economic well-being of the country and the protection of health and morals. Paragraph 2 of the Convention thus qualifies paragraph 1 rather strongly:

"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

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24. Anderlik, M. & M. Rothstein, Privacy and confidentiality of genetic information: What rules for the new science? 401–433 (2001).
25. Warren, S., and L. Brandeis. 1890. The right to privacy. Harvard Law Review 4(5): 193–220.

PRIVACY AS THE RIGHT TO BE LEFT ALONE

Aristotle's division between polis and oikos, the public and the domestic, paves the way to mark off one arena as generally less accessible than another. In ancient Greek culture, of course, freedom was equated with participation in public life, unlike the modern notion of freedom as something to be enjoyed in private. In the wake of new inventions in the late nineteenth century, Warren and Brandeis defined the right to privacy as the right to be let alone: ''Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops''[26].

Persons should be respected—which indeed is a conceptual and not just a normative remark—and regarding them as just objects is not an act of respect. It seems that such a basic right to be respected as a person is a right that cannot meaningfully be waived. This, then, does not provide us with a clear-cut ground for not being under surveillance—which might be legitimate for several reasons, for instance, to prevent criminal acts. By extension, it does not explain why privacy is an important factor in treating people with respect.[27]

Thus, it is not the right to be left alone as a precondition to preserving one's dignity that is at stake here, since the information concerned here is precisely not private in this sense: the information is known to and part of the relation between the individual and the representatives of the Icelandic national health care system. Rather than protecting the right to be left alone, this case concerns the right to keep some kinds of information confidential in the sense of reserving it for the proper kinds of uses and relations.

The upshot of this discussion is that putative right to privacy in the sense of a right to be left alone is neither a precondition for personal autonomy nor a precondition for human subjectivity and dignity. The assertion of a right to be left alone based on respect for the autonomy and dignity of persons seems unjustified. In the context of biobanking such an assertion therefore seems unable to justify that the interest of the individual in being left alone should override all other interests. That informed consent requirements in biobank research should enable the individual to veto all involvement with or use of personal information in biobank research is not justified by the assessed right to be left alone.

26. DeCew, Judith. 2002. Privacy. In The Stanford encyclopedia of philosophy, ed. Edward N. Zalta. http://plato.stanford.edu/archives/fall2008/entries/privacy/ Accessed 23 February 2019.
27. Nordal, Privacy : In The ethics and governance of human genetic databases 180–189 (2007).

"THE PRIVACY OF A PERSON IS THE PRIVACY OF A PERSON": SPHERE OF BIOBANKS IN INDIA

"Biology is the most powerful technology ever created. DNA is software, protein are hardware, cells are factories"

~ Dr. Benjamin Spock

Privacy is a fundamental right in India, but this is due more to interpretation of Article 21 of the Constitution of India than any specific provision on privacy. Article 21 of the Constitution of India states that "No person shall be deprived of his life or personal liberty except according to procedure established by law."

In many judgments the highest court of India, the Supreme Court, has interpreted that the term "life" to include all those aspects of life that are essential to make a person's life meaningful, complete, and worth living. In interpreting the right to privacy as a fundamental right, the Court has taken into account Article 12 of the Universal Declaration on Human Rights and Article 17 of the International Covenant on Civil and Political Rights, 1966.

In the absence of a specific law on privacy, the decisions of the Supreme Court in significant cases form the basis for deciding on privacy rights and their violation. In ***Kharak Singh v. State of UP,***[28] the Supreme Court held that the right to privacy is one of the penumbral rights of Article 21 of the Constitution. Article 19, which guarantees the right of freedom of expression and Article 21, which upholds the right to life, are the key articles invoked in these cases. Over the years, the Court has expanded the scope of Article 21 through its judgments. In ***R. Rajagopal v. State of T.N.***[29] , it was held that a right to privacy was implicit in Article 21 and through this, the Court recognized that prisoners are entitled to the right to privacy. The core issue was what rights were available to citizens when the rules or action taken by the state were considered as violation of privacy.

In India, freedom of speech is a fundamental right, but not an absolute right. The First Amendment to the Indian Constitution qualified this right. None of the leading privacy cases in

28. Kharak Singh v. The State Of U. P. & Others (1962), 1963 SCR (1) 332.
29. R. Rajagopal v. State Of T.N (1994) SCC (6) 632.

India involve access to tissues or biobanks, nor are they about informed consent and privacy in giving and collecting samples. The applications to biobanks must be extrapolated from more general principles.[30]

Due to issues relating to state surveillance, collection of data for government-sponsored programs, outsourcing, and handling of data including personal and financial information and press freedom, privacy issues have received attention in recent years. Privacy issues in health or research, however, have not received much attention. Regarding privacy in health matters, courts have interpreted that although privacy is a fundamental right, it cannot be enforced as an absolute fundamental right without any restriction and in some contexts public good or public welfare can override the right to privacy.[31] Thus, courts have tried to strike a position that balances private right with public welfare. When provisions of two acts are contradictory or when more than one act and guideline is applicable the general interpretations of guidelines are subordinate to acts enacted by Parliament or legislatures. Important cases on health privacy in India are given here to illustrate how courts have handled such cases and the principles invoked therein.[32]

In ***Mr. Surupsingh Hrya Naik v. State of Maharashtra,***[33] the key issue was whether the provisions of the Right to Information Act would prevail over the rules under the Code of Ethics of the Medical Council of India. The Bombay High Court took the view that as the Code of Ethics and regulatory guidelines are subordinate legislation, the provisions of an Act of Parliament would override such regulation if there are conflicts in applying them. In this case, the question was whether the health records of a person in custody and when admitted to a state hospital while in custody can be sought under the Right to Information Act or could they be denied as furnishing them would violate the Code of Ethics. The Court took the position that The Parliament/Legislature and/or its Committees are entitled to the records even if they be confidential or personal records of a patient. Once a patient admits himself to a hospital the records must be available to Parliament/Legislature, provided there is no legal bar. We find no

30. Mrs. Neera Mathur v. Life Insurance Corporation of India and Anr.(1992) AIR 392.
31. Ms. X v. Mr. Z And Anr. (2002) DMC 448.
32. Rohit Shekhar v. Narayan Dutt Tiwari & Anr. (2012) 2 S.C.C 234 (India).
33. Mr. Surupsingh Hrya Naik v. State Of Maharashtra (109) Bom L R 844.

legal bar, except the provisions of the Regulations framed under the Indian Medical Council Act. Those provisions, however, would be inconsistent with the proviso to Section 8(1)(j) of the Right to Information Act. The Right to Information Act would, therefore, prevail over the said Regulations.[34]

There are six key aspects of privacy in case of Biobanking in India [35], which are as follows:-

1. Governance and oversight: The current guidelines cover governance and oversight in a limited way as the guidelines mandate setting up IECs and following the provisions of guidelines. But they do not cover the core issues relating to governance and oversight, such governance structure, conflict of inter est, or dealing with benefit sharing of different types, nor issues involving oversight, particularly when the biobank is operated on a commercial basis or is part of a commercial venture.
2. De-identification policies: At present there are no specific guidelines on this for biobanking.
3. Security policies: The guidelines do not address this in the context of biobanking.
4. Databases open/controlled access policies: The guidelines have some provisions on this, but not in the context of biobanking.
5. Role of informed consent in the privacy frameworks: Informed consent is mandated in the case of identified samples. According to the guidelines: The sample collector must obtain informed consent of the donor for DNA banking or for cell-line transformation and banking. The process of seeking informed consent for purposes of banking must clearly be stated in addition to possible risks and benefits, the conditions under which samples from the Repository shall be provided to other researchers, how long the samples shall be preserved in the Repository and what will be the costs to individual researchers in obtaining samples from the Repository. The sample collector must also clearly

34. *Supra note 34.*
35. G. Greenleaf, "India's Draft The Right to Privacy Bill 2014 – Will Modi's BJP Enact It?" Privacy Laws & Business International Rep. 129, 2014 at 21-24.

inform every donor that he reserves the right to order destruction of his sample from the Repository at any time. The current framework takes into account some issues like use of samples for research, but it can be revised taking into account all aspects relating to prior informed consent and privacy.

Brief analysis shows that while the current regulations address privacy issues, the rules in the guidelines can be revisited and revised to meet the norms of international genomic research. In the absence of a comprehensive law or framework on privacy in India, however, mere revision of the guidelines is not sufficient.

The then-Planning Commission in 2012 appointed a group of experts on privacy and the group was headed by Justice A.P. Shah.[36] The group submitted a report suggesting a conceptual framework for regulation of privacy in India. The key points are:

1. The privacy act should not focus on any specific technology and should be generic enough with flexibility. It should be technologically neutral and interoperable with global standards so that it helps in building trust of global clients and users;
2. The multi-dimensions of privacy should be taken in account and the act should cover physical privacy, DNA, audio, video etc.;
3. The legislation should apply to the government and private sector;
4. The data controller should guarantee privacy and be made accountable; and
5. Industry-specific, self-regulating organizations and the office of privacy officer as primary authority for enforcement of provisions of the act should be established.

Other restrictions to data sharing for the protection of the privacy of research participants: the

36. N. N. Mishra, Privacy and the Right to Information Act, 2005, 5 I.J of Medical Ethics 4, 1-5 (2004).

current regulations on this seem to be adequate, but they may be evaluated on the basis of evolving norms in this.

RECOMMENDATIONS & SUGGESTIONS

"Biology is the least of what makes someone a mother."

~Oprah Winfrey

As of now, in India there is no national privacy framework in general or as it relates to genomic research except the guidelines of ICMR. While some guidance can be drawn from the judgments of the courts , that is not sufficient as these cases have not addressed any issue of privacy in biobanks.

In the absence of a national framework, evaluation for the guidelines for privacy, security, and governance is needed. As pointed out, the guidelines need to be revisited and revised. A better option would be to enact a new law on biobanks and replace the guidelines with that Act. But such an exercise will have to address issues on data transfer, handling of genomic data through bioinformatics, and the implications for privacy and the interfaces/linkages between different acts and regulations in protecting and promoting privacy.

The current approach of invoking Article 21 or fundamental rights in violation of privacy cases is not sufficient to address the complex issues as fundamental rights per se in India are enforceable against the government but not always against private parties. Hence, it is necessary to enact a new law on biobanks and replace current guidelines with that Act and harmonize relevant guidelines of other Acts and ethical guidelines issued by different bodies. This will ensure that biobanks are governed under distinct principles on privacy.

In my view, this makes a beginning, but for health law and privacy — particularly in the context of biobanking — a group of experts can be constituted to examine current frameworks and acts and suggest a roadmap for revisions and addressing concerns about privacy. This group can examine the implications of the Information Technology Act and review data collection and privacy policies of institutions taking into account international norms in bioethics, advances in technology, and concerns of different stakeholders.

Different perspectives on and aspects of privacy have been discussed in this paper in order to reach a better understanding of the notion and importance of privacy. A relational view

of privacy has been argued for on the basis of this discussion of the concepts of individual privacy and previous attempts at defining and grounding privacy rights by linking it to concepts like autonomy, dignity, and property. Rather than granting participants an exclusive right to or ownership of their health information, which always must be waived in order to make biobank research possible, it is argued that that their interests should be related to the specific context of involvement. Some reflections on the consequences for legitimate handling of privacy interests in a research based system of health services has been suggested.

The "Time" magazine in 2009 had reported that, "Bio-banking is one of the ten ideas changing the world right now." With advances in technology, the demand for well-annotated and properly preserved, bio-specimens has increased.

Bio-banking involves the collection, processing, and storage of biological material, development of methods for preserving their tissue integrity, and distribution of these biological samples along with the related clinical data in an organized and credible form to the scientists. A well-managed bio-bank is a prerequisite for biomedical research in the field of neuro-oncology, to characterize the biology of emerging and re-emerging neuro-infections and to identify the cellular and genetic basis of neurodegenerative diseases.

The existing bio-banks in India have a bias in their collection and archival of biological material for research that is influenced by several factors. These include the specific interests and expertise of the pathologists and the clinicians involved, the extent of institutional financial and administrative support available, the accessibility to the human biological material (that is to be collected in a viable state for subsequent archival) and the availability of methods to maintain quality control.

The key to an effective utilization of the bio-banks lies in linking the clinical data to the archived samples and their optimum utilization by the investigators. It is needless to mention that informed consent from the patients or their close legal relatives is mandatory before collecting the respected material at surgery or at autopsy, storing it, and utilizing it for biomedical research and disseminating the knowledge acquired after studying the material while at the same time, preserving the confidentiality of the donor.

These activities need to be governed by the respective Institutional Scientific Ethics Committees in the interest of the donor in order to preserve the conscience of the society, we live in. In India, there are two bio-banks of significance, one - the Human Brain Bank at National

Institute of Mental Health and Neurosciences, Bengaluru, and the other - Cancer Bio-bank attached to Advanced Centre for Treatment, Research and Education in Cancer Tata Memorial Hospital, Mumbai..

The emergence of genomics, transcriptomics, proteomics, phosphoproteomics, and the discovery of biomarkers has enhanced the need for fresh human tissue with well-preserved deoxyribonucleic acid (DNA) and protein integrity that is in a "near normal state." Generally, blood leukocytic DNA is studied as it is expected to reflect the genetic diseases of all organs in the body. Recently, organ-specific DNA mutations in the same individuals have been recognized, underlining the genetic heterogeneity of the tissues in the same subject. Hence, a new line of research has emerged based on these differences.

The progress in bio-banking in neuroscience has been slow although limited attempts are being made in some centers. India has missed the opportunities of optimally studying the human biological material that would have been possible to obtain in the aftermath of natural calamities. This strategy, if implemented effectively, would greatly help us in evolving strategies to combat the effects of these disasters.

A few examples from India include the Bhopal gas tragedy, the Endosulfan toxicity in Kerala, the Buddha Nala pollution in Sutlej River by the industrial effluents, the high levels of radioactive material in the ecosystem in Malwa Region, Punjab, and the mushrooming of assisted reproduction technology related developmental disorders in the offsprings. The biological material obtained from these events was not banked to study, and therefore, no lessons were learnt to evolve the counter measures. Similarly, banking of various human biological tissues following outbreaks of viral infections is not practiced due to the phobia of a possible accidental spread of infection. The discovery as well as the evaluation of diagnostic and prognostic biomarkers that appear or are elevated following neurotrauma - polytrauma is an open field of study with immense clinical relevance.

The only way to confront the situation lies in banking of tissues and fluids for research in order to understand the biology, to develop vaccines and therapeutic strategies, and to form research consortia to share knowledge. The major advantages derived from this venture would be the development of skilled man-power possessing a vast "knowledge bank," the initiation and evolution of innovative techniques in analytical bioinformatics, and the availability of

integrative job opportunities for the next generation of young scientists.

Religion does not act as a barrier for the donation of human tissues as long as it is being done with the sole purpose of alleviating human suffering. Dispelling the misconceptions about harvesting tissues at autopsy facilitates philanthropic donation following one's death. If pursued with a mission mode, bio-banking can become a sustainable venture in the country, similar to the process of organ donation for transplantation. Many of the advanced medical institutions in the country can initiate local bio-banks of various tissues and enroll basic scientists in order to use it and to develop innovative strategies to combat diseases.

Let "Bio-banking" be one of the national priorities. Let the clinicians, pathologists, and basic scientists form a network. Once the philosophy of harvesting internal organs and body fluids for research becomes an integral part of the system, further work may progress on the funding strategies and sustainability. The neurologists, neurosurgeons, neuropathologists, and neuroscientists can work as a team and make a significant contribution to this concept of bio-banking - brain banking and make it a reality in the near future.

"I shall pass this way but once in life. If I may do any good, let it be now, for I shall not pass this way again"

- Stephen Grellet

Let this not be a mere slogan but a mission for the welfare of future generations. Let us all strive to enhance the knowledge base by promoting bio-banking and translational research.

METAMORPHOSIS OF RIGHTS IN A DIGITAL SOCIETY VIS-À-VIS THE PRINCIPLE OF NET NEUTRALITY

Vidhatri Bharti*

"Allowing broadband carriers to control what people see and do online would fundamentally undermine the principles that have made the Internet such a success".

-Vint Cerf, father of the internet

INTRODUCTION

India's economy and society has seen drastic transformation in its design with the advent of technology. However, analog technology has now shifted to digital technology and the internet forms a major part of the digital revolution. The internet has merged distinct realms and unified them into one virtual world, this is because of the unique selling point of the internet technology that is the ease with which it helps express multiple views and opinions at minimal costs. It is a media form which has given the Indian democracy a new and stronger shape where the internet speech conduits i.e. the internet service providers (hereinafter referred to as ISP's) facilitate a vast volume of expression throughout the world.

India alone has 560.01 million internet subscribers as of September 2018.[1] In September 2018, the government's BHIM platform registered 16.33 million transactions worth Rs. 7,064.86 crore per month.[2] In 2017, about 4% of India's GDP was derived from digital products and services created directly through the use of digital technologies, such as mobility, cloud, Internet of Things (IoT), and artificial intelligence (AI). Furthermore, the International Data Corporation (IDC) study commissioned by Microsoft predicts that approximately 60% of India's GDP will be derived from digital products or services by 2021[3].

After looking at statistics it can be deduced that majority of the trade, commerce and service dispansion be it education, healthcare, caller identification, transport and even matchmaking directly of indirectly use internet as a catalyst to development. Moreover, the

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1. Telecom Regulation Authority of India, The Indian Telecom Services Performance Indicators from July-September 2018, (Feb. 1, 2018, 11:38 p.m.), https://main.trai.gov.in/sites/default/files/PIR08012019.pdf.
2. Ahona Sengupta, 405.8 Million UPI Transactions Worth Rs 59,835 Crore Clocked in September 2018, (Feb. 5, 2019, 7:00 p.m.), https://www.news18.com/news/business/405-8-million-upi-transactions-worth-rs-59835-crore-clocked-in-september-2018-1894953.html.
3. Swapnil Jaiswal, Digital Transformation to Contribute US $ 154 Billion to India GDP by 2021, Microsoft News Centre India, (Feb. 3, 2019, 6:50 p.m.), https://news.microsoft.com/en-in/digital-transformation-to-contribute-us154-billion-to-india-gdp-by-2021.

internet platform has the potential of delivering services to the citizens irrespective of their social or economic status. Increased internet penetration has left its impact not only on traditional business models and the Indian economy but also on the standard of living and conduct of citizens. Thus, rightfully the portmanteau 'Netizens' can be used for surfers of the internet across the nation.

With transformation of the conventional society into a virtual world so much so that the physical world seems small in the face of the expanse of the internet, there is also a need of rights for the digital society. The open nature of internet has led to it being largely unregulated[4] and the internet ecosphere is no more unscathed from the violation of rights, abuse of the principles of freedom and deviation from ethics over the years. Moreover, the ideology that the internet is a 'lawless' space does not hold true today and it is here where concepts like 'open internet' and 'internet neutrality' (hereinafter referred to as net neutrality)[5] come into play as core democratising principles. The only stumbling block here is the absence of a cohesive digital rights setup in India implementing such egalitarian principles.

The citizens around the country have the right to access the internet but with accessibility consumers of the internet are also empowered to control their viewing experience, subject to the provisions of the law. Net neutrality is a component of the wider idea of 'open internet' and refers to a principle according to which all electronic communication networks should carry data in a non-discriminatory fashion regardless of their nature, content or the identity of their sender or recipient.[6]

It is in order to refrain from transferring control over the internet to the ISP's and protecting the free and open internet that the preservation of this principal is essential. The non-discriminating principle under this concept has three aspects to it- speed, access and pricing. Thus, any discriminatory treatment, restriction or interference in treatment of content including practices like blocking, degrading or granting preferential speeds to any content is prohibited by the principle of net neutrality thereby ensuring public good. This paper analyses the impact of violation of net neutrality on the rights of stakeholders of the internet and recommends certain solutions for the same.

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4. DAWN C. NUNZIATO, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE (Stanford Law Books, Stanford University Press 2009).
5. Tim Wu, "Network Neutrality, Broadband Discrimination" 2 JTHTL 141 (2003).
6. Luca Belli & Primavera De Filippi, Report on The Value of Network Neutrality for the Internet of Tomorrow: Dynamic Coalition on Network Neutrality 11 (2013).

HISTORY AND BACKGROUND

The debate on the current issue is not as nascent as it seems since the issue was first raised by the internet and telecom sector regulator i.e. Telecom Regulatory Authority of India (hereinafter referred to as TRAI) in one of its consultation papers in 2006, it however was reignited in the year 2015 when a committee was established by the Department of Telecommunication (hereinafter referred to as DoT) to provide recommendations on the subject[7] and multiple reports and consultation papers were also issued by TRAI during the period of 2015-2016. The report by the committee suggested that the 'core principles' of 'net neutrality' should be adhered to.[8] The committee recommended that user rights on the internet need to be ensured so that the ISP's do not restrict the ability of the user to send, receive, display, use, post any legal content, application or service on the internet, or restrict any kind of lawful internet activity or use.

The TRAI had issued a regulation in February 2016 on discriminatory pricing over internet access which led to the ban of platforms like the free basics and airtel zero.[9] This was done a few months after the consultation process was complete and the regulations were followed by an explanatory memorandum. The Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016 (hereinafter referred to as the 2016 regulations) prohibit the differential pricing of data services from consumers on the basis of content except in cases of grave public emergency.[10] Non-adherence is punishable with a financial disincentive of fifty thousand for each day of breach.[11]

Parallelly in the west the 'open internet order' by the Federal Communications Commission (hereinafter referred to as FCC) in 2010 required the providers of services to ensure a transparent network management, to impose the anti-discriminating principle and disallowed blocking of lawful content.[12] In 2015 the FCC passed a resolution that laid down the law prohibiting the ISP's from restricting users traffic or unfairly favouring content.[13] However,

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7. Department of Telecommunication, Net Neutrality DOT Committee Report (2015).
8. *Id.*
9. Ravi Shankar Prasad, Right to non-discriminatory internet access is non-negotiable, TOI, Dec. 16, 2017.
10. Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016, No. 2 of 2016.
11. *Id.*
12. Bhairav Acharya, Net Neutrality and the Law of Common Carriage, The Centre for Internet & Society, (Feb. 23, 2019, 4:00 p.m.), https://cis-india.org/internet-governance/blog/net-neutrality-law-of-common-carriage.pdf
13. Danny Kimbali, Sponsored Data and Net Neutrality: Exemption and Discrimination in Mobile Broadband Industry, MIJ 2 (2015).

only recently has a resolution been passed to scrap this landmark order by the new government.[14]

PRINCIPLES OF NET NEUTRALITY

'Your ability to access a website depends on your desire to access the website and not the deals that the intermediaries have made with each other'

-Cindy Cohn

We access internet via connections that are provided by the ISP's and these access providers make the users who are the end point in this cycle, connect to any point in the network. There however exist certain elements of the internet functioning in this transfer cycle that may aggravate the abuse of freedom of internet users. To ensure that this does not happen there are certain principles of net neutrality that should be followed:

1. The End-to-End Principle

Telecom operators sometimes act as gatekeepers of the internet trying to seek monopoly in its operation. This should be avoided as although the internet was created by several stakeholders, the internet is controlled in its entirety by none. The end-to-end principle advocates that the 'intelligence' in a network ideally should be located at the ends of the system and the content on the internet should travel from one end to the other without any corruption in between. In simple terms it means that the pipelines that carry data and information should not interfere with the flow of the traffic and should not be 'context aware/sensitive' thereby forming a content agnostic approach.[15] Thus, if this principle is to be followed there remains miniscule chances of violation of rights of consumers of the internet. The state can encourage the exercise of this principle by prohibiting content discrimination.

2. Double Dipping By Internet Service Providers

Under the traditional network system, the network owners built their business via charging consumers for providing services, however, in today's day and age the ISP's earn income from both the ends of the pipeline. This is done by not directly charging customers double prices but through latent price hikes as per websites. This exercise deprives small and upcoming companies of their right to free display of content and provides for fast lanes for big content providers. On one hand the ISP's charge the customers for services provided and on the

14. Divyanshu Dutta Roy, US Junks "Net Neutrality", What It Means for Internet in India: 10 Points NDTV (Jan. 30, 2019, 11:20 p.m.), https://www.ndtv.com/india-news/as-us-junks-net-neutrality-how-it-affects-internet-in-india-10-points-1788020.
15. Telecom Regulatory Authority of India, Recommendations on Net Neutrality (2017).

other hand charge the companies providing the original content for their services thereby attaining double benefit by acting as intermediaries. This does disrupts an egalitarian digital society.

3. Deep Packet Inspection

Deep packet inspection (hereinafter referred to as DPI) is an internet surveillance technology that involves inspection of contents of packets as they are transmitted across the network.[16] DPI technologies are intended to allow network operators precisely to identify the origin and content of each packet of data that passes through the networking hubs.[17] DPI devices are designed to determine what programs generate packets, in real time, for hundreds of thousands of transactions each second.[18] The equipment allows network operators to detect and intercept recognized forms of mal-ware (viruses, Trojans, worms, and other dangerous code) before it reaches their customers or employees.[19] This software however, leads to the violation of the principle of net neutrality since this inspection is done by middle men and the DoT has recommended that practices like deep packet inspection should not be used for unlawful access to the type and contents of an application in an internet packet as it is being used by major service providers.[20]

4. Common Carriage Principle

It can be safely said that the internet is a community resource. As community resources are for public good, being the parens patriae the state has the obligation of distributing it equally. A 'common carrier' as the name suggests is any entity which would transport resource on behalf of the community'. The state is bound to protect the resources which are meant for the enjoyment of people and in this regard the principle of equality can be said to be synonymous to net neutrality.

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16. Christian Fuchs, Implications of Deep Packet Inspection (DPI) Internet Surveillance for Society, 1 TPSRPS 49 (2012).
17. Government of India, Telecommunication Engineering Centre, White paper on Deep Packet Inspection (2012).
18. Christopher Parsons, Working Paper, Deep Packet Inspection in Perspective: Tracing its lineage and surveillance potentials, Version 1.2 (2008).
19. *Supra note 16.*
20. Telecom Regulatory Authority of India, Consultation Paper on Net Neutrality (2017).

RIGHTS OF INTERNET SURFERS

'Perfect freedom is as necessary for the health and vigour of commerce as it is to the health and vigour of citizenship'

-Patrick Henry

Rights of people have seen transformation through the ages. The digital revolution has also led to the evolution of a different assortment of rights that citizens should be guaranteed. India is the largest democracy and a democracy is more than a government which is elected by the people, it also involves guaranteeing certain internationally recognised and newly evolving rights to its people. Likewise maintaining net neutrality is not simply a matter of protecting existing standards and preventing the extension of authoritative powers, but instead is a matter of establishing a new fundamental human right in the digital age.[21]

Net neutrality preserves human rights while unbridling the full potential of internet since it allows communication to be distributed worldwide with absolutely no or relatively less barriers to entry. It deals with fundamental values ranging from diversity and freedom of expression to flow of information that liberal democracies aim to achieve for the purpose of legitimizing intervention by communication authorities in the system.[22]

To ensure an undamaged democratic structure that guarantees fundamental rights to all it becomes indispensable to protect the rights of stakeholders of the internet space ranging from the Government, consumers, ISP's, over the top service providers etc. This section of the paper deals in detail with various rights for netizens, the protection of which can be guaranteed by the principle of net neutrality.

1. Right To Freedom of Expression

The Internet is a public good which has become essential for the effective exercise and enjoyment of the right to freedom of expression.[23] Technology, more specifically the internet has led to the overall revolution of the society and one of the ways in which society has transformed is through access to varied rights viz. freedom of expression which protects information,

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21. Sujay Kulshrestha, Net Neutrality: A Human Right for the Digital Age? 5 IJ 1 (2013).
22. Seamus Simpson et.al. (eds.) European Media Policy for the Twenty-First Century 161 (Routledge Taylor & Francis Group, London, 2016).
23. Adessium Foundation of The Netherlands "The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age" ISS (2013).

opinions and ideas of all kinds disseminated through any media, regardless of borders.

The Universal Declaration of Human Rights states, *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*[24]*"* The freedom of speech and expression under article 19(1)(a) under the Indian constitution is a concept with diverse facets, both with regard to the content of the speech or expression and the means through which communication takes place. Clauses (a) to (g) of Art. 19(1) guarantee to the citizens of India freedoms viz of 'speech and expression', 'peaceable assembly' 'association', 'free movement', 'residence' and 'practising any profession and carrying on any business'[25]. It is also a dynamic concept which is constantly evolving with time and advances in technology.[26]

In 2011, the UN Special Rapporteur for Freedom of Opinion and Expression Frank LaRue issued a landmark report on online free expression, calling the Internet "one of the most important vehicles by which individuals exercise their right to freedom of opinion and expression.[27] Thus, this right is the linchpin of a democracy although not absolute.[28]

As such, the non-discriminatory treatment mandated by the principle of net neutrality seems to be instrumental not only to facilitate the complete enjoyment of fundamental rights but also to safeguard the 'openness and fairness' as well as the 'decentralized control, edge-user empowerment and sharing of resources' that represent the very 'scope of the Internet', as recognised by the Internet technical community itself.[29] The discussion over freedom in this scenario is not only restricted to the users of the internet space but also the over the top services (hereinafter referred to as OTT's)[30] service providers. In the light of the same the freedom of the following stakeholders of the internet is essential:

Freedom of users

The right to freedom of expression includes the right not only to impart but also to seek

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24. Universal Declaration of Human Rights (1948).
25. M.P. JAIN, INDIAN CONSTITUTIONAL LAW (7 ed. Lexis Nexis, Gurgaon, 2014).
26. MADHAVI GORADIA DIVAN, FACETS OF MEDIA LAW- A MINI ENCYCLOPAEDIA COVERING MULTIPLE DIMENSIONS OF MEDIA LAW 7 (2nd ed. Eastern Book Company, Delhi, 2013).
27. Frank La Rue, Report of Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, AHRC (May, 2011).
28. INDIA CONST. art. 19 cl. (1), (2).
29. *Supra note 4 at 21.*
30. Prabir Purkayastha, Net Neutrality in the Age of Internet Monopolies, XXXI The Marxist, 2015

and receive information. Eliminating the principle of net neutrality would not only infringe the rights of the OTT service providers to express themselves but also intrude over the right of the consumers to receive the expressed and propagated information. For instance, if the ISP's are allowed to charge a higher fee under a special agreement and the ISP is unyielding on providing services to its users for a lesser price it would limit the user's experience of the world wide web.

Freedom to companies

When it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme.[31]

The right of the companies will be infringed in the absence of regulation since they will be unable to carry on their business as per their plans due to throttling of speed of access to certain sites by the ISP's while providing faster access to preferred ones would lead to the big bucks occupying a position much higher than that of incipient companies. The freedom should not solely be restricted to the ones capable of bequeathing money on the ISP's neither should it be dependent upon the social status of the company. The absence of the net neutrality principle will lead to formation of internet monopolies of the marketplace and the start-ups would cease to exist. The 2016 regulations now have prohibited content providers from entering into agreements with the ISP's.

2. Intrusion of Privacy And Data Protection

Right to privacy constitutes an intrinsic part of right to life and personal liberty under article 21 of the Constitution.[32] The internet as a unique medium of exchange of information, however, has left no information as private. In a non-neutral Internet, providers would be able to monitor communications of the users in order to differentiate between messaging, streaming, peer-to-peer (P2P), e-mails and so on. According to a recent study, some European access providers are already doing so via the use of Deep Packet Inspection (DPI) for their commercial benefit.[33] This directly is an onslaught on the privacy of the customers as ISP's will constantly indulge in intrusive techniques to regulate internet traffic. Moreover, due to the highly volatile

31. Shreya Singhal v. Union of India, AIR 2015 SC 1523.
32. Retired Justice K.S. Puttaswamy v. Union of India, Writ Petition (Civil) No. 494 of 2012
33. KRISTEN FLEDLER & JOE MCNAMEE, COPYRIGHT CHALLENGES OF THE DIGITAL ERA (European Digital Rights, 2013).

nature of the internet and attempts of ISP's to commit intrusions the country's security also will remain under a constant threat.[34]

Privacy and data protection are driven in part by an interest in supporting the appropriate sharing of data. Clarity over the definitions of personal data and the appropriate ways to share the same is required to help support data sharing regimes as uncertainty can put a brake on sharing.[35] It is also important to ensure privacy since it helps with expansion of internet horizons.[36] The Personal Data Protection Bill, 2018 which proposes consent to be central to data sharing is a step in the right direction to a secure internet while also not limiting the freedom of online surfing.

3. Curbing Innovation

To keep pace with advancement of technology and consumer demands it becomes necessary for companies and businesses to constantly innovate. A restricted access would not attract innovation since the incipient internet companies would not be able to compete with the throttling and pricing techniques by the ISP's, exercised to the disadvantage of these start-ups. Preservation of net neutrality will give the embryonic companies to bring forth fresh ideas and allow them to exercise their right to freedom of speech and expression in a vibrant internet environment.

THE PROHIBITION OF DISCRIMINATORY TARIFFS FOR DATA SERVICES REGULATIONS, 2016

The 2016 regulations prohibit service providers from both offering and charging discriminatory tariffs for data services to the consumer on the basis of content. Entering into any agreement or arrangement to this effect is also prohibited. Closed communication networks such as the intranet hold an exception to this regulation.[37] Therefore, the regulations follow the principle of 'what cannot be done directly can also not be done indirectly', this reduces the

34. KARNIKA SETH, COMPUTERS, INTERNET AND NEW TECHNOLOGY LAWS (2nd ed., Lexis Nexis, 2016).
35. DUTTON et al., THE CHANGING LEGAL AND REGULATORY ECOLOGY SHAPING THE INTERNET 52 (UNESCO Publishing, 2011).
36. Sascha Meinrath & Victor Pickard, Transcending Net Neutrality: Ten Steps Toward an Open Internet, JIL, Dec. 2008, 6 at 12.
37. Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016, No.2 of 2016.

probability of ISP's from evading regulation by entering into contracts promising cashbacks rather apart from offering reduced tariff.

Regulation four provides exemption from regulation three in cases of emergency services or in cases of grave public emergency. However, with respect to the reduced tariff the decision of TRAI is binding and final.

As per regulation fee in case of contravention of the above regulations TRAI may direct for withdrawal of such tariff and an amount of 50,000 for each day of contravention not exceeding a sum of 50,00,000.

The above regulations show an initiative by the government towards securing the principle of net neutrality, however, the regulations of 2016 suffer from lacunae owing to their constricted nature. The regulations do not deal with the aspects of speed and access thereby providing loopholes which are to the benefit of the ISP's.

RECOMMENDATIONS

'Change is the law of life, those who look only to the past or the present are certain to lose the future'

- John F. Kennedy

Since the 2016 regulations India has been lauded for having one of the strongest provisions for ensuring an egalitarian digital space however, these regulations only deal with one aspect of pricing which is a major drawback. There always remains scope for further regulations and clarifications when dealing with a subject matter like the internet. Hence, the author proposes the following recommendations:

1. Access to the masses: The digital revolution though has resulted in the ubiquitous spread of internet technology but there still are people in India who are unconnected to the digital age. While we pan out provisions for warranting rights for the digitally sound population, there should also be effort towards ensuring access to internet for all.
2. A holistic legislation: The regulations of 2016 solely concentrate on the pricing aspect of net neutrality while there is a need to monitor the content and speed aspects as well. An umbrella legislation which may prohibit blocking and throttling speed of internet content from specific companies and ensure

protection of rights over the internet is essential.

3. Faulty provision for exception in the 2016 regulations: The regulations of 2016 exempt the 'closed electronic communications network' from the ambit of fine thereby tilting the play field in the favour of ISP's, exemptions like these defeat the purpose of the regulation.
4. Quality of service: The 2016 regulations do not mention any thing with respect to the quality of service by ISP's. Among digital rights, one right of extreme importance is the right to access quality internet. An amendment to the regulations laying down minimum quality of the internet service is thus recommended.
5. Internet measurement platforms: In order to ensure a level playing field for all players in the market it is imperative to design an internet measurement platform which can not only measure deviation but also help in monitoring extent of violations.
6. Application- blindness: As also proposed in the consultation paper by TRAI the ISP's should have application blind software to ensure that no distinction is made between data packets.

The 2016 regulation six provides that TRAI may review these regulations after the expiry of two years of their coming to effect. This leaves scope for the state for providing regulations governing the other aspects of internet freedom.

CONCLUSION

There have been several arguments against policing of internet, however without monitoring this resource the chances of human right infringement exponentially incline. Moreover, since free internet forms a facet of the democratic principles of our newly transformed digital country as alluded above and the constitution framers have considered civil liberties as pillars of democracy, the maintenance of an open internet becomes imperative.[38] Hence, it can be concluded that each 'packet' over the internet should be given equivalent treatment to ensure equal treatment of the stakeholders of the internet. This ultimately would

38. Ellen P. Goodman, Media Policy and Free Speech: The First Amendment at War with itself, 35 Hofstra L.R. 4 (2007).

propel the country towards a true democratic structure unharmed by technological advancements.

In order to preserve an open and user-centric Internet, the implementation of the principles of net neutrality is necessary as they focus on preserving a distributed and user-empowering Internet architecture, allowing individuals to fully enjoy their freedom of expression, imparting and receiving any lawful content, services or application, using any legal device.[39] The TRAI in the interest of all the major stakeholders as has been discussed in the above sections of the paper had asked for opinions of various stakeholders in the numerous consultations and recommendation reports released over the years which ultimately bore fruit in the form of the 2016 regulations. However, as recommended in the previous section, a wholesome legislation is still required in this field.

39. LUCA BELLI, NET NEUTRALITY COMPENDIUM, 21 (Luca Belli, Centre for Technology & Society, Fundação Getúlio Vargas, Rio de Janeiro, Brazil et al.) (2016).

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