

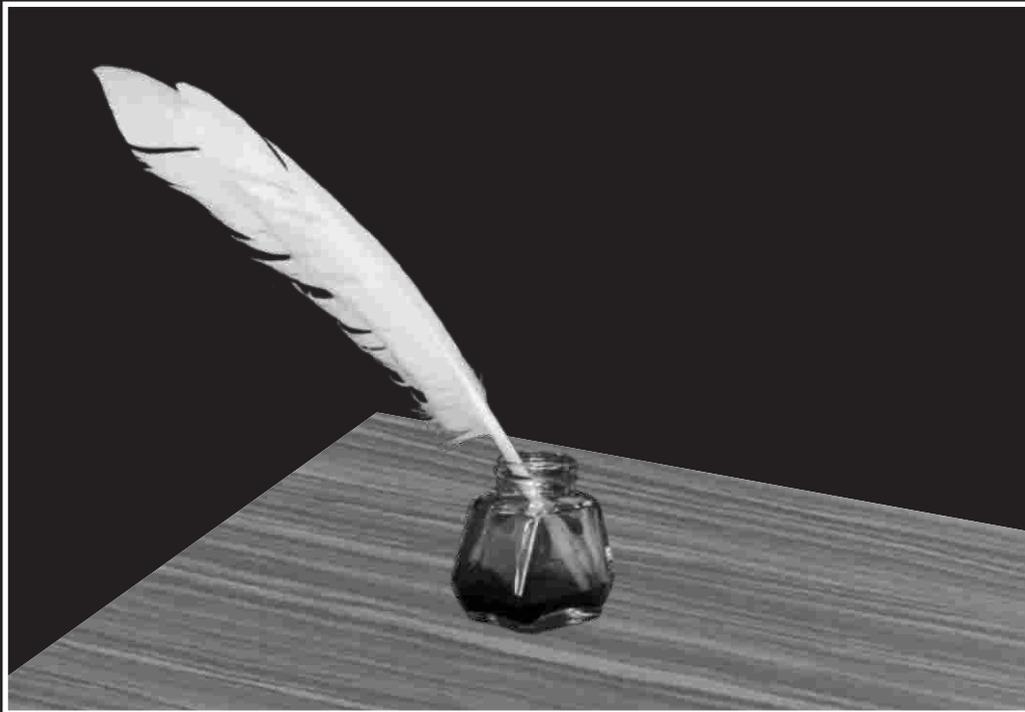
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## FORENSIC UTILITY OF DNA PROFILING

Dr. Ajai Singh\* & Shantanu Gaur\*\*

*“It is the duty of the Judge in criminal trials to take care that the verdict of the Jury is not founded upon any evidence except that which the law allows.”*

-Samuel Taylor Coleridge

### INTRODUCTION

DNA profiling is also referred to as DNA Typing or DNA Fingerprinting, a forensic strategy that primarily clearly distinguishes people in criminal cases by their DNA attributes. The DNA method was developed primarily on the basis of understanding of two technological innovations: first, Kary Mullis' Polymerase Chain Reaction (PCR)<sup>1</sup> in 1983, USA; second, Professor Sir Alec Jeffreys<sup>2</sup> Restriction Fragment Length Polymorphism (RFLP) in 1985, UK.

The name Colin Pitchfork might not be as identifiable as Charles Manson or Jeffrey Dahmer. But for those in the forensic science community, it's a name that holds weight. Pitch work was the first murderer to be caught using DNA analysis<sup>3</sup>; thus it will not be wrong to say that the modern forensic DNA began with the first DNA case. This pioneering case demonstrated the potential of DNA Profiling and firmly pointed towards its future as the most important forensic investigative tool to have been developed in the 20th century. The increasing use of DNA evidence in criminal investigation and in courts assumed the role as the 'New Language of Truth'.

DNA Profiling has gone through three major processes of its development and advancement technologically which includes Multi-locus, Single-locus and STR (Short Tandem Repeat) stages and in addition recently there is a step further towards the advancement that constitute the fourth stage is Sequencing. The introduction of PCR-based STR analysis was the major

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1. Blake, E., J. Milhalovich, J. Higuchi, P.S. Walsh, and H. Ehrlich, *Polymerase chain reaction (PCR) amplification and human leukocyte antigen (HLA)-DQ oligonucleotide typing on biological evidence samples: Casework experience*, 37 J. For. Sci. 700–726 (1992). Available at: [https://en.wikipedia.org/wiki/Polymerase\\_chain\\_reaction](https://en.wikipedia.org/wiki/Polymerase_chain_reaction); Last accessed: 20 August, 2020
2. Jeffreys, A.J., V. Wilson, and S.L. Thein, *Individual-specific 'fingerprints' of human DNA*, 316 Nature, 76–79 (1985). Available at: [https://en.wikipedia.org/wiki/Restriction\\_fragment\\_length\\_polymorphism](https://en.wikipedia.org/wiki/Restriction_fragment_length_polymorphism); Last accessed :20 August, 2020.
3. People v. Manson, Court of Appeals of California, Second Appellate District, Cri. Nos. 22239, 24376; 1976. Also see: Joseph Wambaugh, *The Blooding*, (Perigold Press, 1989). Details of the investigation, identification, and prosecution of Pitchfork has presented in *The Blooding* novel.

innovation with the help of which the utility of DNA Profiling was expanded.

The supposition throughout the Profiling is that the earlier stages that leads to an evidence in court have been undertaken correctly and the inferences drawn at the end is practically useless unless all of these aspects have been undertaken with due attention while maintaining the continuity and the integrity.

Numerous social, ethical and political concerns and issues pertaining to forensic DNA Profiling and data basing are situated at the intersection of civil rights, science and governance. Such concerns include but not limited to privacy, non-standardization of jurisdictional databases, surveillance, reliability of DNA testing, potential misuses and abuse of databases. Judges do not deny the scientific accuracy and conclusiveness of DNA testing, but in few cases they do not even admit as evidence on the grounds of legal or constitutional prohibition and at times even on account of public policy.

## **LEGISLATIONS**

### **LEGISLATIONS IN INDIA**

DNA evidence was first accepted by the Indian courts in the year 1985 and then in 2005 the Code of Criminal Procedure<sup>4</sup> was amended by which Section 53 of the Code included Scientific techniques involving DNA profiling comprise analysis of blood, blood traces, semen, swabs in cases of sexual felonies, sputum and sweat, hair samples and fingernail clippings<sup>5</sup>.

The legislations that provides for application of DNA technology in India are-

- i) The Constitution of India
  - Article 20(3)- Provides that no person who has been accused be compelled to be a witness against himself. Forcing testimony to incriminate oneself in a crime is what Article 20(3) foresees. In no way does the use of DNA technology to identify the culprit contradict this guaranteed fundamental right.
  - Article 21- There is a dispute between two basic fundamental rights, the right to privacy and the right to information, as far as DNA technology is agitated. The protection of the state and public policy as the court is

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4. Elonnai Hickok, Rethinking DNA Profiling in India, 47 EPW, Issue No. 43 2012. Available at: <https://www.epw.in/journal/2012/43/web-exclusives/rethinking-dna-profiling-india.htm> Last accessed: May 27th 2021.

5. Section 53. The Criminal Code of Procedure, 1973. Available at: <http://www.vakilno1.com/bareacts/crpc/s53.htm>. Last accessed: May 27th 2021.

reluctant to oblige a person to go for a DNA or blood test in the lack of any particular legislation because it leads to a violation of the right guaranteed under Article 21.

- Article 51-A(h) and (j) provide that it is the responsibility of every citizen of the state to cultivate the scientific disposition, humanism and spirit of investigation and change and to pursue excellence in all fields of individual and collective action so that the nation continues to grow to higher levels of effort and accomplishment.

ii) The Indian Evidence Act 1872

The Indian Evidence Act 1872 does not specify directly the use or applicability of DNA technology but under some of its provisions DNA technology as an evidence can be considered.

- Section 9- facts are relevant as far as they are necessary to introduce or to explain a fact in issue.
- Section 45- Expert evidence  
Section 45 provides as to how the Court has to form an opinion upon a point of foreign law or of science or art, or identity of handwriting [or finger impressions] etc<sup>6</sup>.
- Section 46- Evidence bearing the expert's speculation.
- Section 51- grounds of speculation shall be a relevant fact
- Section 112- Legitimacy of child-The DNA test cannot rebut the conclusive presumption envisaged under section 112 of the Indian Evidence Act. The parties can avoid the rigor of such conclusive presumption only by proving non-access which is a negative proof<sup>7</sup>.
- Section 114- The court may imply the existence of such facts which are likely to have occurred in reference to the facts and circumstances of a particular case, taking into account the common course of natural phenomena, human actions and their public or private undertakings.
- Nemo Tenetur Seipsum Accusare, a Latin maxim- No man can be accused

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6. <https://lawcommissionofindia.nic.in/reports/Report271.pdf> Last accessed: May 27th 2021.

7. Shaik Fakruddin v. Shaik Mohammed Hasan, AIR 2006 AP 48.

of criminalising himself.

iii) The Code of Criminal Procedure, 1973

- Section 53, 53A, 54 - Examination by medical practitioner

With predominance of legal spirit, the Malimath Committee recommended that DNA expert should be included in the list of experts which has been provided under Section 295(4) and under Section 482 as the inherent power of court in the Code of Criminal Procedure, 1973 which shall deem to include power to order as may be necessary to discover truth.

iv) The Code of Civil Procedure, 1908- Section 75, 151, Order XXXII Rule 15, Order XXXVI Rule 10-A

In particular Section 151 of the Code of Civil Procedure 1908 preserves the courts' inherent authority to investigate to the degree that it might be appropriate for the purposes of justice to avoid misuse of the court's mechanism. Therefore, DNA tests can be carried out and the use of the inherent powers of the court in cases relating to succession and inheritance can provide the requisite guidance.

v) The Indian Penal Code, 1860

vi) The Identification of Prisoners Act, 1920

The Malimath Committee<sup>8</sup> suggested that Section 4 of the Prisoner's Identification Act be changed on the same line as the Prevention of Terrorism Act, 2002, in which the police officer examining a case may compel the court in writing to obtain a sample of handwriting, fingerprints, blood saliva, etc. from any suspect. The investigative agency can seek authorization to seek identity via DNA testing, as if those recommendations are approved.

vii) Medical Termination of Pregnancy Act, 1971 and Amendment of 2004

Under Section 3 of the Medical Termination of Pregnancy Act and its amendment it is provided that a registered practitioner may terminate pregnancy and this goes along with Section 376 of the Indian Penal Code, 1860 and if DNA is conducted and on the basis of expert assertion the criminal may

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8. Malimath Committee Report on Reform of Criminal Justice System, 2003.

easily be sent behind bars.

viii) Family Laws

Under such laws there arises disputes with regard to marriage, paternity, maternity, adoption and maintenance and these can best be resolved with DNA profiling but till date there has been no specific provision, which could provide for this.

### **LEGISLATIONS IN CANADA**

Canada passed the DNA Identification Act of 2000 that allowed the creation of DNA databases from which DNA profiles can be derived<sup>9</sup>. It assists law enforcement agencies to link crimes, identify alleged suspects, eliminate suspects where there is no link between crime scene DNA and DNA profile in DNA Database and further determine the seriousness of crime and criminal activity involved. Furthermore, in Canada it is valid to take a sample without obtaining consent provided it is taken by professional health personnel. In addition there have been more legislations too in this regard like The DNA Analysis Backlog Elimination Act of 2000, DNA Technology Act of 2003 which ensures that the appropriate use and dissemination of DNA information should be facilitated, the DNA information should be accurate and shall remain confidential, all obsolete or inaccurate information shall be timely removed and such record be destroyed expeditiously and under all circumstances privacy of an individual shall be protected.

### **LEGISLATIONS IN ENGLAND**

Acknowledging the importance of DNA technology, the UK also enacted Data Protection Act in the year 1998<sup>10</sup>. The concept of blood testing and limits under the law has been the point of intense contention in England. In a variety of occasions, the British Courts have had a chance to evaluate the powers of the Court over the parties to seek out blood tests against the will of an individual. In such cases, if the person was a lunatic or unstable person or under the age of sixteen or otherwise unable to consent, the person from whom such consent was to be obtained was then brought before the courts for examination.

DNA Profiling is more efficient in England and Wales than elsewhere as it is considered to be an integral part of every investigative process and is not merely used in particular or specific cases but in almost all cases of criminal matters.

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9. *Supra note 6*, at 31. Available at: <http://www.ttparliament.org/legislations/a2000-27.pdf>; Last accessed: 24 August 2020.

10. [https://en.wikipedia.org/wiki/Data\\_Protection\\_Act1998](https://en.wikipedia.org/wiki/Data_Protection_Act1998) Last accessed: May 28th 2021

### **LEGISLATIONS IN UNITED STATES OF AMERICA**

In the United States there is a reference to Paternity Exclusion tests in early 1920s and since then there have been exclusive legislations like DNA Identification Act, 1994; Transplantation of Human Organs Act, 1994 and Advancement of Justice through DNA Technology Act, 2003. Further, in the United States there is a prevalence of two main tests for admissibility of scientific information laid down by the experts. One is the Frye Test, which has been enunciated in the landmark case of *Frye v. United State*<sup>11</sup>, and the other test is of Helpfulness. Admissibility depends upon the quality of science underlying the evidence as determining the scientists themselves. The competence of experts testifying regarding the new scientific concept, the use of the new method, the capacity for inconsistency of the technique, the presence of specialised literature describing the technique and its feasibility can also be regarded by the court.

### **LEGISLATIONS IN NEW ZEALAND**

For the first time the issue of DNA testing<sup>12</sup> was raised in the year 1978 in New Zealand and gradually after several attempts for years New Zealand's Minister of Justice announced that the government is in support for DNA profiling and a national DNA data bank be set up for the same reason. Henceforth, the Criminal Investigations (Blood Samples) Act was passed in the year 1995, which was enforced, from the year 1996<sup>13</sup>.

### **JUDICIAL PRONOUNCEMENTS**

The advent of DNA profiling raises two key issues for judges viz;

- i) Determining admissibility and,
- ii) Explaining the jurors the appropriate standards for weighing evidence.

In India specifically the legal position of forensic technique has to undergo three-fold litmus test, which is as follows;

- i) The Constitutional Validity of DNA profiling-this can be challenged on the basis of Article 20(3) of the Constitution of India and the answer for the same can be obtained from the decision in the case of *State of Bombay v. Kathegalu*,<sup>14</sup> wherein it was held that forensic related information is an extension of the

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11. 293 F. 1013 (D.C. Cir. 1923)

12. Tim McBride, *State Surveillance: The Slippery Slope*, 4 PLPR 71 (1997), Also see, Allison Puri, *An International DNA Database: Balancing Hope, Privacy, and Scientific Error*, 24 B.C. Int'l & Comp. L. Rev. 372, 341-380 (2001), Available at: <http://lawdigitalcommons.bc.edu/iclr/vol24/iss2/6>, Last accessed: May 27th 2021.

13. <https://www.esr.cri.nz/assets/about-ESR-content/Images/SallyAnn-Harbison-PRINT.pdf>. Last accessed: May 27th 2021.

14. AIR 1961 SC 1808.

provision of Section 9 and 11 of the Indian Evidence Act, 1872 and hence not in contravention to Article 20(3) of the Constitution of India.

- ii) The evidential value of forensic information obtained from the experts- the justification for this can be provided under Section 45 of the Indian Evidence Act, 1872.
- iii) In the absence of specific legislation solely for this purpose under which legislation the admissibility is based? –Provisions of the Code of Criminal Procedure, 1973 is generally the basis and further it is left completely on the judicial discretion either to permit DNA test or to deny any such request.

The Apex Court in case of Goutam Kundu v. State of West Bengal<sup>15</sup>, held that courts in India cannot order blood tests as a matter of course, whenever the application is received for such prayers that is to allow blood test, such reports can not under any circumstance be entertained, the court must carefully examine the reasons for ordering such, the need and the consequences for allowing or not allowing such an application.

Further, in case of Sharad v. Dharampal,<sup>16</sup> the apex court held that *“if for arriving at the satisfaction of the court and to protect the right of a party to the lis who may otherwise be found to be incapable of protecting his own interest, the court shall pass an appropriate order and then the question of such action being violative of Article 21 of the Constitution of India would not arise under any circumstance.”*

In another case of Dwarika Prasad Satpathy v. BidyutPrava Dixit,<sup>17</sup> it was held that the Party’s refusal to undergo a DNA test may lead the court in drawing an inference therefrom.

The Supreme Court in case of Kamti Devi v. Poshi Ram,<sup>18</sup> observed that DNA test is to be directed only in deserving and some special cases and not as a matter of routine.

In case of Narinder Singh Bogarh v. State of Punjab,<sup>19</sup> It was held that *“taking blood samples should be voluntarily for DNA analysis and if the suspect is not volunteering, CBI cannot ask the recourse to Section 166-B of Code of Criminal Procedure, 1973.”*

In case of M.V.Mahesh v. State of Karnataka,<sup>20</sup> it was held that scrutiny of DNA testing is

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15. AIR 1993 SC 2295.

16. AIR 2003 SC 3450.

17. AIR 1999 SC 3348.

18. (2001) 5 SCC 311.

19. (2004) 2 Crim.LJ 1446.

20. 1996 Cri.LJ 221.

commendable and any benefit of doubt arising from malpractices or irregularities in the scientific process ought to go to the accused.

The supreme Court in case of Chandan Pannalal Jaiswal v. State of Gujarat,<sup>21</sup> were issued directions, which are as under-

- i) Blood sample to be taken in jail itself and by a responsible medical officer
- ii) Blood sample of accused may be collected from the hospital by a responsible medical officer
- iii) Expert forensic laboratory to ensure that crime exhibits remain intact.

The court in case of Haribhai Chanabhai Vora v. Keshubhai Haribhai Vohra,<sup>22</sup> held that “*consent of the parties is must for DNA testing.*”

In case of Abdul Salam v. Chalil Sajid and Ans.,<sup>23</sup> it was held that “*even though the result of a genuine DNA test is scientifically accurate, this is not enough to escape from the conclusiveness of Section 112 under the Indian Evidence Act, 1872.*”

The Apex Court in Selvi v. State of Karnataka,<sup>24</sup> has made it “*mandatory to take consent from the court prior to conducting forensic techniques like Narco-Analysis as the statements of the subject are recorded under the influence of the drug administered to them, thus it is important for the court to maintain a balance between society and interest of justice.*”

The Apex Court in Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and Ans.,<sup>25</sup> while facing the question of DNA Report being available on record and no objection being taken as to the establishment of prima facie case for non-access at the time when direction for DNA Test was called for, held that in such a situation the DNA test will prevail over the presumption of conclusive proof under Section 112 of the Indian Evidence Act, 1872.

The Apex Court in case of Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Ans.,<sup>26</sup> observed that the judiciary should use the discretionary power only in the case when the interests of both the sides are in a balanced state and there exists due consideration for a rightful decision in the case when DNA test is urgently required. DNA test in cases relating

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21. 2004 Cr.LJ 2992.

22. AIR 2005 SC 157.

23. (2003)1 DMC 774.

24. (2010) 7 SCC 263.

25. (2014) 2 SCC 576.

26. (2010) 8 SCC 633.

to paternity of a minor should not be stated by the judiciary as a usual activity on a daily basis but it should be done only when such a request is made. The judiciary also needs to analyze the varying aspects such that of presumption u/s 112 of the Evidence Act, 1872 wherein merits and demerits of such pronouncement and the test of 'urgent requirement' is to be observed in order so that the court can reach on truthful vision without using such test.

In case of Krishna Kumar Malik v. State of Haryana,<sup>27</sup> The Apex Court held that after the incorporation of Section 53-A in the Code of Criminal Procedure, 1973 as its amended provision it has become necessary for the Prosecution to undergo DNA test especially in cases relating to the acts which constitutes an offence against human beings as provided for under the Indian Penal Code.

The Apex Court in the case of Rohit Shekhar v. N.D. Tiwari<sup>28</sup>, held that an order for DNA test to determine paternity does not in any manner infringe a person's Right to Privacy.

While on other, in case of Vikas Garg v. Beena Garg, 2019 the Apex Court opined that DNA evidence is in the nature of opinion evidence and a court is not bound to accept the opinion and that the probative value accorded to DNA evidence gets varied from case to case, depending upon facts and circumstances of each case and the weight accorded to other evidences on record, whether contrary or corroborative.

The Apex Court in case of Kathi David Raju v. State of Andhra Pradesh and Ans.,<sup>29</sup> has held that *"the DNA test cannot be ordered without there being any appropriate satisfaction for the requirement of such a test by the court."* Though there can be no dispute so as to the right of the police to seek permission from the court to conduct DNA test but such request is not to be meted out without there being appropriate satisfaction for the requirement for such test and DNA test cannot be conducted without carrying any substantial investigation by the police authorities.

In case of conflict between the Right to Privacy of an individual and the duty of the court to discover the truth, the court must exercise its discretion while balancing the interests of the parties and the just decision in the matter before it as opined in the case of Ajay Singh v. Smt. Rama Bai and Others.,<sup>30</sup>

The Supreme Court in Dipanwita Roy v. Ronobroto Roy<sup>31</sup>, held that DNA test is most legitimate

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27. (2011) 7SCC 130.

28. (2012) 12 SCC 554.

29. (2019) 7 SCC 769

30. MP.No. 1239/2020.

31. (2015) 1 SCC 365.

test and scientifically perfect method to establish legitimacy of child.

Recently, in *Jayanta Chatterjee v. State of West Bengal*,<sup>32</sup> the Apex Court “*granted bail to an Octogenarian after DNA Reports showed that he is not the father of a rape victim’s child.*”

The various guidelines were issued by the Madras High Court<sup>33</sup> and it was asserted that the courts cannot compel the parties to undergo DNA test for the second time, the first DNA report cannot be set aside merely on the basis of allegations by the party against whom the result of the test was declared, DNA test report though is the only evidence available to determine the paternity of a child but it is to be noted that the said report is to be analyzed along with the facts and other evidence to be adduced by the parties in support of their arguments.

#### **THE STRENGTH AND THE WEAKNESS**

While speaking about the utility of DNA profiling in the light of above observations one need to consider the overall strength and weakness of the DNA Profiling which are as follows-

- i) Strengths:
  - a) With the exception of identical twins, no two individuals have the same DNA and thus it becomes easy to identify the culprits and even the accused.
  - b) DNA Profiling has the potential to significantly improve both criminal justice system as well as police investigation practices.
  - c) The development of PCR improved the sensitivity of the analysis
  - d) The time taken was reduced to less than 24 hours per analysis.
  - e) As a result of reduction of labour it became highly cost effective.
  - f) The data collection was standardized and it was easy to optimize the analysis and interpretation of data.
- ii) Limitations:
  - a) Profiling of DNA has led to some of the most complex issues to legal rights like that of privacy rights and right against self-incrimination.
  - b) No appropriate statute exists to provide a roadmap for the investigative agencies and the judiciary as well. This also leads to lack of procedure

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32. Criminal Appeal No. 537 of 2020.

33. *S Veera Lakshmi v. The Superintendent of Police*, (2015) 2 MLJ (Cr) 36.

when adopting DNA as evidence.

- c) Judges neither deny its accuracy and conclusiveness nor admit as evidence in some cases.

#### **SUGGESTIONS BY MALIMATH COMMITTEE**

The Malimath Committee constituted under the Chairmanship of Justice V.S. Malimath has strongly recommended that DNA experts must be included under Section 293 of the Code of Criminal Procedure, 1973 and necessary amendment must be made in the Indian Evidence Act, 1872 so as to consider DNA as a conclusive evidence. Further it also provided for-

- i) Establishment of well-equipped laboratories to handle DNA samples and evidence.
- ii) Enactment of special legislation.
- iii) Creation of national DNA database.

Other prominent recommendations made from time to time includes-

- i) Constitution of DNA Profiling Board, which shall be responsible to lay down the procedure, standard to establish DNA Laboratories, grant accreditation to laboratories and to supervise, monitor, inspect and assess them.
- ii) Exclusive purpose to undertake DNA profiling will just be restricted to identification of person and no other information.
- iii) Records to be kept confidential.
- iv) Provide punishment to the violators of the provisions and directions.
- v) There shall be a separate record of all DNA experts and should be Government authorized officers.

#### **CONCLUSION**

In India, the evaluation of DNA evidence is still at its early stage of development and acceptability. The reason probably is lack of technical knowledge and question that remains unanswered all the while is whether DNA can form a sole basis of its conclusiveness and can it convict an offender beyond reasonable doubt. India needs a more aggressive DNA processing with a 'Collect, Test and Compare' approach.

The criminal justice system is expected to be based on equal and egalitarian standards with the mission of the court, without being influenced by commercial attention granted to scientific inventions patented for the use of science as a resource for trade, to laboriously understand scientific evidence and determine its value systems. Our criminal justice system has to reach to a

level so there remains no stone unturned to save the life of an innocent and provide him or her with the justice and on the other hand affirm that a criminal does not get away at the cost of life of an innocent and for realizing this efficiency in our criminal justice system and observing the utility of DNA profiling and the stage where it has reached in India one can easily deduce that DNA profiling has been an efficient tool in resolving various cases and further development of forensic science or DNA as forensic tool will prove to be pivotal in fighting against crime.

The responsibilities should be taken in order to provide for-

- i) Appropriate committee and advisory board to ensure the accuracy of records of DNA recognition, collection and all research relevant to DNA.
- ii) State-wise funding for upgrading and keeping the DNA data banks in its proper condition.
- iii) Balance out between such profiling's and public interest at large.
- iv) Establishment of DNA data banks and introducing the legislations to regularise the same.
- v) Separate legislation specifically for the purpose of safeguarding the processes and guidelines for DNA profiling.

Moreover, DNA profiling is technically demanding for a need to have a quality control with every precaution taken to ensure preparation for DNA profiling and proper analysis of the results obtained therefrom. As DNA profiling has become the most popular and preferred forensic tool in criminal investigation but the only issue that lies and to be taken care of is that there should be no human mistakes or human derived results in collection, preservation, dispatch and quality control.

In conclusion it can be observed that Apex Court still needs to ponder upon comprehensive analysis upon the legality of several forensic elements in order to know about the truth at the time of investigation. In many of the cases, the degree of conviction or acquittal depends on the evidence submitted as per the profiling of DNA. In order to make the tool of profiling of DNA more trustworthy, the Parliament and the Judiciary should come up with appropriate statutes or detailed guidelines. This will ensure less complexity at the time of investigation thereby preventing injustice.

## **WOMEN AND EQUAL OPPORTUNITY IN INDIAN ARMY: AN ANALYSIS WITH SPECIAL REFERENCE TO COMBAT ARMS**

**Akshay Jain\***

*“The engagement of women officers in the Army has been an evolutionary process... Arguments founded on the physical strengths and weaknesses of men and women and on assumptions about women in the social context of marriage and family do not constitute a constitutionally valid basis for denying equal opportunity to women officers.”<sup>1</sup>*

*~ Justice DY Chandrachud, Judge, Supreme Court of India (17 February 2020)*

*“If there ever was a time to discuss the place of women in the Armed Services, that time has passed... The average woman could conceivably be better suited physically for some of today’s combat positions than the average man, depending on which skills the position required. Combat roles no longer uniformly require sheer size or muscle.”<sup>2</sup>*

*~ Justice Gary H Miller, Senior United States District Judge (22 February 2019)*

### **INTRODUCTION**

Indian army is one of the constituents of Indian Defence Forces<sup>3</sup> which performs land-based operations. The Defence Forces of the Union of India, including the Indian army, are headed by the President as its supreme commander.<sup>4</sup> The Indian army comprises of various services which can be broadly classified into three broad categories viz. (i) Combat Arms, (ii) Combat Support Arms, and (iii) Services.<sup>5</sup> Combat Arms refers to that category which involves direct ground combat with the enemy on battleground and includes combat units such as Infantry and Armoured Corps. Due to the nature of tasks involved in this category, it has been subjected to male dominance and no women candidates are entitled to serve thereunder in Indian army. On the other hand, the Combat Support Arms entails direct combat support services such as artillery,

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1. The Secretary, Ministry of Defence v. Babita Puniya & Ors., 2020 SCC Online SC 200.

2. National Coalition for Men v. Selective Service System, No. 19-20272 (5th Cir. 2020).

3. ‘the Forces’ means the regular Army, Navy and Air Force or any part of any one or more of them. Army Act, § 3, cl. (ix) (1950).

4. India Const. art. 53, cl. 2.

5. Lt. Gen. Syed Ata Hasnain (Retd.), Understanding the inner workings and selection process of army, Hindustan Times (February 18, 2020, 05:53 AM),

<https://www.hindustantimes.com/opinion/understanding-the-inner-workings-and-selection-process-of-army/story-7vR5Tlr6qjZnn24gzS0MyK.html>.

signals, aviation and intelligence, and Services encapsulates technical, administrative and professional support services to the army. The said two categories are generally made open for both men and women candidates.

Combat arms of armed forces across the globe remain a subject of male dominance. It is argued that, historically, the military has always been considered as a pillar of masculine power and the same has excluded women in order to preserve patriarchy.<sup>6</sup> Moreover, Joshua S. Goldstein, in his well known work on women in military and role of women in combat arms, argues that “*combat forces in the world’s state armies today include several million soldiers (the exact number depending on the definition of combat), of whom 99.9 per cent are male*”<sup>7</sup>. However, with the advent of nations with progressive constitutions entailing bill of rights, recognition of professional competency and combat training over gender based discrimination along with the right to gender equality read with the principle of equal opportunity<sup>8</sup> have not only influenced policy decisions but also recognized inclusion of women in military combat services of armed forces moving from incremental advancements to absolute entitlement in combat services. For instance, in the year 1982, the Canadian Charter on Rights and Freedom<sup>9</sup> introduced equality of opportunity for women in Canadian armed forces and by the year 1989, the nation further ensured access to women in all combat services except service on submarines. However, in the year 2001, restriction on service on submarines was also lifted up for women henceforth granting absolute entitlement to women in combat services. Germany opened up all combat roles for women in the year 2000 ensuring considerable increase in women offers in its armed forces. Subsequently, Australia in 2011, United States in 2015 and United Kingdom in 2016 lifted all restrictions pertaining to exclusion of women in combat units of their respective armed forces.

With an enhancement of role of women in combat units of armed forces across the world in

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6. Cynthia H. Enloe, *Does Khaki Become You? The Militarisation Of Women’s Lives* (1983).

7. Joshua S. Goldstein, *War And Gender: How Gender Shapes The War System And Vice Versa* (2004).

8. ‘Equal Opportunity’ means the principle of treating all people the same, and not being influenced by a person’s sex, race, religion, etc. Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/equal-opportunity> (last visited Aug. 30, 2020).

9. The Canadian Charter of Rights and Freedoms is a bill of rights entrenched in the Constitution of Canada, forming the first part of the Constitution Act, 1982. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

recognition of professional competence over gender discrimination;<sup>10</sup> Indian army is yet to implement the principle of equal opportunity in combat services for women. The restriction upon women officers in combat services has been imposed by invoking Section 12<sup>11</sup> of the Army Act, 1950 (Act of 1950) which prescribes for ineligibility of females for employment under such services which have not been notified by the Central Government read with the power of Central Government to limit the application of fundamental rights to persons subject to the Act of 1950 respectively. Though the Constitution of India under Article 14 and 16(1) recognize equality of opportunity as a fundamental right in matters of employment under the State<sup>12</sup>, however, in matters relating to armed forces, the fundamental right of equal opportunity becomes subject to Article 33 of the Constitution which provides immunity to provisions of the Act of 1950. Also, apart from legal factors, mindsets of army personnel seem to be a major barrier in induction of women in army which is substantially reflected by a statement given by the former army chief and the current Chief of Defence Staff, General Bipin Rawat which stated that “India was not yet ready to accept body bags of women killed in combat”<sup>13</sup>.

The reason of exemption from enforceability of fundamental rights in the matters of armed forces, however, does not justify unreasonability in executive actions. The Supreme Court of India (the Supreme Court) has time and again declared that discretionary actions of the executive under the Act of 1950 must confirm to the test of rationality and the same shall align with the constitutional and statutory mandates. For instance, on 17 February 2020, the Supreme Court has declared that Short Service Commission<sup>14</sup> (“SSC”) women officers shall be eligible for

10. Anthony King, Women in Combat, 158 *The RUSI Journal* 4 (2013).

11. Ineligibility of females for enrolment or employment: No female shall be eligible for enrolment or employment in the regular Army, except in such corps, department, branch or other body forming part of, or attached to any portion of, the regular Army as the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that nothing contained in this section shall affect the provisions of any law for the time being in force providing for the raising and maintenance of any service auxiliary to the regular Army, or any branch thereof in which females are eligible for enrolment or employment.

Army Act, § 12 (1950).

12. “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. India Const. art. 12.

13. Soutik Biswas, India’s soldiers ‘not ready for women in combat’, BBC NEWS (Feb. 8, 2020), <https://www.bbc.com/news/world-asia-india-51385224>.

14. Short Service Commission refers to a limited term of service in Indian army. For officers who are serving under the Short Service Commission, the prescribed term of their service is 14 years that comprises of an initial service period of 10 years which is extendable by four years on the basis of prescribed eligibility criteria. Further, a SSC officer also has an option of electing Permanent Commission after his/her initial service period of 10 years. However, not all SSC women officers are provided with the option of electing Permanent Commission at par with SSC men officers. See TYPES OF COMMISSION, <https://joinindianarmy.nic.in/types-of-commission.htm> (last visited Aug. 30, 2020).

Permanent Commission<sup>15</sup> and command appointments in Indian army at par with their male counterparts.<sup>16</sup> The move came after an appeal was filed by the Union of India against judgment dated 12 March 2010 passed by the division bench of the Delhi High Court in Writ Petition (Civil) No. 16010 of 2006<sup>17</sup>. In the said judgment, the High Court declared that women SSC officers would be entitled to the option of Permanent Commission at par with male SSC officers with consequential benefits. In an appeal to the Supreme Court by the Union of India, the Supreme Court upheld the decision of Delhi High Court and further decided that in order to achieve the purpose of grant of Permanent Commission as a matter of career advancement at par with male SSC officers, women officers shall also be entitled to command appointments in Indian army. It is, however, pertinent to note here that the Supreme Court judgment is only applicable to branches of Short Service Commission and does not equalize the position of male and female officers in combat services of Indian army.

## **INDUCTION OF WOMEN OFFICERS IN INDIAN ARMY**

### **Pre- Independence Era**

Women in Indian army were first introduced through Military Nursing Service which came into being on 28 March 1888. The services were only meant for women and introduced to provide nursing care to army personnel in Military hospitals in India. The said Military Nursing Service was renamed as Indian Army Nursing Service (IANS) in the year 1893 and Queen Alexandra Military Nursing Service (QAMNS)<sup>18</sup> in the year 1902. In the year 1914, due to the participation of Indian troops in the First World War, a dire need of nursing care arose for Indian troops and hence, a temporary Indian Nursing Service was started in India where in, for the first time, nurses were enrolled in India and attached to QAMNS. However, addressing the need of a permanent Nursing Service for the Indian troops of the British Indian Army, a service known as the Indian Military Nursing Service (IMNS) came into being on 1 October 1926 and the same was made a permanent part of British Indian Army.<sup>19</sup>

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15. Permanent Commission refers to a full-fledged term of service in Indian army till the prescribed age of retirement. See Types of Commission, <https://joinindianarmy.nic.in/types-of-commission.htm> (last visited Aug. 30, 2020).

16. See *Supra note 1*.

17. 2010 SCC Online Del 1116.

18. See Ministry of Defence, Military Nursing Service celebrates 94th Raising Day, Press Information Bureau (Oct. 1, 2019, 05:14 PM), <https://pib.gov.in/PressReleasePage.aspx?PRID=1586873>.

19. Join Indian Army, [http://164.100.158.23/military\\_nursing\\_service.htm](http://164.100.158.23/military_nursing_service.htm), (last visited Aug. 30, 2020).

During the Second World War, on 15 September, 1943, the Indian arm of Nursing Service was separated through formation of IMNS by the colonial Government under the Military Nursing Services(India) Ordinance, 1943<sup>20</sup> as an auxiliary part of the armed forces.<sup>21</sup> Before passing of the Act of 1950, IMNS was an auxiliary service subject to the provisions of Indian Army Act, 1911. Thereafter, even after passing of the Act of 1950, the Military Nursing Service continued to be governed by Military Nursing Service Rules, 1944 framed under the Military Nursing Services (India) Ordinance, 1943 and eventually became a part of Armed Forces Medical Services of India. It is pertinent to note here that since the very inception of IMNS in the year 1943, its members who comprised of women were of commissioned officers ranking<sup>22</sup> and for the first time in history, women in Indian Army were granted commissioned officer ranks at par with commissioned officers of regular army who were governed by Indian Army Act, 1911 in the pre-independence era and thereafter, by the Act of 1950, in the post-independence era. Due emphasis is laid on the fact that the officers of IMNS are considered as a separate cadre and the same are distinct from officers of regular army<sup>23</sup> who are currently governed by the Act of 1950.<sup>24</sup>

### **Post- Independence Developments**

It was only in the year 1992 when women were permitted to enter into officer cadre of regular army through the first Women Special Entry Scheme (Officers) (WSES(O)) which was formulated in terms of Special Army Instructions (SAI) No. 1 of 1992<sup>25</sup> dated 7 September 1992. The developments in relation to induction of women in Indian army were made by Government of India through its policy decisions issued by various notifications in pursuance of its powers under Section 12 of the Act of 1950. In exercise of its powers under Section 12 of the Act of 1950, the Ministry of Defence, Government of India (MoD) vide notification dated 30 January 1992<sup>26</sup> made women eligible to be appointed as officers in five specific branches of Indian army

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20. No. 30 of 1943.

21. Military Nursing Services (India) Ordinance, § 3 (1943).

22. *Id.*, § 5.

23. "regular Army" means officers, junior commissioned officers, warrant officers, non-commissioned officers and other enrolled persons who, by their commission, warrant, terms of enrolment or otherwise, are liable to render continuously for a term military service to the Union in any part of the world, including persons belonging to the Reserve Forces and the Territorial Army when called out on permanent service. Army Act, § 3, cl. (xxi) (1950).

24. See Ministry of Defence, Disparity in Applicability of Army Act on MNS, Press Information Bureau (Aug. 11, 2015, 01:19 PM), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=124762>.

25. Jatinder Preet Kaur and Ors. v. Union of India and Ors., (2008) ILR 1 Delhi 778.

26. (1992) S. R. & O. 11.

which came under the category of Services.<sup>27</sup> However, paragraph 2 of the aforesaid notification provided that it was to remain in force only for a period of five years from the date of its publication i.e. 15 February 1992. Further, vide notification dated 31 December 1992<sup>28</sup>, MoD made women eligible to be appointed as officers in Indian army in five branches of Combat Support Arms.<sup>29</sup> Hence, on 31 December 1992, a total of ten branches were made open for women to be appointed as officers in Indian army i.e. five from Services and five from Combat Support Arms. Thereafter, in order to encourage the role of women in Indian army, MoD vide notification dated 12 December 1996<sup>30</sup> relaxed the condition of induction of women for an initial period of five years by deleting paragraph 2 of notification dated 30 January 1992.

In realization of resourcefulness of women officers in services of Indian army, MoD vide notification dated 28 October 2005<sup>31</sup> amended the aforementioned notifications dated 30 January 1992, 31 December 1992 and 12 December 1996, to expand the scope of various terms of services of women officers which are as follows:

- (i) The tenure of five years of women officers inducted under WSES(O) introduced by notifications dated 30 January 1992, 31 December 1992 and 12 December 1996, was extended by five years from the year 1997 at the option of such women officers;<sup>32</sup>
- (ii) The term of service of both male SSC officers and women officers under WSES(O) was made extendable upto fourteen years at the option of such officers;<sup>33</sup>
- (iii) WSES(O) ceased to apply and women officers were to be appointed under SSC scheme on similar lines with that of male SSC officers for the ten services notified under notifications dated 30 January 1992 and 31 December 1992;<sup>34</sup>

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27. The five services were viz. (i) Army Postal Service; (ii) Judge Advocate General's Department; (iii) Army Education Corps, Army Ordnance Corps (Central Ammunition Depots and Material Management); and (v) Army Service Corps (Food Scientists and Catering Officers). See s Id., 1.

28. (1992) S. R. & O. 1.

29. The five services were viz. (i) Corps of Signals; (ii) Intelligence Corps; (iii) Corps of Engineers; (iv) Corps of Electrical and Mechanical Engineering; (v) Regiment of Artillery. See Id.

30. (1996) S. R. & O. 10(E).

31. (2005) S. R. & O. 121.

32. *Id.*, 1.

33. *Id.*, 2.

34. *Id.*, 3.

- (iv) Substantive promotions, as applicable to officers with Permanent Commission, were made applicable to both male and female SSC officers for the prescribed term of their service.

However, it is pertinent to note here that even before issuance of notification dated 28 October 2005, male SSC officers were also granted an option of Permanent Commission subject to service requirement and availability of vacancies, however, the same option was not available to women officers which deprived them of benefits like pension, ex-servicemen status, medical facilities among various other benefits attached to Permanent Commission. The discrimination was duly addressed by two writ petitions filed before Delhi High Court by Advocate Babita Puniya and Major Leena Gurav in the years 2003 and 2006 respectively for grant of Permanent Commission to women SSC officers. Owing to similar cause of action and relief prayed, the High Court merged the aforesaid two petitions and started proceeding on merits. Meanwhile, on 26 September 2008, MoD issued a circular granting prospectively Permanent Commission to women SSC officers in two of the ten branches namely, Judge Advocate General's Department and Army Education Corps, wherein women officers were recruited through SSC in Indian army but the same did not make the position of women SSC officers at par with their male counterparts.<sup>36</sup> Hence, in view of the aforesaid differentiation in terms of service of male and female SSC officers, the Delhi High Court vide its judgment dated 12 March 2010 held that the women SSC officers shall be entitled to Permanent Commission at par with their male counterparts with all consequential benefits.<sup>37</sup> However, the judgment was not complied by the MoD, where after, the Supreme Court vide its judgment<sup>38</sup> dated 17 February 2020 upheld the aforesaid judgment of Delhi High Court and directed the government to grant Permanent Commission to women SSC officers at par with male SSC officers. That on 23 July 2020, in compliance of the judgment dated 17 February 2020, MoD issued a formal Government Sanction Letter for grant of Permanent Commission to women SSC officers through the process of screening by a Permanent Commission Selection Board<sup>39</sup> and as a corollary, the Army

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35. *Id.*, 4.

36. See Ministry of Defence, Induction of Women in Armed Forces, Press Information Bureau (Aug. 2, 2011, 12:12 PM), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=73837>.

37. See *Supra* note 17.

38. See *Supra* note 1.

39. See Ministry of Defence, Grant of Permanent Commission to Women Officers in Indian Army, Press Information Bureau (Jul. 23, 2020, 03:01 PM), <https://pib.gov.in/PressReleseDetailm.aspx?PRID=1640638#main-nav>.

Headquarter has started accepting applications from women SSC officers towards this end.<sup>40</sup> Given the aforesaid developments, though there seems to be a substantial enhancement in induction of women officers in Indian army, however, it doesn't pass the test of equal opportunity and fairplay in selection process in all aspects. To date, the position of women officers has been equalized only with respect to branches<sup>41</sup> covered under the categories of Combat Support Arms and Services including auxiliary services and the same have been excluded from the branches<sup>42</sup> covered under Combat Arms of Indian army.<sup>43</sup>

### **WOMEN IN COMBAT ROLES IN INDIAN ARMED FORCES**

#### **Indian Army**

In pursuance of policy decisions of MoD under Section 12 of the Act of 1950, women officers in Indian army are not inducted in Combat Arms which involves direct combat tasks.<sup>44</sup>

#### **Indian Air Force**

Section 12 of Air Force Act, 1950 is mutatis mutandis to Section 12 of the Act of 1950 in relation to terms of eligibility of appointment of women officers. However, unlike the restrictions imposed under Section 12 of the Act of 1950, MoD under Section 12 of Air Force Act, 1950 has relaxed its policy of exclusion of women officers in combat roles in Indian Air Force by commissioning the first batch of three women fighter pilots in the year 2016.<sup>45</sup>

#### **Indian Navy**

Indian Navy was the first wing of the Indian armed forces to induct women officers in combat roles. Section 9(2) of Navy Act, 1957 is mutatis mutandis to Section 12 of the Act of 1950 in relation to terms of eligibility of appointment of women officers. However, unlike the restrictions imposed under Section 12 of the Act of 1950, MoD under Section 9(2) of Navy Act, 1957 has relaxed its policy of exclusion of women officers in combat roles in Indian Navy.<sup>46</sup>

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40. See Ministry of Defence, Grant of Permanent Commission to Women Officers in Indian Army: Army HQ Issues Detailed Instructions for Submission of Applications, PRESS INFORMATION BUREAU, (Aug. 4, 2020, 03:54 PM), <https://pib.gov.in/PressReleasePage.aspx?PRID=1643299>.

41. Corps of Engineers, Corps of Signals, Army Air Defence, Army Service Corps, Army Ordnance Corps, Electrical and Mechanical Engineering, Army Education Corps, Judge Advocate General Department, Intelligence Corps (Int), Army Aviation, Army Medical Corps, Army Dental Corps and Military Nursing Service. See infra note 43.

42. Armoured Corps, Infantry, Mechanised Infantry and Artillery. See infra note 43.

43. See Ministry of Defence, Posts Open for Women in Defence Forces, Press Information Bureau (Mar. 16, 2020, 02:56 PM), <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1606538>.

44. See Ministry of Defence, Women in Armed Forces, Press Information Bureau (Mar. 12, 2018, 03:32 PM), <https://pib.gov.in/PressReleasePage.aspx?PRID=1523801>.

45. *Id.*

46. *Id.*

### Special Forces

The three branches of Indian armed forces viz. Army, Air Force and Navy maintain separate special armed forces to conduct special operations<sup>47</sup>. To date, women are not inducted in these special armed forces as they conduct specific combat operations.<sup>48</sup>

### UN Peace Keeping Forces

Women officers from Indian Army have been deployed in active combat roles in Syria, Lebanon, Ethiopia and Israel. Moreover, in 2007, India became the first country to deploy an all-women contingent<sup>49</sup> to a UN peacekeeping mission of UN Operation in Liberia.<sup>50</sup>

### Central Armed Police Forces

As declared by the Ministry of Home Affairs on 18 March 2011, five armed forces of India namely, (i) Border Security Force (BSF), (ii) Central Reserve Police Force (CRPF), (iii) Central Industrial Security Force (CISF), (iv) Indo-Tibetan Border Police (ITBP), and (v) Sashastra Seema Bal (SSB) are to be referred under a uniform nomenclature, Central Armed Police Forces.<sup>51</sup> Hence, India presently has a total of seven armed forces under Central Armed Police Forces namely, Assam Rifles (AS) and National Security Guard (NSG) including the above mentioned five forces.<sup>52</sup>

In 2011-12, the NSG became one of the first Central Armed Police Forces to induct women commando.<sup>53</sup> Moreover, induction of women for combat roles in other Central Armed Police Forces began in the year 2016.<sup>54</sup>

47 'Special Operations' means Military activities conducted by specially designated, organized, trained and equipped forces using distinct techniques and modes of employment. See NATO Standardization Office, AAP-(06)2019-NATO Glossary of Terms and Definitions (English and French), North Atlantic Treaty Organization (Nov. 11, 2019), [https://nso.nato.int/nso/zpublic/\\_branchinfo/terminology\\_public/non-classified%20nato%20glossaries/aap-6.pdf](https://nso.nato.int/nso/zpublic/_branchinfo/terminology_public/non-classified%20nato%20glossaries/aap-6.pdf).

48. 'Para SF' of Indian Army, 'MARCOS' of Indian Navy and 'Garud Commando Force' of Indian Air Force.

49. 'Contingent' means a group of people representing an organization or country, or a part of a military force. See Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/contingent> (last visited August 30, 2020).

50. India And United Nations Peacekeeping And Peacebuilding, Permanent Mission Of India To The UN, <https://www.pminewyork.gov.in/pdf/menu/49151pkeeping.pdf> (last visited August 30, 2020).

51. Office Memorandum, Ministry Of Home Affairs, <https://www.mha.gov.in/sites/default/files/OM2-020513.pdf> (last visited August 30, 2020).

52. Central Armed Police Forces, Ministry Of Home Affairs, <https://www.mha.gov.in/about-us/central-armed-police-forces> (last visited August 30, 2020).

53. See Kamaljit Kaur Sandhu, Battle of sexes: NSG loses its last woman commando after she goes on maternity leave, India Today (Oct. 29, 2017, 02:13 PM), <https://www.indiatoday.in/india/story/nsg-commandos-women-black-cats-crpf-capf-central-forces-1071272-2017-1029#:~:text=The%20female%20soldiers%20joining%20NSG,in%20the%20force%20are%20underway>.

54. See Press Trust of India, Government allows women to be combat officers in all Central Armed Police Forces, The Economic Times (Jul. 11, 2018, 01:53 PM), <https://economictimes.indiatimes.com/news/defence/government-allows-women-to-be-combat-officers-in-all>

**Other Central Armed Forces**

The Indian Coast Guard became deployed women officers in combat roles in the year 2017. The Special Protection Group inducted first female commandos in the year 2013.<sup>55</sup>

**WOMEN IN COMBAT ROLES IN ARMED FORCES OF OTHER NATIONS**

Nations have adopted policies in favour of women participation in combat roles due to three major factors viz. (i) military dictatorship, (ii) compliance with judicial pronouncements, and (iii) realization of constitutional values and principles of gender equality. A total of 22 countries have adopted a gender neutral policy in favour of women for combat roles in their armed forces. For instance, North Korea has enacted its policy of inclusion of women in combat roles out of an arbitrary military dictatorship regime.

Israel, Canada and Germany have encouraged women in combat roles in compliance of judicial pronouncements. In the case of *Alice Miller v. Minister of Defence*<sup>56</sup> the Supreme Court of Israel directed for inclusion of women in training of Air Force Pilots. In *Gauthier v. Canada (Canadian Armed Forces)*<sup>57</sup>, the question came up before the Canadian Human Rights Tribunal for appointment of women for combat roles in Canadian Armed Forces. The question was answered in affirmative and it was held that a general exclusionary policy of exempting entry of women in combat roles is not justified on constitutional grounds as there was no risk of failure of performance of combat duties and hence such a policy was held to be discriminatory on the ground of sex. Therefore, in 1989, Canada opened up combat duties for women in Canadian Armed Forces. Similarly, In *Tanja Kreil v. Bundesrepublik Deutschland*<sup>58</sup>, the Court of Justice of the European Communities held that general exclusion of women from the armed forces was in violation of the principle of equal treatment for men and women. Hence, following the ruling of the court, Germany declared an all-inclusive policy for inducting women for combat roles in its armed forces in the year 2000.

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central-armed-police-forces/articleshow/51380021.cms. See also Press Trust of India, Assam Rifles inducts first batch of 100 women personnel, *The Economic Times* (Jul. 11, 2018, 01:57 PM), <https://economictimes.indiatimes.com/news/defence/assam-rifles-inducts-first-batch-of-100-women-personnel/articleshow/51729160.cms>.

55. See Vijaita Singh, PM's wife is first SPG protectee to have women commandos, *The Indian Express* (Nov. 9, 2013, 05:08 AM), <http://archive.indianexpress.com/news/pms-wife-is-first-spg-protectee-to-have-women-commandos/1192741/>.

56. H CJ 4541/94 *Miller v. Minister of Defense* [1995] IsrSC 49(4) 94.

57. [1989] C.H.R.D. No. 3.

58. Case C-285/98, *Tanja Kreil v. Bundesrepublik Deutschland*, [2000] ECR I-0069.

United States<sup>59</sup> and United Kingdom<sup>60</sup> started inducting women for combat roles in the years 2015 and 2016 respectively. The nations changed their policies in realization of their constitutional values of gender equality and equal opportunity.

**Table: List of Countries and Year from which women were allowed in combat roles:<sup>61</sup>**

Countries	Year
North Korea	1950
Netherlands	1979
Norway	1985
Denmark	1988
Sweden	1989
Canada	1989
Finland	1994
Israel	1995
Eritrea	1998
France	1998
Spain	1999
Lithuania	2000
Germany	2000
New Zealand	2001
Romania	2002
Poland	2004
Belgium	2010
Australia	2011
Estonia	2013
United States	2015
United Kingdom	2016
Brazil	2016

59. See Kristy N. Kamarck, Cong. Research Serv., R42075, Women In Combat: Issues For Congress 14 (2016).

60. See Lisa DeLance, Women and Combat: The Case of the British Military, Oxford Research Group (Aug. 8, 2016), <https://www.oxfordresearchgroup.org.uk/blog/women-and-combat-the-case-of-the-british-military>.

61. Mr. Gautam Narayan was appointed as amicus curiae by the Delhi High Court for assistance in the case of Kush Kalra v. Union of India and Ors. Mr. Narayan presented a detailed analysis of role of women in combat tasks in armed forces of other nations. See Kush Kalra v. Union of India and Ors., 2018 (167) DRJ 584.

**JUDICIAL RESPONSE TO THE ROLE OF WOMEN IN COMBAT ARMS**

In India, neither any petition nor *suo motu*<sup>62</sup> cognizance has ever been taken by the Supreme Court or High Courts challenging the bar on women officers to be inducted in combat roles in Indian army. However, various judgments of the Supreme Court and High Courts evince that the courts have time and again refrained from answering the issue of induction of women officers in combat roles or to interfere with the policy decisions on roles to be assigned to women officers in armed forces in general.

Section 12 of the Act of 1950 provides for executive discretion in the matters of deciding upon enrolment or employment of women in regular army and the same has been further protected by Article 33 of the Constitution of India. Though the provision is discriminatory on the ground of sex and the same is hit by Article 14 of the Constitution, however, the Supreme Court has held that each provision guaranteeing fundamental rights under Part III of the Constitution can be modified or abrogated in confirmation with the provisions of Article 33.<sup>63</sup>

As mentioned above, the executive has exercised a positive discretion by inducting women in combat roles in Indian Air Force and Navy, however, women officers in Indian army have been deprived of such combat positions. The issue was once answered by the Government of India in the case of *Jatinder Preet Kaur and Ors. v. Union of India and Ors.*<sup>64</sup> before Delhi High Court wherein pointing on the issue of differentiation in policies relating to induction of women in combat roles in Indian Army, Navy and Air Force, the Government of India contended that the Army, Navy and Air Force have different sets of service conditions, different ages of retirement for various ranks/cadres, corps, departments and different criteria for posting in the respective services due to their peculiar needs and nature of work. The educational qualifications and mode of selection also differs from service to service. Women officers in Indian army are deployed in non-combat appointments as they cannot be subjected to the rigours of harsh service conditions especially in war field/counterinsurgency portion environment which incidentally are negligible in Air Force and totally absent in Navy except when naval ships are off-loaded and the period is considered forward tenure for specific purposes. There was, according to the

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62. The term *suo moto* is a Latin term meaning “on its own motion” and it is approximately an equivalent of the term “*sua sponte*” (Latin) which means, “of one’s own accord”. The term defines one acting spontaneously without prompting from another party... “*suo motu*” or “*sua sponte*” for the two mean the same thing, a judge or court in a given case takes a course or decision without prior motion or request from the parties. *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR.

63. *Ram Sarup v. Union of India*, AIR 1965 SC 247.

64. See *Supra note 25*.

Government, no question of any discrimination or hostile treatment resulting from denial of extension to women officers serving in the Army vis-a-vis those serving in Navy and Air Force.<sup>65</sup>

It is pertinent to note here that the intelligible differentia presented by the Government seems to be ill-founded on three major grounds viz. (i) women serving in other branches of Indian armed forces, apart from Air Force and Navy, have been inducted in ground close combat roles henceforth falsifying the claims of physiological and social limitations, (ii) in the present technology driven combat scenario, modernization of Indian army has resulted in lesser reliance on hand-to-hand combat, and (iii) various other nations have adopted an all-inclusive policy for appointing women for ground close combat (GCC) roles in their armed forces. The question of induction of women in combat roles in Indian army, however, was left answered by the court as the same was not directly and substantially covered in the main issues of the case.

Further, reference is made to the case of *Kush Kalra v. Union of India and Ors.*<sup>66</sup> wherein the issue of appointment of women in territorial army came up before the Delhi High Court. The judgment in the case discussed the role of women in combat positions in armed forces and appointed *amicus curiae* to assist the court on said issue. The *amicus curiae* presented a detailed analysis of his findings wherein it was submitted that recruitment of women in combat roles does not impact operational effectiveness of the armed forces and placed his reliance on the policies of 22 countries<sup>67</sup> which have an all-inclusive policy for inducing women for combat roles in their armed forces. The question again was left answered by the court as the same was not directly and substantially covered in the main issues of the case.

Moreover, with reference to opportunities being given to women in other countries to enter into combat roles in their respective armed forces, the Delhi High Court in the case of *Babita Puniya v. Secretary & Anr.*<sup>68</sup> has observed that the claim of right to serve in combat positions in the armed forces has been and is a matter of debate in various countries and such debate is coloured by its own social and cultural norms and ethos. However, again the question of induction of women in combat roles in Indian army was left unanswered by the court as the issue involved in the case pertained to grant of Permanent Commission to women officers in Indian army. Since the issue was decided against the Government, an appeal was filed by Government against the

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65. *Id.*

66. 2018(167)DRJ 584.

67. See *Supra note 61.*

68. See *Supra note 17.*

aforesaid judgment and the matter came before the Supreme Court as *The Secretary, Ministry of Defence v. Babita Puniya and Ors.*<sup>69</sup>. In the said matter, the Government, on the various physiological and biological grounds, submitted arguments mentioning inefficiency of women as a gender to cope up with the male gender in terms of facing harshness of combat roles. On hearing upon such arguments from the Government, the Court raised a serious concern on a dire need for change in attitudes and mindsets to recognize the capabilities of women and commitment to the constitutional values of gender equality and justice. Though the court did not interfere with the policy of non-induction of women in combat arms division of Indian army, however, a positive attitude was taken by the apex court towards the strength and capabilities of women officers serving in Indian armed forces by discussing their achievements at length, which may pave way for formulation of a policy for induction of women in combat roles in Indian army at some point of time in future.

### **CONCLUSION**

Where armed forces of various nations across the world have moved ahead from the carious mindset of prohibiting women in combat roles in recognition of the principle of ‘professional competence over gender-based discrimination’, the laws and mindsets of various stakeholders relating to Indian army still seem to work upon sub-standard and unsound beliefs against competence of women to perform combat roles. It is a well established fact that apart from Indian army, other armed forces of India have readily recognized the potential of women in combat arms, however, Indian army still awaits the same recognition from its stakeholders. The laws and mindsets governing the position of women in Indian army are blatantly against common prudence, as the same do not align with the fundamental principles of civilized and progressive societies. The argument of physiological weakness of women for non-induction of women in combat roles emanates from absolute absurdity as success of combat tasks rests upon professional competence and degree of training rather than gender. Moreover, the grounds of social and cultural barriers presented against women participation in combat are utterly unfounded as currently, women are being inducted in other armed forces of India in similar roles and in general, it is evident from the social and cultural scenario of India that competence and capabilities of women have been duly recognized in all areas of professional world.

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69. See *Supra* note 1.

Hence, given the aforesaid research analysis, it can be conveniently concluded that Indian army seems to be in dire need of reconsideration of roles to be assigned to women officers and transformation with respect to policy framework which prescribes ill-founded restrictions upon women which harmonize neither with the laws of civilized nations not with the principles of wisdom and prudence.

## COMPETITION LAW ENFORCEMENT IN THE ERA OF PLATFORM ECONOMIES IN INDIA

Ankit Srivastava\* & Divyansha Kumar\*\*

### INTRODUCTION

The past decade has seen the rise of Digital platforms inventing new product and services, which has transformed the functioning of the market. The changing market dynamics has been a challenge for the competition enforcement authorities in India and the world. The platforms are the new driving force for consumers globally. These platforms are characterised as multi-sided markets having features like Network effects, economies of scale etc.<sup>1</sup>. These platforms are majorly multi-sided, providing free services to the consumers on one side of the market in monetary terms but rather earn from the other side of the platform by providing the data of the customers to different players who use this data for target advertising. Shri Ashok Kumar Gupta, Chairperson, Competition Commission of India (CCI), in his speech during his address during a report released by Consumer Unity & Trust Society International (CUTS), focused upon the aspect of benefits these platforms are providing and also the challenges for the authorities, *“We are witnessing the emergence of the digital economy characterised by disruptive innovation. In addition to the introduction of new products and business models, disruptive innovation seeks to remove inefficient intermediaries, increases consumer choice, forces incumbents to improve in order to compete effectively with the “disruption”, and reduces information asymmetry, all of which lead to greater competition in the market. Indeed we are living in interesting times of ‘New Age’ Markets... While the on-going shift of markets towards a digital platform-centric configuration has opened up new opportunities, it has also posed new challenges for both market participants and regulators.”*<sup>2</sup>.

The new players, who are willing to enter the market, face barriers created by the giants in this market. Either these new entrants do not survive, or a dominant player acquires them. These

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1. Ebru Gokce Dessemond, Restoring competition in "winner-took-all" digital platform markets, UNCTAD, (Feb. 4, 2020), <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2279> (Last accessed 14/08/2020)
2. Shri Ashok Kumar Gupta, Chairperson, Competition Commission of India (CCI), Keynote Address at Report Release by CUTS at IIC, New Delhi, <https://www.cci.gov.in/sites/default/files/speeches/CUTS.pdf?download=1>. (Feb. 5, 2020) (Last accessed 23/08/2020)

new-age markets function with algorithms for collecting and processing the data. For any platform to function and dominate the market, the number of users using that platform and the consumer's personal data play an essential role. Also, to hold dominance in the market, these platforms, apart from strengthening the networks effect, provide huge subsidies to the consumers so that the services provided are often free.

Apart from the disruptive innovation, the growing size of these platforms is setting up challenges for competition authorities. Recently, tech giant Apple Inc. touched the market value of \$ 2 trillion, making it the first company in the United States (US) to achieve such a feat.<sup>3</sup> The CCI in the year 2018 approved the acquisition of Flipkart by Wal-Mart International Holding Inc., retail giants in the US, setting aside the arguments relating to Appreciable adverse effect on the competition by such an acquisition failing to notice the concerns regarding deep discounting and preferential treatment.<sup>4</sup> The lack of good interceptions by the authorities at the right time may make these platforms grow at such a pace that they may form a monopoly in the market. The amount of data these giants (such as Apple, Google, Facebook etc.) have stored creates barriers to entry and should be a concern for the authorities, as the new entrants in the markets may not survive in the future.<sup>5</sup>

The article explores the features of platform markets, the importance of data and data as a tool for competitive advantage in this market. The article further focuses on the role of the CCI and how it has dealt thus far concerning the different major case laws relating to the platform economies impacting the major limbs of the competition act. The issues discussed in this article are of utmost urgent attention as their importance is likely to increase manifolds in the future.

### **RELEVANT FEATURES OF PLATFORM ECONOMIES AND IMPACT ON COMPETITION**

The increasing use of technology and dependence on the Internet has given birth to the online market platforms incorporating a range of apps, services, etc., which are rising quickly.<sup>6</sup> These

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3. Apple's \$2 trillion m-cap makes it 8th largest nation in GDP terms, India Today, (Aug. 20, 2020), <https://www.indiatoday.in/business/story/apple-s-2-trillion-m-cap-makes-it-8th-largest-nation-in-gdp-terms-1713122-2020-08-20> (Last accessed 25/08/2020)
  4. AtulKaushik, Competition Law and Digital Economy: Identifying Emerging Challenges, Centre For WTO Studies, Indian Institute of Foreign Trade, working paper, (June. 2018).
  5. Eve Smith, The Techlash Against Amazon, Facebook, and Google and What They Can Do. The Economist, (Jan. 20, 2018), <https://www.economist.com/briefing/2018/01/20/the-techlash-against-amazon-facebook-and-google-and-what-they-can-do>.(Last Accessed August 17, 2020)
  6. Smriti Parsheera et al, Competition Issues in India's Online Economy, National Institute of Public Finance and Policy, New Delhi, working paper No. 194, (April, 2017).

online market platforms are having features different to that of the traditional markets.

- **Data and its Advantage**

The currency for the online platforms and the key component for profit need not always be money; it can also be in the form of 'data'<sup>7</sup>. The data used by search engines, social networks and e-commerce platforms are unique and is not freely available.<sup>8</sup> The firms are investing huge capital in providing the best services to the consumer free of cost. In return, they get their data because it is not easily and readily available.<sup>9</sup> The effect of exclusive access to data and collection of data is subject to 'economies of scale', giving rise to competitive advantage.<sup>10</sup> For a platform player to increase advantage in the market, it needs to accumulate real-time data as the past user information or preference doesn't always remain the same. Facebook as a social media platform collects and stores real-time data and processes it rendering to the consumer's choices, so continuously changing the content as per the user's preference operating the platform and analysing such data for all the users. Adapting to the latest user preferences, Google amounts to be the best search engine because of its large base of returning users, providing the requisite data quickly.<sup>11</sup> So, the pace at which procuring and developing this personal data is done is the major reason for any company to obtain significant market power and get an advantage in the market.<sup>12</sup>

- **Innovation and Technology**

Alteration of the market in consideration by creating a new market or transforming the old one is a basic feature of platform economies.<sup>13</sup> The

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7. Stucke, Maurice E., Should We Be Concerned About Data-opolies?, 2 Georgetown Law Technology Review, 275 (2018), SSRN: <https://ssrn.com/abstract=3144045> (Last Accessed 13/08/2020)

8. *Supra Note.3*

9. Grunes, A. P., and Stucke, M. E., No Mistake About It: The Important Role of Antitrust in the Era of Big Data, 14 Antitrust Source, 1-14 (2015).

10. Vicente, B., The Big Data Relevant Market, 23 Concorrenza e Mercato, (2016), <https://ssrn.com/abstract=3064792> (Last Accessed 11/08/2020)

11. Toole, K. O'. and Athey, S., How Big Data Changes Business Management, Stanford Business (Sep. 20, 2013), <https://www.gsb.stanford.edu/insights/susan-athey-how-big-data-changes-business-management>. (Last Accessed 11/08/2020)

12. Ezrachi, A., & Stucke, M. E., Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy (Harvard University Press 2017).

13. Kenney, Martin, and John Zysman, The Rise of the Platform Economy, 32 Issues in Science and Technology, (Spring 2016).

disruptive changes in the market in the past decade are phenomenal. If we take the example of the calling market, the traditional calling was challenged by Skype, as a platform for free video calling across the globe, which was challenged by Whatsapp, which started as an instant messenger app but delveloped into video and audio calling for its customers for free and almost ending the market for Skype. The platforms are growing in the services they are providing but are expanding and delving into new businesses, and all of this is happening at a dissolute speed. The data, which is collected, is helping these platforms to enter other sectors too. For instance, Amazon was an online marketplace to buy goods, but it has entered the TV market through Amazon prime. Google was just an Internet search service provider and then entered the market of smartphones manufacturing too.

- **Multi-sided Markets**

Two or Multi-sided market creates an economic value when distinct groups of customers value each other's participation on the platform. The distinct groups are interdependent in a multi-sided market, which isn't the case in a single-sided market. For instance, in online cab services, drivers and the customers are interdependent for this multi-sided platform to succeed.<sup>14</sup> It is very interesting to note that one side is charged very little or sometimes nothing to be on the platform in these markets, and the other side is the major source of profits. For instance, the Google search engine is free for its customers and earns through advertisements from the other side of the platform. The higher the number of customers or users on the platform means the higher number of advertisers, as it is the major source of business revenue. Thus in multi-sidedmarkets, one side can gain added worth from its interaction with the other side of the market.<sup>15</sup>

- **Economies of Scale**

Goods and services produced in the digital market space have high fixed costs and very little variable costs. When the quantity of production goes up, the cost

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14. Interview by Sean Silverthorne with Andrei Hagiu, Professor, Harvard Business School, Working Knowledge (Mar.12, 2006), <https://hbswk.hbs.edu/item/new-research-explores-multi-sided-markets> (Last accessed August 21, 2020)

15. Parker, Geoffrey and Petropoulos, Georgios and Van Alstyne, Marshall W., Digital Platforms and Antitrust, (May 22, 2020), <https://ssrn.com/abstract=3608397> (Last accessed August 20, 2020)

per unit goes down, and hence the return on scale production increases as the average cost per unit goes down.<sup>16</sup> For instance, the ride-sharing apps incur a technological cost for developing the platform where drivers and consumers interact as well as the cost of the global position system (GPS). After that, the drivers need to bear all the other costs, and per ride incentives are given. Hence, the fixed cost is to establish the platform, and after that, its' minimal variable cost has to be incurred by the platform.

- **Network Effects**

The effect occurs when a consumer benefit increases with the increase in the number of other consumers, meaning that the utility grows as the size of the network grows.<sup>17</sup> For instance, if we take a messenger app, the app is useful if many people are connected through it. On the other hand, if no one knows of the app, it's useless.<sup>18</sup> So, as the number of people on the messenger app increases, the value of the platform increases. Network effects are of two types, direct network effect, when the value of a good or service increases as the number of users grow (e.g. Whatsapp) or indirect network effect when the value of the network is raised as increasing number of users of a good leads to more complementary products or services (e.g. Amazon, OLX etc.)<sup>19</sup>

These features of the platform economies act to create more competition to enter the market and lessen the competition within the market.<sup>20</sup> Networks effect clubbed with economies of scale results in the first-mover advantage. The first player in the new market has an advantage as it creates a network, learns the market, resulting in reduced average cost of production, thus creating wide margins for the new player to match or compete. This situation creates two scenarios; the players have increased incentives to explore the unexplored markets. Still, players

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16. "The marginal cost of adding an extra user on the existing platform is negligible and financial returns on the interaction of a new user with the existing members are high..." Garima Sodhi, Relevant Market and Market Power in Ride Sharing Industry in Competition and Regulation in India 149-61 (Udai S Mehta, Ujjwal Kumar, 2020)

17. Avirup Bose and Smriti Parsheera, Network Effects in India's Online Business: A Competition Analysis, CRESSE, [http://www.cresse.info/uploadfiles/2017\\_pa14\\_pa2.pdf](http://www.cresse.info/uploadfiles/2017_pa14_pa2.pdf). (Last Accessed August 14, 2020)

18. Graef, Inge, Market Definition and Market Power in Data: The Case of Online Platforms (Sept. 8, 2015), World Competition: Law and Economics Review, Vol. 38, No. 4 (2015), p. 473-506., <https://ssrn.com/abstract=2657732>. (Last Accessed August 15, 2020)

19. Inge, G., Market Definition and Market Power in Data: The Case of Online Platforms, 38 World Competition: Law and Economics Review, 473 (2015).

20. *Supra note.10*

are hesitant to invest in a market where a dominant player is present, thus creating monopolies. Hence, the authorities are facing an increasing case of Abuse of Dominance. Few digital firms have grown so much that they have started expanding to the other closely related markets. Giants such as Google, Apple, Amazon, Microsoft etc., have grown and taken over the respective markets in no time. "BAADD (*too big, anti-competitive, addictive and destructive to democracy*) to Worse" phrase was given by the Economist in one of their articles pointing out the amount of data stored by the major giants such as Facebook, Google, Apple and Amazon and that has made them Data Monopolies.<sup>21</sup> It is often said that apart from relevant and recent data, the firm needs a well-functioning algorithm to operate an online platform successfully. Still, Peter Norvig, chief scientist at Google, was quoted saying, and "*We don't have better algorithms than anyone else. We have more data*"<sup>22</sup> So, the algorithm works the same for most, but the real deal in the platform market is the 'Data'. This market is prone to acquiring different new players by the already established players without the commission's scrutiny as the thresholds for scrutiny under the law are linked to asset base and turnover. If it is not met, the combination happens automatically, and no scrutiny is required. It shows that despite the substantial impact and user base of digital companies, transactions Personal Data and Consumer Welfare in the Digital Economy could easily escape from the merger review and acquisitions because of the low asset base and free service model prevalent in this industry.<sup>23</sup> Economies of Scale and Networks Effect are the factors leading to entry barrier that protect the position of the already existing player in the market and make it robust for a new firm to enter and find a position in the market.<sup>24</sup>

#### **PLATFORMS ECONOMIES AND COMPETITION LAW ENFORCEMENT**

The platform markets are recognised for their rapid innovation and creative disruption. The Competition Commission of India has come across various issues concerning platform

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21. Smith, E., The Techlash Against Amazon, Facebook, and Google and What They Can Do, The Economist (Jan. 20, 2018), <https://www.economist.com/briefing/2018/01/20/the-techlash-against-amazon-facebook-and-google-and-what-they-can-do>. (Last Accessed 18/08/2020)

22. Asay, M., and Reilly, T. O., 'Whole Web' is the OS of the Future, CNET (Mar. 18, 2010), <https://www.cnet.com/news/tim-oreilly-whole-web-is-the-os-of-the-future/#:~:text=The%20Web%20is%20the%20future,few%20savvy%20companies%20like%20Google>. (Last Accessed 18/08/2020); supran.3.

23. Peter, A. (2017). Re-imagining competition policy and law in the era of disruptions. Competition commission of India <https://www.cci.gov.in/sites/default/files/speeches/AddressWorld%20Competition%20Day%20Speech.pdf?download=1>

24. Shapiro, C., & Varian, H.R., Information Rules: A Strategic Guide to the Network Economy, Harvard Business School Press, (1999).

economies, be it a search engine, e-commerce, cab aggregators etc. The commission faced issues in delineating the relevant market for online and offline markets and whether there is substitutability in them. It is also dealt with multi-sided platforms, network effects and market power, Big Data and many more. With the evolving Digital space in the market, the issues relating to competition in the market are also on the rise, holding in itself a new challenge for the authorities to ponder.<sup>25</sup> The author has discussed below landmark judgments by the commission on different competition issues of Platform Economies.

The issue regarding relevant market in an online market was discussed in the case of *Ashish Ahuja v. Snapdeal*<sup>26</sup>, CCI, in its order, stated that Relevant Market includes both offline and online market channels and concluded that they are different channels of distribution of the same product; hence they are not different but single market.<sup>27</sup> *On the other hand, in All India Online Vendors Association and Flipkart India Private Limited & others*<sup>28</sup>, the CCI, for the first time, believed that the relevant market is different for the online and offline markets. In this case, CCI delineated the Relevant Market as "*services provided by online marketplaces for selling goods in India*". The commission also believed that '*online market platforms*' are different from *online retail stores*.<sup>29</sup> It stated, "*In an online retail store, a particular seller, who may or may not own a brick-and-mortar retail store, owns his portal to sell products thorough an online website. Whereas in an online marketplace platform such as Amazon or Flipkart, the owner of the online portal offers a platform for buyers and sellers to transact.*" The Competition Law Review Committee on this aspect has suggested changes in sections 19 (6) and 19(7) dealing with Relevant geographic and product Markets. The committee thought of making the specific provisions in these sections more inclusive and expands the scope of market delineation to cover developments in the platform economy.<sup>30</sup>

Apart from clarifying the delineation of the relevant market as a separate online and offline market in the Flipkart case, there was an allegation of Abuse of Dominance on Flipkart, a leading

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25. Parakkal, R., *Antitrust in the Digital Era: Rethinking Dominance and its Abuse*, Competition and Regulation in India, 28-56 (Apr. 8, 2020).

26. *Ashish Ahuja v. Snapdeal.*, Case No. 17, CCI, (2014).

27. Also see *Mr. Mohit Manglani v. Flipkart India (P) Ltd. & Ors.*, Case No. 80, CCI, (2014)., *Confederation of Real Estate Brokers' Association of India v. Magicbricks.com & Ors.*, Case No. 23, CCI, (2016).

28. *All India Online Vendors Association v. Flipkart India Ltd. & Ors.*, Case No. 20, CCI, (2018)

29. Nisha Kaur Uberoi, Akshay Nanda and Tanveer Verma, *Global competition around the world : India*, Global Competition Review (Oct.15, 2019), <https://www.lexology.com/library/detail.aspx?g=f66ea523-b5df-4c5d-81f2-67f7997bc2b9>(Last Accessed 20/08/2020)

30. *Supra note. 27*

online market platform in India. It was alleged that the wholesale trading company of Flipkart sold goods to companies previously owned by the founders of Flipkart at a reduced price and then it was sold on the platform operated by Flipkart and such practices amounted to preferential treatment to a few sellers and that this discernment amounted to an abuse of dominant position. Also, Flipkart was alleged for selling products at a discount and abusing its dominant position resulting in a denial of market access to the individual sellers. CCI held in favour of Flipkart by reasoning that according to the current structure of the online market platform, Flipkart is not the dominant player because of the presence of Amazon in the market and the complaint was dismissed. CCI also mentioned that not intervening in these new upcoming markets needs carefulness to let the innovation grow. But, the demand of the current time from the regulator is to strike a balance between innovation and anti-competitive practices. An innovation, which leads to disrupting competition, is ultimately going to harm the consumers. CCI's order was quashed by NCLAT in March 2020<sup>31</sup>. As per the Bench, CCI ignored an essential element of the All India online vendors association complaint referring to the case of Flipkart India Pvt. Ltd v Assistant Commissioner of Income Tax<sup>32</sup>, in which the assessing officer observed a prima facie case of predatory pricing which, according to the NCLAT, should be investigated by the Director-General under the Act as Flipkart was selling at a price below the cost price and it seemed to be a clear strategy to eliminate the other market players and create a monopoly.<sup>33</sup> In the latest scenario, more than 2000 online sellers in India have filed a case against Amazon alleging the US Company for favouring few sellers whose online discount is driving the other independent sellers out of the market.<sup>34</sup>

In May 2020, CCI started investigating an allegation that Google abuses its dominant position<sup>35</sup> to promote mobile payments unfairly. It was said in the allegation that Google showcases its payment app more prominently in the Google App store, giving an unfair advantage over other

31. All India Online Vendors Association v. CCI, Competition Appeal (AT) No.16, NCLAT, (2019).

32. M/S Flipkart India Private Ltd. v. Assistant Commissioner of Income Tax., ITA No. 202/Bang/ITAT, (2018).

33. MM Sharma, India: NCLAT Directs Investigation Into Alleged Abuse Of Dominant Position By Flipkart - Quashes Earlier CCI Order Closing The Case, Mondaq, April 22, 2020, <https://www.mondaq.com/india/antitrust-eu-competition-/807614/cci-holds-neither-flipkart-nor-amazon-as-dominant-in-the-market-for-online-marketplace-platforms-hints-at-considering-online-market-as-a-separate-market-for-market-analysis> (Last Accessed 21/08/2020)

34. Indian Sellers Bring Antitrust Case Against Amazon, Competition Policy International, Competition Policy International (Aug. 26, 2020), <https://www.competitionpolicyinternational.com/indian-sellers-bring-antitrust-case-against-india/> (Last Accessed 29th August, 2020)

35. Google faces antitrust case in India over payments app: Report, The Times of India (May 27, 2020), [http://timesofindia.indiatimes.com/articleshow/76038619.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://timesofindia.indiatimes.com/articleshow/76038619.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

apps. This wasn't the first time that Google was investigated by the regulator. In the case of *Matrimony.com Limited & Ors. V. Google LLC & Ors. and Consumer Unity Trust Society v Google LLC & Ors.*<sup>36</sup> For the first time, CCI recognised the role of Big Data and how the platforms are collecting and processing them is making the Internet search market dynamic, which is changing everyday due to innovation. The CCI noted that '*for a search engine, it is extremely important to 'crawl' the web and index the data.*<sup>37</sup>' The commission held that Google has a dominant position<sup>38</sup> in the '*online general web search*' and '*web search advertising services*' markets in India, and it has abused it by the unfair practice of displaying the advertisements without any relevance, by prominent display and placement of its commercial flight unit with link to Google's specialised search option, on the users. Also, the partners seeking access for advertisement on Google were in a foreclosure agreement asked not to use search services provided by the competing search engines violating various provisions of section 4 of the Act.<sup>39</sup> The CCI pronounced a balanced Judgment and recognised that intervening in the technology market should be done very carefully as innovation is the key to consumer welfare. The intervention should not deny the benefits of innovation to the consumers and thus didn't intervene in the product design of innovation. In another case<sup>40</sup>, CCI ordered a probe against Google for abusing its dominant position in violation of section 4 of the Act and framed a *prima facie* view against the compulsory pre-installation of the 'Google Mobile Services' suite. The CCI noted, "*a wide range of applications like Google Maps, Google Chrome, YouTube were only available through GMS on android phones which had to be preinstalled by the manufacturer and couldn't be availed directly by the end-users*", which corresponds to unfair trading conditions in violation of Section 4 (2) (a) (i) strengthening the already dominant position of Google.<sup>41</sup> Google faced a similar case in the European Commission in which a penalty of €4.34 billion was being levied on it.<sup>42</sup>

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36. *Matrimony.com Ltd. v. Google LLC & Ors.*, Case Nos. 07 and 30, CCI, (2012)

37. *Matrimony.com Ltd. v. Google LLC & Ors.*, Case Nos. 07 and 30, CCI, (2012) ¶ 122.

38. The Competition Act, s 4 (2)(a)(i), (2002)

39. The Competition Act, s 4 (2) (a) (i), s 4 (2) (c) and s 4 (2) (e), (2002).

40. *Mr. Umar Javeed & Ors. v. Google LLC and Google India (P) Ltd.*, Case No. 39, CCI, (2018)

41. Mohit Agarwal, *Competition Commission of India Strikes Another Blow to Google for Abuse of Dominant Position*, Kluwer Competition Law Blog (Jul. 18, 2019), [\(http://competitionlawblog.kluwercompetitionlaw.com/2019/07/18/competition-commission-of-india-strikes-another-blow-to-google-for-abuse-of-dominant-position/?doing\\_wp\\_cron=1598814023.3504340648651123046875#:~:text=On%2016th%20April%202019%2C%20the,2002%20\('Act'\)\)](http://competitionlawblog.kluwercompetitionlaw.com/2019/07/18/competition-commission-of-india-strikes-another-blow-to-google-for-abuse-of-dominant-position/?doing_wp_cron=1598814023.3504340648651123046875#:~:text=On%2016th%20April%202019%2C%20the,2002%20('Act')). (Last Accessed 25/08/2020)

42. Case AT.40099 – Google Android, Commission Decision of 18 July 2018

In *Vinod Kumar Gupta v. Whatsapp Inc.*, allegations were made that Whatsapp has changed its privacy policy, and the users were compelled to share their data with Facebook. The case history goes back to 2014 when Facebook acquired Whatsapp. Federal Trade Commission in the United States and the European Commission (EC) scrutinised the merger, and the Indian commission didn't scrutinise the same, as the threshold limits were not met. The EC allowed the merger on the condition that there shall be no data sharing between the two. But in the year 2016, Whatsapp changed its privacy policy under which the subscribers had to share their details with Facebook. The European Commission duly slammed a fine of 110 million euros against Facebook for misleading the commission. The informant also alleged that Whatsapp is indulging in predatory pricing by providing the services free of cost and violating the privacy provisions of the IT Act. Still, the commission opined that this subject matter was not under their ambit, and a separate case is going on in the Hon'ble Supreme court.<sup>43</sup> After considering Whatsapp's argument, the commission dismissed the case that an option to opt out was given to the subscribers. The sharing is done to increase efficiency, and content shared on Whatsapp is encrypted and cannot be accessed by a third party. According to the author, the commission had a chance to scrutinise the adverse effect of the merger, which they missed in the year 2014. The commission thought that ease of switching for the consumers and other similar apps were present in the app store. It was an opportunity for the commission to delve into the economics of platform markets and discuss the 'Networks effect'.<sup>44</sup> A platform's value increases with the increasing number of subscribers, and the order itself mentions that 96% of the smartphone users are on Whatsapp, hence making it hard for a subscriber to switch to another app that is not of any use to the consumer as there are less or no known people to the consumer on that platform. Considering this, the authors believe that Whatsapp should have been fined for not giving an informed choice to the consumers and violating the Abuse of Dominance provisions of the Act.

When the cab aggregators entered the market, they faced many allegations regarding predatory pricing, price algorithms, Hub and Spoke Cartel etc. Several cases were mostly dismissed by the CCI because there are no dominant players in this market. Also, the promotional offers when a new player enters the market cannot be considered predatory pricing. Rather, it helps the platform enter the market and compete with the established players.<sup>45</sup>

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43. *Karmanya Singh Sarren and Other v. Union of India*, (2017) 10 SCC 638

44. Bose, M., *Who Will Bell The Apps?* MONDAQ (Jul.13, 2017), <http://www.mondaq.com/india/antitrust-eu-competition-/610112/who-will-bell-the-apps>

45. *Bharti Airtel Ltd v. Reliance Industries Ltd & Reliance Jio Infocomm Ltd.*, Case No. 03, CCI, (2017)

In *Samir Aggarwal v. ANI Technologies Pvt. Ltd. (Ola) and Uber*<sup>46</sup>, the informant alleged that these platforms are using a pricing algorithm. They fix the price and give high incentives to the drivers. Because of the algorithm, the drivers aren't competing against each other and riders and drivers have to accept the price set by the algorithm. The informant also alleged that the drivers who are attached to the platform are not their employees, but rather they work as an independent service provider; there is a concerted action between the drivers and platforms, the cab aggregators act as 'Hub' and drivers as 'spokes' and collude on prices. CCI dismissed the allegations of the cartel because there should be some exchange of sensitive information, including information related to price, which can lead to price-fixing, and there is no evidence of a conspiracy to fix prices. In addition, the CCI noted, "*While the drivers may have individually acceded to the algorithmically determined prices by the network operators, this alone cannot be said to be amounting to collusion between the drivers.*"

In a cab aggregator case of *In Re: Meru Travel Solutions Private Limited (MTSPL) v Uber India Systems Pvt. Ltd*<sup>47</sup>, the case went up to the Hon'ble Supreme Court. Uber faced an allegation by Meru that the former indulge in predatory pricing and offers deep discounts, apart from the already subsidised prices. They were also providing additional incentives to the drivers for keeping them intact to the network. The relevant market taken by the commission was '*market for radio taxi services in Delhi*'. The informant submitted a report establishing dominance by Uber. Still, the commission on the ground that it wasn't reliable and a similar other report rejected the contention of dominance by Uber, ignored this report. CCI opined that Uber has Ola as a competitor in the relevant market. Their inconsistent market share indicated that they are competitive in the relevant market; hence the case was dismissed. Meru filed an appeal in the Competition Appellate Tribunal (COMPAT)<sup>49</sup>. The COMPAT changed the relevant geographic market from Delhi to Delhi-NCR, stating the frequency of movement of these cabs in this region. COMPAT emphasised that CCI has the power to make a *prima facie* view<sup>50</sup>, and if there were contrary reports, it was a good reason to order an investigation by the DG. The COMPAT, in its order, directed for a detailed investigation by the DG on the allegations regarding Deep

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46. *In re: Samir Agrawal v. ANI Technologies Pvt. Ltd. &Ors.*, Case No. 37, CCI, (2018).

47. *Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd. &Ors.*, Case No. 96, CCI, (2015)

48. The Competition Act., s 26(2), (2002)

49. *Meru Travels Solutions Pvt. Ltd. v. CCI*, Appeal No. 31, COMPAT (2016)

50. The Competition Act., s 26(1), (2002).

Discounts and incentives provided by Uber as the COMPAT reasoned that Uber does it to expand their business in the relevant market. Uber filed an appeal in the honourable Supreme Court of India.<sup>51</sup> The honourable Court decided not to interfere with the investigation order of COMPAT. It opined, "it is difficult to say that there is no prima facie case of Abuse of Dominance." Uber must have faced heavy losses by providing discounts, and this argument that there may be an intention of Uber to eradicate competition from the market. Although not discussing the pricing in the platform markets, the Honourable Court decided that this issue is relevant to be looked upon in the future by the authorities.<sup>52</sup>

The CCI has also been proactive in enabling the new businesses in the platform markets to grow and has carefully analysed the issues relating to competition in this sector so that the innovation is not hindered. The issue in this technologically driven market is of acquisition of as much data as possible. There are numerous mergers taking place in these markets and the major motive behind these mergers is to acquire data, which could result in market foreclosure and entry barriers. We see the giants in this market acquiring the new thriving players entering the market, be it Facebook acquiring Whatsapp<sup>53</sup>, Google acquiring Double click<sup>54</sup> or Microsoft acquiring Skype. Data will be the key in future mergers, and the regulator needs to work upon their Mergers control regime. The CCI has assessed several mergers, such as *Wal-Mart International Holdings, Inc. and Flipkart Private Limited*<sup>55</sup>, *Amazon.com NV Investment Holdings LLC [Acquirer] and Shoppers Stop Limited [Target]*<sup>56</sup>, *Flipkart and eBay*<sup>57</sup> etc. CCI has observed that platform markets provided more comfort, discounts and eased to the consumers, and if sufficient number of players are present, it is good for the competition. CCI did not scrutinise the interesting case of Whatsapp and Facebook due to not meeting threshold limits as discussed above. This is the prime example that such platforms may escape scrutiny for not meeting the thresholds. Thus, the merging of data should be an inclusive factor in the cases involving platforms so that such mergers can be kept at bay in the future.

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51. Uber India Systems Pvt. Ltd v CCI, Civil Appeal No. 641 of 2017

52. Chandola, B., Supreme Court of India Upholds Investigation against Uber, Kluwer Competition Law Blog (Sept. 18, 2019), <http://competitionlawblog.kluwercompetitionlaw.com/2019/09/18/supreme-court-of-india-upholds-investigation-against-uber/> (Last Accessed 27/08/2020)

53. Case No. Comp/M7217, decision dated 3.10.2014

54. Google/DoubleClick, Case No. Comp/M.4731 (Mar. 11, 2008) (European Commission), [http://ec.europa.eu/competition/mergers/cases/decisions/m4731\\_20080311\\_20682\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf)

55. Combination Registration No. C-2018/05/571

56. Combination Registration No. C-2017/12/538

57. Combination Registration No. C-2017/05/505

**CONCLUSION**

The future of competition law enforcement in India shall depend upon the balance between consumer choice, innovation, and the competitive market. It is not as easy as it might sound, and analysing the orders passed by the CCI, shows that it is not in favour of intervening much in the platform markets as it might hinder the innovation. The Ministry of Corporate affair (MCA) in India is working towards amending the competition laws to tackle the changing environment of the business market. MCA set up a Competition Law Review Committee to propose the amendments to the Act of 2002 to handle the changing dynamics of the market. The committee's recommendations are reflected in the Competition Law (Amendment) Bill, 2020. It is a welcome step by the MCA to ponder upon and amending the laws as per the market. The merger control regime in India should include transactional value thresholds to incorporate the acquisition of digital players, which shall help the regulator keep a check on the acquisition of innovative startups and help maintain the market's competitive nature. 'Control over Data' and 'Network effect' should also be considered factors for determining the market power for delineating the relevant market. The issues relating to competition in this market needs in-depth investigation by the commission, focusing upon and elaborating the economics of new concepts like big data, Networks effect, economies of scale, lock-in effects etc. while pronouncing the orders. The commission should involve IT experts and data scientists to better understand these new-age markets. Effective competition enforcement can prove to be a game-changer for the platform marketplace in India else; it would not be easy to control the economic power of the growing giants of platform economies. The pro-active approach of the commission and the government is required to amend the laws, as required, with the changing economy.

## **CONSUMER PROTECTION ACT, 2019: THE NEW DIMENSIONS**

**Mrs. Anmolpreet Kaur\* & Amandeep Kaur\*\***

### **INTRODUCTION**

In today's world, consumers and their rights are given utmost importance. Gone are the days when consumers were asked to beware. Now the consumers are treated as 'kings' and the sellers are supposed to beware. The market is full of sellers and consumers with a wide range of products and services offered at different platforms with cut throat competition. It is the consumer that brings business to the sellers and this, on an obvious note, calls out for the protection of their rights. The vision of consumer protection and their rights was outlined for the first time by the United States President John F. Kennedy in his special address to the Congress on March 15, 1962 which is now celebrated as the World Consumer Rights Day throughout the world.

### **MEANING OF CONSUMER AND CONSUMER PROTECTION**

"Consumers, by definition, include us all" was the definition given by the John F. Kennedy in his address. Consumer is a person who consumes the good, products and services offered by the sellers, traders and manufacturers. A consumer is a person who buys goods for consumption and not for resale or commercial purpose. A consumer is one who is the decision maker whether or not to buy an item at the store, or someone who is influenced by advertisement and marketing. Every time someone goes to a store and buys a shirt, toy, beverage or anything else, they make a decision as a consumer.<sup>1</sup>

The range of products, goods and services that is available can't be measured in numbers. But all these goods are not beneficial. There are many products and services that are injurious for the health of the consumers and many harmful practices are followed by the sellers for their selfish motives without caring about the harm that could be posed to their ultimate beneficiaries that it the consumers, for example- unfair trade practices, adulteration, false weights and measures, creating monopolies and so on. The consumers need to be protected against all this and this calls out for the consumer protection. Consumer protection is the process of shielding the consumers

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1. Consumer Rights, <https://www.consumerrights.org.in/meaning-of-consumer.htm> (last visited on Aug. 21, 2020)

against malpractices of sellers and traders. This is basically a way of ensuring that consumers are safe.<sup>2</sup>

### **THE CONSUMER PROTECTION ACT, 1986- A BRIEF ANALYSIS**

Consumer protection is not new to India. Since Vedic era, consumers have been given importance. Ancient texts like Manu Smriti, Yajnavalkya Smriti, Narada Smriti, Kautilya's Arthashastra etc have talked about protecting the consumers from unfair trade practices like adulteration, using false weights and measures, manipulation in prices and have also prescribed punishments for the traders who indulge in such practices. The rulers made sure that the interest of the consumers was protected. Also during the medieval period, steps were taken to ensure adequate protection to the consumers. In the British regime, the legal system in India underwent a huge change. They introduced various legislations which were an amalgamation of Indian customs and British standards. Some of the laws which were passed during the British regime concerning consumer interests are: the Indian Contract Act of 1872, the Sale of Goods Act of 1930, the Indian Penal Code of 1860, the Drugs and Cosmetics Act of 1940 and the Agriculture Procedure (Grading and Marketing Act) of 1937. These laws provided specific legal protection for consumers, Sales of Goods Act being the exclusive and the most important among them all. Consumer protection legislation enacted after India's independence from Britain include: the Essential Commodities Act of 1955, the Prevention of Food Adulteration Act of 1954 and the Standard of Weights and Measures Act of 1976. In addition to the remedies under contract and criminal law, consumers have rights under tort law.

But these enactments proved to be insufficient in ensuring adequate protection of the consumers. The orthodox legal requirements under the law of torts and contracts created an obstacle in the way of justice. Also, at the international level, the United Nations Guidelines for Consumer Protection are prevalent to which India is a signatory. The Guidelines were first adopted by the General Assembly in resolution 39/248 of 16 April 1985, later expanded by the Economic and Social Council in resolution 1999/7 of 26 July 1999, and revised and adopted by the General Assembly in resolution 70/186 of 22 December 2015. These guidelines set out principles to be followed for enacting effective and adequate consumer protection legislations, enforcement institutions and redress mechanisms like fair and equitable treatment, commercial

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2. Sonika Sekhar, The Concept of and Need of Consumer Protection, LAW TIMES JOURNAL (Aug. 21, 2020, 10:14 AM), <http://lawtimesjournal.in/the-concept-of-and-need-for-consumer-protection/#:~:text=Consumer%20Protection%20is%20important%20as,of%20the%20producers%20and%20traders.>

behavior, transparency, awareness etc.<sup>3</sup>

Consequently, the Consumer Protection Act of 1986 (CPA, 1986) was enacted with the objective of providing “cheap, simple and quick” justice to Indian consumers. The Indian legal system experienced a revolution with the enactment of CPA 1986, which was specifically designed to protect consumer interests. The CPA, 1986 was passed with objective to provide justice which is “less formal, involves less paper work, less delay and less expense”. The CPA, 1986 has received wide recognition in India as poor man’s legislation, ensuring easy access to justice. However, the CPA simply gave a formal outlook to rights that have been recognized and protected since the ancient period.<sup>4</sup>

#### **BASIC FEATURES OF CPA, 1986**

The Consumer Protection Act, 1986 was the first legislation enacted by the Indian Parliament that exclusively dealt with the consumers and their protection. The 1986 Act is indeed a very unique and a highly progressive piece of social welfare legislation. The Act covered all kinds of goods, services and unfair trade practices unless there was specific exemption made by the central government. All the sectors- public, private or cooperative, came under its ambit. Some of the basic features of the CPA, 1986 are discussed below:

##### **a. Definition of Consumer**

The definition of consumer under Sec. 2(d) of CPA, 1986 states that “consumer” means any person who buys any goods or hires or avails any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user/beneficiary of such goods/services other than the person who buys/hires or avails of the goods/services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such goods/services are used/availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose. The explanation attached to the definition clearly spells out that commercial purpose does not include use by a person of goods bought

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3. United Nations Conference on Trade and Development,  
[https://unctad.org/en/PublicationsLibrary/ditceplpmisc2016d1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/ditceplpmisc2016d1_en.pdf) (last visited on Aug. 21, 2020)

4. Dr. A. Rajendra Prasad, Historical Evolution of Consumer Protection and Law in India, 11N3 JCCL 132, 134 (2008), [http://www.jtexconsumerlaw.com/v11n3/jccl\\_india.pdf](http://www.jtexconsumerlaw.com/v11n3/jccl_india.pdf)

and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment.

**b. Three-tier Consumer Dispute Redressal Mechanism**

The Act establishes a three-tier consumer dispute redressal mechanism for the redressal of grievances of consumers. At the lowest level is the District Consumer Dispute Redressal Forum,<sup>5</sup> then the State Consumer Dispute Redressal Commission<sup>6</sup> and at the highest is the National Consumer Dispute Redressal Commission.<sup>7</sup> These agencies are empowered to entertain complaints against goods and services purchased or availed by the consumers with varying pecuniary jurisdiction at each level. Their basic motive is to provide effective time bound justice to the complainants.

**c. Establishment of Consumer Protection Councils**

Under chapter II of the CPA, 1986, provisions have been made for the establishment of Consumer Protection Councils at 3 levels- Central, State and District with the aim of promoting and protecting the rights of the consumers such as:

- (i) The right to be protected against the marketing of goods and services which are hazardous to life and property;
- (ii) The right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be, so as to protect the consumer against unfair trade practice;
- (iii) The right to be assured, wherever possible, access to a variety of goods and services at competitive price;
- (iv) The right to be heard and to be assured that consumer's interest will receive due consideration at appropriate Forums;
- (v) The Right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and
- (vi) The right to consumer education.

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5. Consumer Protection Act, 1986, sec. 9(a), No. 68, Acts of Parliament, 1986 (India)

6. *Id*, sec. 9(b)

7. *Id*, sec. 9(c)

**d. Prescribed penalties**

The CPA 1986 empowers the Consumer Disputes Redressal Agencies under this Act to award imprisonment in cases of default of compliance of their orders. Section 27(1) prescribes punishment of imprisonment for a term which shall not be less than one month but which may extend to three years or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees, or with both where a trader or a person against whom a complaint is made or the complainant fails or omits to comply with any order made by the District Forum, the State Commission or the National Commission, as the case may be.

**THE NEED FOR CPA, 2019**

The guiding principle behind CPA, 1986 is that business organizations must adopt utmost ethical practices while conducting their business transactions. If and when the businesses gallivant and fail to fulfill their social and ethical obligations, the government will come to the assistance of the consumer. No doubt the CPA, 1986 came as a revolutionary step in the Indian legal system, but no law is devoid of flaws.

Lack of consumer awareness and the existence of consumers as an unorganized sector are problems that continue to plague the Capitalistic economy. It gives the traders an unfair advantage over the purchasers who are subjected to further market risks. This often leads to the widespread exploitation of consumers and this is where CPA as legislation becomes crucial.

The major lacuna of the CPA, 1986 is the exclusion of the e-commerce activities and transactions that have mushroomed to quite a large extent in the past few decades. The Act failed to tackle the issues faced by the consumers owing to the modern methods of providing goods and services through different platforms like online sales, tele-shopping, direct sale etc. Keeping in mind the changing trends of the market practices and to ensure better effective administration of the whole system, the Parliament passed the Consumer Protection Act, 2019. Instead of amending the earlier Act, the legislature enacted a whole new Act covering the emerging and booming e-commerce industry within its ambit and also introduced various other significant dimensions to strengthen the consumer protection.

The Consumer Protection Act, 2019 was passed by the Lok Sabha on July 30, 2019 and by the

Rajya Sabha on August 06, 2019. The Bill got the assent of the President and was published in the Official Gazette on August 09, 2019. The Ministry of Consumer Affairs, Food and Public Distribution issued a notification on 15th July, 2020 as the date of enforcement of the Act. Except few sections, almost all the provisions have come in to force.

### **THE NEW DIMENSIONS**

The new Act has broadened the scope of consumer protection. Various new concepts have been introduced and many structural as well as procedural changes have been made to strengthen the rights of the consumers and to ensure their protection. All the new dimensions have been discussed hereunder:

#### **i. Inclusion of e-commerce transactions**

The Act of 1986 did not cover the e-commerce transactions. This was the major drawback in the view of the increasing e-commerce activities. The CPA, 2019 covers all such transactions. The definition of the term 'consumer' has been widened and it covers all those persons who 'buys any goods for consideration' or 'hires or avails any service for consideration' either through 'offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing.'<sup>8</sup>

The Consumer Protection (E-Commerce) Rules, 2020 came in to force on 23rd July, 2020 which lays down conditions, duties and liabilities of e-commerce entities, marketplace e-commerce entities, sellers on marketplace and inventory e-commerce entities.<sup>9</sup> As per the Rules, the e-commerce entity means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity. Such entity must be a company incorporated under the Companies Act, 1956. Every such entity is obliged to set up a grievance redressal mechanism and is barred from indulging in unfair trade practices, discriminating the consumers and

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8. Consumer Protection Act, 2019, Sec. 2(7) Explanation (b), No. 68, Acts of Parliament, 1986 (India)

9. Department of Consumer Affairs, <https://consumeraffairs.nic.in/theconsumerprotection/consumer-protection-e-commerce-rules-2020> (last visited on Aug. 21, 2020)

manipulating the prices in an unreasonable manner.<sup>10</sup> The marketplace e-commerce entities are obliged to furnish all the details of the sellers in a clear and accessible manner and all the information relating to return, refund, exchange, warranty and guarantee, delivery and shipment, modes of payment, and grievance redressal mechanism, and any other similar information.<sup>11</sup>

## ii. Consumer Rights

CPA, 2019 has specifically laid down 6 rights of the consumers. Recognition of such rights aims at strengthening the faith of the people in the law. The rights are as follows:

- a. the right to be protected against the marketing of goods, products or services which are hazardous to life and property,
- b. the right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services,
- c. the right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices,
- d. the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate fora,
- e. the right to seek redress against unfair trade practice or restrictive trade practices or unscrupulous exploitation of consumers,
- f. the right to consumer awareness.<sup>12</sup>

## iii. Enhancement of Pecuniary Jurisdiction

The new Act has enhanced the limits of the pecuniary jurisdiction of the Commissions (were called Forums earlier) working at different levels i.e. the District Commission, State Commission and the National Commission. The revised limits are as follows:

	Previous limit (in Rs.)	Revised limit (in Rs.)
<b>District Commission</b>	Upto Rs. 20 lakhs	Upto Rs. 1 crore
<b>State Commission</b>	From Rs. 20 lakhs to Rs. 1 crore	From Rs. 1 crore to Rs. 10 crores
<b>National Commission</b>	Exceeding Rs. 1 crore	Exceeding Rs. 10 crores

10. The Consumer Protection (E-Commerce) Rules, 2020, Rule 4

11. *Id* Rule 5

12. Consumer Protection Act, 2019, sec. 2(9), No. 68, Acts of Parliament, 1986 (India)

But there remains an ambiguity about the pending cases in the different forums as per the earlier pecuniary limits. There is no clarity on the fact that whether they will be transferred to the forums as per the new limits or they will continue where they are pending. This might result in further delays in disposal.

However, in a case of 2020 a landmark order was passed by National Consumer Disputes Redressal Commission in the case of *Pyaridevi Chabiraj Steels v. National Insurance Company Ltd.*<sup>13</sup> The NCDRC has held that for determining the pecuniary jurisdiction of Consumer Commissions, the value of the goods/services “paid” as consideration shall be the method. Earlier method of including compensation and other charges for calculating and deciding jurisdiction of Commission is no more in operation after new Act 2019 came into force. In this case, the issue in hands with National Commission to decide was about repudiation of insurance claim. It was alleged by the party that they had paid an amount of Rs. 4,43,562/- as premium for a policy worth Rs 28,00,20,000/- which was purchased by insurance company. However, in this case reference is made to sections 34(1), 47(1) (a) (i) and 58(1) of CPA, 2019 which provides for the pecuniary jurisdiction of the District Consumer Disputes Redressal Commission, State Consumer Disputes Redressal Commission and the National Consumer Disputes Redressal Commission and Commission held that for determining the pecuniary jurisdiction of Consumer Commissions, the value of the goods/services “paid” as consideration shall be the method and in present case amount of Rs. 4,43,562/- paid as premium shall determine the jurisdiction of commission and not the claim amount.

**iv. Filing of complaints**

The new Act has eased the process of filing of the complaints by including the place of residence or work of the consumer as the jurisdictional forum. As per the earlier Act, the complaints could be filed either at the place of purchase or at the place of seller’s registered office. This created troubles for the consumers. But now flexibility has been provided to the process and they won’t be compelled to travel to other and faraway places to file their complaints. Further, the new Act has allowed e-filing of the complaints and hearing/examination of parties, in appropriate cases, could be done on video-conferencing. This is aimed at ensuring administrative ease and to prevent

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13. Consumer Case No. 833 of 2020.

harassment of the consumers.

v. **Establishment of Central Consumer Protection Authority (CCPA)**

Chapter III, Section 10 of the Act creates a regulating authority which is called the Central Consumer Protection Authority (CCPA). There was no such regulator under the previous Act. The CCPA has been conferred with wide powers to look into the consumer right violations, unfair trade practices or misleading advertisements and to protect and enforce the rights of the consumers as a class. The CCPA will also have an Investigation Wing to investigate into the consumer rights violations.<sup>14</sup> Further the CCPA has been authorized to take suo moto action also against the violators and pass orders recalling the goods which are dangerous, reimbursing the consumer for such recalling, to issue directions and impose penalties against false and misleading advertisements. Though it is a praiseworthy step, the practical functioning of the body remains ambiguous. The overlapping of the functions of the Investigation Wing of the CCPA and the existing District Collectors may possibly result in conflict of interests.

Exercising the power under Sec. 10, the Central government established the CCPA as a body corporate on 24th July, 2020.<sup>15</sup>

vi. **Concept of Product Liability**

The CPA, 2019 has added an altogether new concept of 'Product Liability' aiming to compensate the consumers for the harm suffered due to defective product or deficient service.<sup>16</sup> The product liability action can be brought by the complainant claiming such compensation. The Act has defined the terms 'product manufacturer', 'product service provider' and 'product seller' under its definition clause and the concept covers all the three. The Act also sets out their respective liabilities.<sup>17</sup> The Act has also laid down certain exceptions for the same under Section 87 for example, such an action will not lie against the seller if during the harm, it was misused, modified or altered, where the

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14. *Id* Sec. 15

15. Department of Consumer Affairs, <https://consumeraffairs.nic.in/sites/default/files/Estt%20of%20CCPA.pdf> (last visited Aug. 20, 2020)

16. Consumer Protection Act, 2019, Sec. 2(34), No. 35, Acts of Parliament, 2019 (India)

17. *Id* Sec. 84, 85, 86

manufacturer has given the adequate warnings or instructions for the use but they were not complied with by the consumer, the product is of such a nature that it is common knowledge to know the dangers associated with it etc.

**vii. Stringent penalties for misleading advertisements**

The Act has defined the term ‘misleading advertisements’ as an advertisement which:

- a. falsely describes such product or service
- b. gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service
- c. conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice
- d. deliberately conceals important information.<sup>18</sup>

The Act has authorized CCPA to take actions against such advertisements.<sup>19</sup> It can issue orders for modification or discontinuation of such advertisements. It can also impose penalties on the manufacturer or the endorser which may extend to Rs. 10 lakhs. The Act has also made it a criminal offence and punishment for such false and misleading advertisement may extend upto 2 years of imprisonment along with fine that may extend up to Rs. 10 lakhs and every subsequent offence can land the manufacturer or service provider in jail for 5 years along with fine of Rs. 50 lakhs.<sup>20</sup>

Various laws exist that deal with the misleading advertisements like The Drugs and Cosmetics Act, 1940, Food Safety and Standards Act, 2006, The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1955, Cable Television Network (Regulation) Acts, 1995 Press Council Act, 1978 etc. The Consumer Protection Act is one such legislation among the abovementioned that addresses the grievances of the consumers and gives them the right to seek redress against such advertisements and the strict norms under the new Act further strengthen the law on the point. A voluntary self regulatory body, The

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18. *Id* Sec. 2(28)

19. *Id* Sec. 21

20. *Id* Sec. 89

Advertising Standards Council of India (ASCI) has also been working in this respect and has been pulling up different brands for such misleading advertisements. Further the endorsement of goods and services, generally done by the celebrities and actors, have also been covered under the Act. They have the onus of not endorsing any false or misleading advertisements. The CCPA has been authorized to prohibit the endorser from making such false and misleading advertisements.

**viii. Mediation as an Alternate Dispute Resolution**

The progressive step taken in the new Act is the provision of Mediation as a method of Alternate Dispute Resolution. This will help in lowering the burden of the consumer courts and will help in quick decision making and easier resolution of the disputes. The Act provides for the establishment of mediation cells for each District and State Commission. National Commission will also have a mediation cell attached to it and its regional branches.<sup>21</sup> The case will be referred to mediation, at the time of first hearing or at any later stage, when there exists the possibility of the same and both the parties have consented for such reference.<sup>22</sup>

The Consumer Protection (Mediation) Regulations, 2020 came into force on 24th July, 2020 which lays down the eligibility, disqualification and the procedure for the empanelment of the mediators. It also lays down the rules to be followed in the mediation proceedings and all the related aspects.<sup>23</sup>

**ix. Unfair Contracts**

The CPA, 1986 covered complaints pertaining to unfair or restrictive trade practices only. The complaints regarding contracts that were not fair or reasonable were not dealt with under the 1986 Act. This lacuna has been covered by the CPA, 2019. The Act has specifically defined what an unfair contract is and it includes those contracts between the manufacturer/seller and the consumer that require excessive security deposits by the consumer for

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21. *Id* Sec. 74

22. *Id* Sec. 37

23. Department of Consumer Affairs, <https://consumeraffairs.nic.in/sites/default/files/220668.pdf> (Visited on Aug. 20, 2020)

performing the obligations under the contract, imposes penalties on the consumers in case of breach which are highly disproportionate with the loss, entitles a party to unilateral termination of the contract etc.<sup>24</sup> The scope of the Act has been expanded by the inclusion such contracts under its ambit. The jurisdiction to deal with such complaints has been given to the State and the National Commissions only.

**x. Expansion of Unfair Trade Practices**

The new Act has added three more clauses in the definition of what constitutes unfair trade practices and has expanded its scope. The additions are:

- a. Non-issuance of bill or cash memo or receipt for the goods or services.
- b. Refusing, after selling goods or rendering services, to take back or withdraw defective goods or to withdraw or discontinue deficient services and to refund the consideration thereof, if paid, within the period stipulated in the bill or cash memo or receipt or in the absence of such stipulation, within a period of thirty days
- c. Disclosure of personal information given by the consumer in confidence unless such disclosure is made in accordance with the provisions of any law for the time being in force.

**xi. Appeal and Review**

The period of limitation for filing appeals against the orders of District Commission has been enhanced from 30 to 45 days. Further, it has been provided that no appeal shall lie after a settlement has been reached via mediation.<sup>25</sup> Appeals from the State Commission to the National Commission can only be made when a substantial question of law is involved and appeals from the National Commission to the Supreme Court can be made only against those complaints that were filed originally before the National Commission. These provisions are in complete contrast to the previous Act. Under the previous Act, the power to review the orders was with the National Forum only. Now this power has been given to the District as well as the State Commissions.

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24. Consumer Protection Act, 2019, Sec. 2(46), No. 35, Acts of Parliament, 2019 (India)

25. *Id.* Sec. 41

**xii. Other miscellaneous matters**

The definition of the term 'goods' has been amended and it now includes 'food' as defined by the Food Safety and Standards Act, 2006. This has the impact of bringing under its ambit the rapidly rising food delivery services.

In contrast to the previous Act, the new Act provides for the compounding of offences in certain circumstances.<sup>26</sup>

Various new terms have been inserted in the definition clause like Advertisement, design, direct selling, express warranty, injury, e-service provider etc.

The provision of Circuit benches that existed in the previous Act has been done away with in the new Act.

**CRITICAL ANALYSIS OF THE CONSUMER PROTECTION ACT, 2019**

- i. The Central Consumer Protection Authority (CCPA) has been created to "regulate matters relating to a violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class." Further, the authority is given the power to inquire and investigate, which is done through an investigative wing headed by a director-general. Though this provision is commendable in its real sense the functions of the authority is vague as since district collectors are given the responsibility to undertake inquiries and investigations. Therefore, in the near future, the task of the investigative wing and the functions of the district collector will somewhat overlap which would, in turn, lead to a clash in their interests.
- ii. Further, the authority is also empowered to impart justice by penalizing manufacturers or endorsers for misleading advertisements, return of goods, preventing the endorsers to undertake activities relating to misleading of the advertisements, reimbursement of the price paid for good and services. Appeals against such order can only be challenged in the National Commission. But the basis for hearing such appeals is unclear which leaves the

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26. *Id* Sec.96

legal fraternity as well as the consumers in great confusion.

- iii. It is also not known as to whether the disputes with the present consumer commission will be heard by the same or will be transferred to the commissions having the pecuniary jurisdiction according to the new act. This ambiguity will lead to further delays.

### **CONCLUSION**

Everything has its benefits and flaws and same is applicable to the new Act. Some provisions are commendable while some provisions might lead to some unprecedented and unanticipated consequences. But nothing could be said specifically about the working of the Act till the time it is not implemented in full force. The Act has been partly enforced as of now. Nevertheless, the Act is a positive step taken in the wake of changing market trends and socio-economic scenarios in the country. The prevalent jurisprudential aspect of 'Caveat emptor' (buyer beware) is fading away and is being replaced by 'Caveat venditor' (seller beware). The consumers are now given the utmost importance and their rights are being recognized on a wider horizon.

## THE ANALOGY OF CONSERVATION: THE GENESIS OF ENVIRONMENTAL CONSERVATION IN INDIA

Anurita Yadav\*

*“The Earth is what we all have in common”*

- Wendell Berry

### INTRODUCTION

The continuous human activities to modify the environment, to fill the needs of society, is causing severe effects, leading to the major environmental challenges for humankind in the contemporary World. India is also facing the heat of global phenomenon of environmental degradation. Rapid industrialization, growing urbanization, intensive cultivation, and other developmental activities, coupled with increasing biotic pressure are adversely impacting India's environment. The major areas of environmental concern today include, deforestation, degradation of land resources, pollution of air and water, deforestation, sanitation, pollution, population, hunger, a decline in net cereal produce, rise in sea levels, drought, intensified rainfall during rainy days; resulting in flood, degraded land quality; increase in several wastelands are an all-potent threat to the very human existence. We are already facing a global pandemic situation wherein we have understood how imperative is it to maintain basic hygiene and sanitation for our wellbeing.

This ongoing imbalance is calling for creating a state of equilibrium between development and the environment. Measures are required to be taken which can protect wildlife and ecosystems in ways which can benefit both human and non-human inhabitants while taking into consideration the available limited resources. To deal with the challenge of environmental conservation, we need to look at its origin; the basic foundation of the concept; the ancient philosophy of environment conservation and what lies beneath the foundations of environmental jurisprudence.

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## **PHILOSOPHICAL AND LEGAL FOUNDATIONS OF THE CONCEPT OF ENVIRONMENTAL CONSERVATION; THE EVOLUTION OF THE CONCEPT OF CONSERVATION**

The ancient philosophy depicts the concept of human interrelationship and interdependence on nature and other life forms. In past, humans understood the importance of nature very well. They knew that their survival is dependent upon nature; hence there was a feeling of kinship amongst the living creatures and nature, we see various examples where humans have evolved different practices to show their gratitude and admiration towards nature.

In the past, human beings were mindful of the fact that all these nature's goodness is there in existence for a limited period and that they are only going to reap benefits from nature, till the time they can well protect and preserve it. We can understand this phenomenon with the help of the profound Indian philosophy of Panchmahabhuta; the theory of five elements. According to the Indian traditions, there are five basic elements which exist in the Universe such as air, water, fire, earth and space and everything survives, with the combination of these elements; which ultimately forms the nature. So, everything is created by these elements and will be submerged in them. Thus, mountains, trees, rivers, lands, were considered pious; they were worshipped, they believed that God is present in every fragment of nature; nature became their God; they understood that nature is the basis of their existence; their survival and our ancestors knew very well that destruction of nature will be the destruction of the human race. Hence, this divine status of God and this tradition of nature worship continues to travel through past and is still being continued in Indian societies; it continues to be the centric part of the local knowledge and culture. Nature is still believed to be the guardians and protectors of the forests and natural resources. And, continue to remind humans to establish and sustain the harmony with nature. Because the Indian societies remained relatively more associated with the components of natural environment like water, soil and trees in various forms and because of the historical interaction of communities and their natural environment, this ultimately gave birth to traditions and cultural landscapes such as sacred forests, groves, sacred corridors, etc.; which are still being practised. Sacred Groves are estimated to be between 100,000 to 150,000 in India.<sup>1</sup>

1. Kannan C.S. Warriar, Significance of Sacred Groves in Conservation of Biodiversity, ENVIS Centre, Ministry of Environment & Forest, govt. of India (Aug.30,2020, 2:10 PM), [http://frienvis.nic.in/Content/SignificanceofSacredGrovesinConservationofBiodiversity\\_1792.aspx?format=Print](http://frienvis.nic.in/Content/SignificanceofSacredGrovesinConservationofBiodiversity_1792.aspx?format=Print).

Indian history showcases various examples related to cultural practices of diverse communities in close relationship with the environment for many centuries. As for the people of India, environmental conservation is not a new concept. Historically, the protection of nature and wildlife was an ardent article of faith, reflected in the daily lives of people, enshrined in myths, folklore, religion, arts, and culture. The management of natural resources has always been regarded as a tradition in Indian society. We have many examples of practices where man's oneness with nature is being duly recognized and respected too.

Ancient Harappan civilization, where the importance of nature was duly recognized, respected, preserved and protected. The oldest visual image of the human fascination, love, and reverence for nature in India can be found in the 10,000-year-old cave paintings at Bhimbetka in Central India depicting birds, animals, and human beings living in harmony.

Twenty-two centuries ago Emperor Ashoka decreed that it was a king's duty to protect wildlife and the trees of the forests. He got edicts inscribed on rocks and iron pillars throughout his kingdom, prohibiting the destruction of forests and the killing of various species of animals. This historical evidence, surviving to this day, is the first recorded measure on conservation anywhere in the world. In more recent historical times, Mughal Emperor Babur's memoirs (Baburnama), Guru Nanak's hymns on 'Baramasa' ( the seasons) depicting each month with a dominant bird image, and Emperor Jehangir's memoirs showing his keen interest in and study of wildlife provide fine illustrations of this Indian tradition. Indian tradition considered the earth as 'Mother'. Vedic literature (about 1500 BC) speaks that there is an integral balance in Man, Nature and The God. Natural forces were considered to be expressions of the Lord Himself and are venerable entities. Vedas envisage a beautiful natural environment on earth and command the man not to pollute. Veda commands the knowledgeable to keep the environment free from all impurities and show that it can be done by way of Yagnas or sacrificial fire. Yagnas have said to be the medium of the relation between human and the Devatas and are done to worship the deity and to purify the air, keeping the environment healthy; which served the purpose of balancing the interests of man and nature. The balance between the two is the ultimate key to the sustainability of the environment and life.<sup>2</sup> In Atharvaveda, the Earth is cherished as our paradise

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2. R. Renugadevi, Environmental ethics in the Hindu Vedas and Puranas in India, AJHC [4(1)], Jan. 1-3, 2012.

and it is stated that we must protect our paradise. Furthermore, the fundamental philosophy of sustenance of human life lays its emphasis on the interdependence and interrelationship between the man and environment; numerous accounts of which can be cited from the ancient scriptures right from the Isopanishad which talks about enjoying one's life by forming close relationships with the other species, without encroaching on rights of others. Manusmriti defined various species of plants which can experience pain and pleasure.<sup>3</sup>

Thus, historically conservation of nature and natural resources was an innate aspect of the Indian psyche and faith, reflected in our religious practices, folklore, art and culture flowing into every aspect of the daily lives of people. Scriptures and preaching that encourage reverence for nature and conservation can be found in most of the religions that have flourished in the Indian subcontinent. The management of natural resources has always been regarded as a tradition in Indian society.

When we analyze the concept environment and aligned subject matters regarding environmental protection, conservation and preservation from a legal perspective. We find that the Constitution of India embodies the framework of protection and preservation of nature without which life cannot be enjoyed. The knowledge of constitutional provisions regarding environment protection is the need of the day to bring greater public participation, environmental awareness, environmental education and sensitize the people to preserve ecology and environment. From Preamble, the federal structure, legislative powers given by the Constitution to both Central and state legislatures to legislate over the matters of the environment; whether it is as basic yet important as a forest which was made part of the concurrent list after the 42nd Amendment Act from the state list or newer concept of E-Waste management; environment conservation has become an important concern not only for decision-makers, judiciary but also society at large. Hence, matters concerning the environment have again gained importance with the increasingly challenging times.

When British Government decided to take management of the forest away from the local communities; they gave the reason that these natives are incapable of managing forest and its resources effectively and the same has to be well effectively only handled by the central cadre of

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3. Anand Kale & Pushpkant Shaktwiphee, Environmental Approach in Ancient India \_Atharva Veda Preaching, AIJRHASS(19-105), 2018.

officers and introduced the Indian Forest Act, 1927; which went through various changes, with the changing times. It is just one illustration that shows how eventually something which was an inherent part of the local community; their lives was when taken away from them; this has eventually led to the deterioration of nature. Because by taking away their rights in their resources; it leads to the restrictions; further detaching them from nature itself.

When India became independent India a lot of initiatives were taken; to turn things right; to give back what was taken away from the people; their resources; so now with the adoption of the Indian Constitution, the people of India became the real sovereign; with rule of law; the state now got a very crucial responsibility to bear and fulfil that it has to act as a trustee to the resources which belongs to the people of India. Although, so far with the help of the specific legislation concerning the environment, along with the Constitutional provisions; the responsibility to protect and conserve the environment is not alone on the shoulders of the state, but it has to be bear by its people too; as in our country, we have rights and duties both complementary to each other and Constitution of India continues to guide them.

Constitutional provisions broadly concerning the environment are engraved in the following Articles of the Indian Constitution; Article 253<sup>4</sup> talks about the Power of Parliament to legislate on matters to give effect to the international agreements, Article 249<sup>5</sup>, talks about the power of parliament to legislate over matters given under state list in the national interest, Article 252<sup>6</sup> deals with the power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State, Article 14<sup>7</sup> which talks about the right to equality, Article 19(1)(g)<sup>8</sup> is about the right to practice any profession or to carry on any occupation, trade or business, Article 21<sup>9</sup> states the protection of life and personal liberty, Article 47<sup>10</sup> talks about the duty of State to raise the level of nutrition and standard of living and to improve public health, Article 48A<sup>11</sup> is about protection and improvement of environment and safeguarding forests and wildlife, Article 51A(g)<sup>12</sup> levels a duty to protect and improve the natural environment

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4. Indian Const. art.253.

5. Indian Const. art.249.

6. Indian Const. art.252.

7. Indian Const. art.14.

8. Indian Const. art.19(1)g.

9. Indian Const. art.21.

10. Indian Const. art.47.

11. Indian Const. art.48A.

12. Indian Const. art.5(A)g.

including forests, lakes, rivers and wildlife, and to have compassion towards all living creatures, Article 226<sup>13</sup> and 32<sup>14</sup> of the Indian, Constitution talks about Exceptionally important writ jurisdictions of the High Courts and the Supreme Court of India. All these Constitutional provisions play a significant role in the protection and preservation of the environment. The legislative list is given under Part XI of the Constitution, Article 246<sup>15</sup> shows the distinction between the legislative powers of the state and union; shows that both State and union government has the power to legislate on the subjects related to environmental concerns like drainage, water supply, agriculture. Article 248<sup>16</sup> talks about the residuary power of the Parliament; concerning any matter not mentioned under any of the lists; giving parliament immense power to legislate on matters that come up with the changing times and condition.

It is noteworthy to mention, one of the turning points in the history of humanity especially in terms of the environment at the international level, came when for the very first time at the global level, environment and its relation with humans was given attention. Because, until then war was considered as the only potential threat to humanity. It was for the very first time got recognized that human and environment are interrelated; affect on one will have an impact on the another. In 1972 at the Stockholm Conference on human and environment and their relationship was discussed at the international level. This conference emphasized the responsibility to protect and improve the environment is on man for the present and future generation. Hence, through the 42nd Amendment Act, India showed its national commitment to the protection and conservation of the natural environment by adding provisions in the Directive Principles of State Policies (Article 48A) and legal provisions related to Fundamental duties.

We also have other legal provisions concerning the environment under the Code of Criminal Procedure are the provisions of Chapter X of the Criminal Procedure Code of 1973, Indian Penal Code Environment and development Chapter XIV. And various measures that have been adopted through different legislation like in the wake of Bhopal Gas tragedy the Environment (Protection) Act of 1986 was enacted; considerably the most comprehensive legislation promulgated in the sphere of Environmental protection, the Air (Prevention and Control of

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13. Indian Const. art.226.

14. Indian Const. art.32.

15. Indian Const. art.246.

16. Indian Const. art.248.

Pollution) Act, 1981, the Water (Prevention and Control of Pollution) Act, 1974, the Forest Act, 1927, the Forest Conservation Act, 1980, the Wildlife (Protection) Act, 1972, the Public Liability Insurance Act, 1991, etc. showcase the different statutory provisions striving to work towards the objective of protection, preservation and conservation of environment.

Along with these legal provisions, it is noteworthy to mention about the incredible role played by the Supreme Court of India; the Supreme Court has given a new meaning to the concept of human rights by introducing environment while doing an interpretation of the Constitutional provisions; thereby played a crucial role in evolving and developing environmental jurisprudence in India.

#### **ROLE OF JUDICIARY, STATE AND SOCIETY IN ENVIRONMENTAL CONSERVATION: AN ANALYSIS**

The Supreme Court of India has so far played an extraordinary role in advancing and further strengthening the cause of environmental conservation, through their activism whether via PIL (Public Interest Litigation) by advancing and broadening the scope of Article 21 to such an extent that now it includes, right to the environment, right to wholesome environment, right to a healthy environment, right to clean water and air, etc. in order to do justice to environment and victims of environmental pollution, apex court has made huge contribution; whether it is about P.N Bhagwati's contribution in evolving principle of absolute liability to different apex court's judgement further applying the principles of sustainable development in the Indian context; right from polluters pays principle, public trust doctrine, enhancing the scope of precautionary principles to ensuring that state does its job and doesn't run away from its statutory obligations and constitutional responsibilities; the apex court has even applied affirmative actions against the state. Judiciary in India has taken up a proactive role of not only being a protector but also the guarantor of the rights of the people; especially in the ambit of environmental protection and conservation by fully utilizing Article 32 most proactively. Apex court has duly recognized the need to have a more scientific approach and involvement of experts while dealing with the matters of environmental concerns and was vocal about the need of establishment of a specific adjudicatory mechanism to deal with matters of environmental concerns to deal with the matters of environmental protection and conservation more expeditiously. Thus, leading to the establishment of National Green Tribunal in 2010 to effectively and expeditiously dispose of

civil cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right related to the environment.

Further more, the 42<sup>nd</sup> Amendment has given the constitutional obligation not only to the state but also to the citizens by incorporating the provisions of Fundamental Duties under which Article 51 A(g) entails a duty upon the Indian citizens to protect, improve the environment and also to have compassion for all living creatures. Judiciary has interpreted Article 51 A (g) and Article 48A in a way that judiciary has struck down various governmental orders, legislations, decisions which were inconsistent with these provisions of these articles despite their non-justiciable nature.

The apex court of India has done incredible work to not only uphold the Cause of environmental protection and conservation but also developing and strengthening environmental jurisprudence in our country by giving due recognition to the fact that right to life will mean nothing if the environment in which people are residing is not at all fit for their survival; as what kind of life can be, if you cannot afford breathable air quality, water fit for drinking and environment fit for human survival. Now, a very important aspect that the apex court has recognised is that environment doesn't just mean humans and their survival rather it includes all that surround us; hence it is imperative for the state, society and all the stakeholders involved in the process, including law-making bodies and judiciary itself to understand that there has to be an equilibrium; some balancing which needs to be done between human activities and environmental preservation. And, the law has a very vital role to play in this as formulating legislative policies will never be enough when it comes to environmental conservation because everyone is responsible here in some capacity. So, laws are not only to be made but should be executed also in a proper manner. Also, here society has a pertinent role to play as state alone cannot make policies a success. Society at large has to contribute together in furtherance of this common objective. And for which there is a need to emphasize the importance of people's participation, which has to be seen as a social process as, where participation happens when people coming from different communities, are communicating and willing to work together cooperatively for a common cause with different people and groups to achieve common goals. Participation consists of a series of steps, where a member presents new insights and solutions to challenges. It also means learning from each other's knowledge and mistakes.

Indian society is filled with many successful examples where community participation and cooperation has played an utmost important role in safeguarding and conservation of the environment. individual local action can grow into a global idea, producing positive change. It is our responsibility to take immediate action if we want to prevent our planet from moving towards its own to destruction in the coming decades and it can be only possible when communities also play their active part in the environmental conservation.

There are numerous accounts from innovative community participation in the field of protection and conservation of the environment. The local community have showcased immense zeal in strengthening the cause of environment conservation; whose impressive results reveal how individuals can make a difference. Whether it was the Himalayan Chipko Movement began in the 1970s in Utrakhand, which aimed to prevent deforestation by hugging trees targeted for felling; considered as one of the most successful conservation movements in India. Even today, Chipko movement spearheaded by the womenfolk of Gopeswar village in Garhwal in the Himalaya serves as the example to enlighten and inspire the communities across the globe to help them understand how a simple act of hugging trees through which Commercial felling of trees was effectively stopped. This simple yet effective action eventually saved 12,000 sq.km. of a sensitive water catchment area. And, there was a similar chipko movement in the southern state of Karnataka.<sup>17</sup>

Another example of community awareness and participation in the conservation of the environment is of Bishnoi community, which strongly show cased their love for nature and zeal to work for its preservation, especially in the times where the world was scarcely aware and conscious of ecological consequences of environmental degradation. When in 1973, the then ruler had ordered to cut down the Khejri (*Prosopis cineraria*) trees to bake lime for the construction of the fort; was faced with rampant protest from the Bishnoi community. Protestors consisted of men, women, whether young or old had placed their heads against the trees to prevent them from being cut and were axed along with the trees. This sacrifice of the protestors had moved the ruler and he sought pardon later from the people and passed an order stating that no green tree should be cut in the Bishnoi village. This legend is now celebrated by singers on

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17. The Chipko movement,( Jul. 10, 2020, 3:12 PM),<http://edugreen.teri.res.in/explore/forestry/chipko.htm>.

stage and in the streets during the Tree Festival.<sup>18</sup> Thus, these examples show that we need to engage local communities back to their roots. Also, state and society have to work together to mitigate the challenges and to achieve the common objective of environmental conservation.

Furthermore, the role of Judiciary in India is been incredible as judiciary continues to act both as a facilitator and observer of the proper and effective implementation of the laws related to environmental protection and conservation; by bringing forth the active participation of the state and society. However, along with the continuance of the innovative role of the judiciary, the green jurisprudence in India is still evolving and there is scope for ample radical reforms; a significant qualitative improvement that is required in legislative and executive actions along with the proactive designated responsibility of the community at large.

#### **CONCLUSION AND SUGGESTIONS**

The existing policy and legal mechanisms to protect traditional knowledge usually do not involve these communities themselves. Hence, they do little to safeguard local community needs, values and customary laws relating to traditional knowledge and genetic resources of indigenous and local communities. We have to preserve this aspect of indigenous culture and amalgamate it with modern methods to work towards environmental conservation.

This is an additional responsibility to not only revive the lost age-old philosophy of Environmental conservation but to protect, preserve and promote the cultural heritage that we have through living sustainably; for this several techniques can be used like agro forestry, bioprospecting, which can help us take the benefits of nature without causing any further harm. Practices like Permaculture which engages the alternative techniques of farming with the involvement of local communities; making the whole process more sustainable and environmentally friendly. Eco rejuvenation technology with the help of which a wasteland can be turned into a fertile land where site-specific plantation can be done with the type of crops which can be grown on a particular site like bamboo plantation can be done on fly ash dump site; already have been taken up by NEERI and conducted successfully on such wastelands with the proactive participation of the local communities. This kind of practices also help in the creation of job opportunities for local communities who have lost their source of livelihood because of

18. About Bishnoi, Bishnoi Village Safari, (Jul. 12, 2020, 12:10 PM), [http://www.bishnoivillagesafari.com/bishnoi\\_history.html](http://www.bishnoivillagesafari.com/bishnoi_history.html).

the regulated forests and forest produce many a time or due to some other factors; instead of running towards the cities; these people can easily be engaged back in the activities related to environment conservation and they can work well alongside the governmental agencies.

Through the creation and regulating natural resources stewardship within the community. We have several successful examples where community participation and cooperation has played an utmost important role in safeguarding and conservation of the environment. Restoring the goodness of nature; under which individual local action has played a significant part; this can be used as a global idea to produce a positive change in the society at large. We have already had the legal provisions given under the Indian Forest Act, 1927 whereby under village forest; forests are given to the local communities for its management, thereby protection and preservation remains the responsibility of the local community, which allows them to employ their traditional knowledge and skills for its preservation and management.

One of such example is of two communities of Arunachal Pradesh and Nagaland, were using their traditional knowledge indigenous communities led organizations have played a tremendous role in conservation and protection of wildlife species and their incredible contribution was also recognized and duly awarded by the Government of India in partnership with United Nations Development Programme (UNDP) for their outstanding models of biodiversity conservation, sustainable use and governance at the local level; well-coordinated efforts and functioning alongside governmental department(Forest department); both Singchung Bugun Village Community Reserve Management Committee of Arunachal Pradesh and Lemsachenlok Organization of Nagaland has indeed presented an exceptional example of community participation and use of traditional knowledge for the protection and conservation of environment.<sup>19</sup>

Our country is filled with such examples; where the indigenous community is working with governmental departments to bring out the best and effectively work towards the cause of environmental conservation. This is the need of the hour; to make this practice a uniform framework of functioning with the help of legislative and executive actions. Although, it in itself is a huge task in a diverse country like India; where every state is a new place representing different natural phenomena, so we cannot have one single policy which can be applied to all

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19. S.Ghosh, Two conservation communities from northeast India win Biodiversity awards, Mongabay, Jun 26, 2018.

diverse areas and circumstances, but rather there is a need to have a uniform legislative framework with the concrete legal provision; with specific rights and liabilities of every stakeholder involved in the process.

Because, conservation involves not just protection but restoration, more usually it's engaged with preventing damage and deterioration and our Indian traditions, customs and religious beliefs enlighten us about the protection of the flora and fauna. They teach us one fundamental principle of ecology, especially that every living entity of the biosphere has an important role in the flow of energy and cycle of nutrients which keep the world going. Indians have articulated the need to sustain and promote the ecological balances of nature through sacred incarnations and systematized rituals for the sustenance of life on the earth.

Thus, there is an urgent need to integrate ancient local and indigenous knowledge, best practices along with the world views into sustainable development and resource management process. Rural communities have to become active partners in defining sustainable development targets and means to achieve them for all. We need to focus on the needs of traditional knowledge holders, including both elders and youth. There has to be coordination between the different allied departments and spheres; protection and preserving of environment cannot be done alone by making legal provisions or stringent laws; as their implementation in an effective manner is only possible when community wilful participation is involved; indigenous people should be given due representation in the policy-making and implementation of the policies and programs related to environmental conservation; Governmental decision making should involve proactive political will to bring about significant changes in the planning and policy-making process; where all the stakeholders of the society are involved in some capacity.

Furthermore, there is a need to have a single system of laws about the cause of environmental conservation. The multiplicity of laws, often cause confusions and overlapping provisions further reduces the impact of the legal provisions leading to a reduction in their impact; for example, an act punishable under the Water (Prevention and Control of Pollution) Act, 1974 and the Environment Protection Act, 1986, here the penalty will be given as per the specific Act, i.e. the Water Act not according to the provisions of Environment Protection Act, 1986, even if the punishment is lesser under the Water (Prevention and Control of Pollution) Act, 1974.

Also, there is a need to amend the existing specific acts concerning environmental protection and conservation; raise the level of penalty; inculcate the principles of sustainable development like precautionary principles, the polluter pays principles, public trust doctrine, intergenerational, intragenerational equity principle, etc. in a way that they are not implied or interpreted by the judiciary rather are present in the form of concrete legal provisions.

The current Chief Justice of India Justice S.A. Bobde stated that one of the primary objectives for our future is the conservation of the environment. He said, " Human beings are seeds as well as parasites as far as the environment is concerned since they take much more than they give to the environment"<sup>20</sup>.

The Supreme Court of India through its judicial activism has amplified the scope of Article 32 which has further strengthened the cause of environmental protection and conservation in India. Still, environmental conservation in itself is a huge challenge, especially in a diverse country like India, where there are different stakeholders with different interests, balancing varied interests along with conserving the environment in a manner that we preserve our resources so that we can leave behind enough for the future generation seems like a challenging task. But if the state, society along with proactive judiciary work together; this can be achieved and we will be able to not only protect the environment for ourselves but also will be able to conserve its goodness for the future generation; this a responsibility that all of us together as one community has to bear and fulfil.

In earlier times, people were satisfied with minimal comforts which they could derive from their narrow surroundings. But with the increase in population, the area of land occupied by people has also grown enormously. People also resort to technological innovations to satisfy their wants. With technological growth, their desires also increase and multiply. Over time people have also started abusing the very surroundings which support their existence. The traditional cultures and knowledge are very important for both nature and society. For this government should take measures to preserve, protect and promote knowledge and cultures and also encourage research on this for conducting social and scientific study to preserve the remaining traditional practices. Although the coordination between the different allied departments is

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20. CJI SA Bobde underlines the need for a single system of laws for conservation of environment across the world, Firstpost( Jul.18, 2020, 12:10 PM), <https://www.firstpost.com/india/cji-sa-bobde-underlines-need-for-single-system-of-laws-for-conservation-of-environment-across-the-world-8077501.html>.

lacking. We need to see environmental and cultural resources as symbols of our pride and hence, we should strive to further protect, maintain and preserve this by creating a harmonious balance between the ancient Indian philosophy of conservation along with the current legal provisions; so that the real objectives of environmental preservation and protection can be achieved. All this can be a reality if there is political will, education, empowerment of native people and a change in the mindset of the people in general and by including the voices of all those who are being affected by environmental degradation.

Thus, there is a dire need to again rejuvenate and revive the feeling of oneness with nature that we had in the past. The zest for survival; survival based on preservation of what we have got naturally, by protecting it well; by nourishing it further and conserving it for us and our future generation. It calls for a significant collaborative partnership between the state, all the allied department, administrative agencies and society in which judiciary shall continue to further act as the facilitator of the effective implementation of the policies; continue to protect, safeguard the interests and rights of the people and environment as a whole.

## INTERNET SHUTDOWN IN INDIA: A DIGITAL APARTHEID

Anviksha Pachori\* Manali Maheshwari\*\*

### INTRODUCTION

*“The Internet is becoming the town square for the global village of tomorrow”*

-Bill Gates

It goes without saying that with the advent of internet, which is a new fuel to mankind and without which no human mobile works is the most essential invention of all time and most certainly provides a revolutionary platform which can be used for enabling social engagement, communicating and disseminating information. These rights act as a symbol of democratic government where right to free speech is a fundamental right. Internet blackouts can be defined as complete or partial disruption in digital communications which results into inaccessibility of internet connectivity within a definite area affecting specified group of citizens<sup>1</sup>. For instance, recently after the passage of the Citizenship Amendment Act, various anti-CAA rallies were held in different parts of the country like Assam to protest against National Register of Citizens. As a consequence, several orders were passed to disrupt the network connections by State police officers<sup>2</sup>. The actions of the governments were not justified because as per the procedures laid down by Suspension Rules, police officials are not provided with this arbitrary power. Also, such type of measures are implemented for political repression and to suppress the dissent of citizens of the country. India has emerged as global leader of Internet Shutdowns leading to the climate of “Digital Apartheid”. In 2018 alone, 134 internet blackouts took place in India<sup>3</sup>. As per the findings by Software Freedom Law Centre, the longest communication blackout was recorded in Kashmir and it remained for the duration of 213 days (4th August, 2019- 4th March, 2020)<sup>4</sup>. This resulted into loss of business and trade, disconnection between family members and lack of online education opportunities. Further, in a recent report by Top10VPN, India happened to be one of the third most economically affected countries after Iraq and Sudan,

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1. Berhan Taye et al., The State of Internet Shutdowns, Access Now (Aug. 22, 2020, 9:35 AM), <https://www.accessnow.org/the-state-of-internet-shutdowns-in-2018>.
2. Anirudh Vijay, CAA & NRC Protests: the problematic Internet Shutdown orders, Law School Policy Review (Aug. 27, 2020, 6:00 PM), <https://lawschoolpolicyreview.com/2019/12/27/caa-nrc-protests-the-problematic-internet-shutdown-orders/>.
3. *Supra note 1*.
4. Software Freedom Law Centre, Using 2G to fight a pandemic in a digital world (Aug. 21st, 2020, 4:23 PM), <https://sflc.in/using-2g-fight-pandemic-digital-world>.

which cost \$1.3 billion to Indian economy<sup>5</sup>. According to World Press Freedom Index 2020 report by Reporters without Borders, India dropped its rank and is placed at 142nd number<sup>6</sup>. This rank is sufficient enough in itself to explain about the constant press freedom violations taking place in the country by political parties, police authorities etc.

This paper is an in-depth study of the constitutional and human rights infringements with respect to Internet governance in a democratic state. Furthermore, the authors also analyze the impact of Covid-19 on the Internet blockade situation in J&K.

### **LEGAL MECHANISMS APPLICABLE ON INTERNET SHUTDOWNS**

#### **SECTION 144 OF THE CODE OF CRIMINAL PROCEDURE CODE, 1973**

Section 144 of Code of Criminal Procedure, 1973 is an archaic law envisaged under Chapter X of the code<sup>7</sup>. It is most commonly used as a legal sanction to curb the legitimate expression of opinion or thought and to maintain the public order and tranquility. The Court in *Madhu Limaye v. Sub Divisional Magistrate, Monghgyr*<sup>8</sup>, held that communication blackouts can only be ordered when there are some harmful and urgent situations which needs to be controlled. Subsequently, in *Anuradha Bhasin v. Union of India*<sup>9</sup>, Supreme Court reiterated the same belief by observing that there must be the presence of danger or apprehension of danger. The power under section 144 can only be exercised when danger exist in the form of “emergency”. Section 144 was considered as a discretionary and arbitrary power because of the existence of certain terms such as ‘likely to’, ‘sufficient ground’ and ‘prevent’ which provides enough power to authorities to disrupt the internet on their satisfaction. The Apex Court by expressing its views in *Ramlila Maidan Incident v. Home Secretary, Union of India & Ors.*<sup>10</sup> stated that Section 144 should only be exercised when “lesser alternatives are not adequate”. It was observed that Section 144 should be considered as a last resort in the case of “emergencies”. The nature of threat involved should not be imaginary but it must be real.

Section 69 of Information and Technology Act can also be used as an alternative to limit the

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5. Top10VPN, The Global Cost of Internet Shutdowns in 2019 (Aug. 25th, 2020, 10:30 PM), <https://www.top10vpn.com/assets/2020/01/Top10VPN.com-Cost-of-Internet-Shutdowns-2019-Supporting-Data.pdf>.

6. Reporters without Borders, 2020 World Press Freedom Index: Entering a decisive decade for journalism, exacerbated by coronavirus (Aug. 20th, 2020, 7:25 PM), <https://rsf.org/en/2020-world-press-freedom-index-entering-decisive-decade-journalism-exacerbated-coronavirus>.

7. The Code of Criminal Procedure, 1973, § 144.

8. *Madhu Limaye v. Sub Divisional Magistrate, Monghgyr*, AIR 1971 SC 2486.

9. *Anuradha Bhasin v. Union of India*, AIR 2020 SC 1308.

10. *Ramlila Maidan Incident v. Home Secretary, Union of India & Ors.*, (2012) 5 SCC 1.

communication of information by blocking the internet services<sup>11</sup>. This indiscriminate legal mechanism is exercised by executive authorities without satisfying the criteria of legality or legitimacy. IT Act has an overriding effect over the provisions of CrPC as it is a special law. However, in *Guarav Sureshbhai Vyas v. State of Gujarat*<sup>12</sup>, judiciary failed to act as savior and held that State Government can use its discretion while exercising its power. It was concluded that the scope of operations of both Section 69 A and Section 144 do not overlap and are not similar.

#### **TEMPORARY SUSPENSION OF TELECOM SERVICES (PUBLIC EMERGENCY OR PUBLIC SAFETY) RULES, 2017**

As per Indian Telegraph Act, 1885, Section 5(2) is used by authorities to prohibit the transmission of telegraphic message due to public emergency or in the interest of public safety<sup>13</sup>. The procedure envisaged for the disruption of Internet is governed by Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 which were issued under Section 7 of the Indian Telegraph Act, 1885. These rules were enacted to prevent the Government from arbitrary use of its power provided under Section 144. Section 144 was considered as an outdated law as it provides too much freedom and discretion in the hands of the authorities. It was held that usage of Section 144 by the authorities in a repetitive manner is illegal in *Mazdoor Kisan Shakti Sangathan v. Union of India*<sup>14</sup>.

The rules confer the power of restricting the Internet on “competent authority” which comprises of Secretary to the Ministry of Home Affairs (Union government) and Secretary to government in-charge of the home department (State government).<sup>15</sup> No other person is competent to order blackout except the officer who is not below than Joint Secretary to the Union or State Government in an emergency period. A protection measure as establishment of review committee is instilled to check the credibility of the order under Section 5 of the Indian Telegraph Act, 1885. Therefore, an order will be considered as ultra vires if it is inconsistent with Suspension rules. There are many lacunas in the above-mentioned rules as there is broad interpretation of the expressions “public safety” and “public emergency”. But recently, Jodhpur

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11. The Information Technology Act, 2000, § 69.

12. *Guarav Sureshbhai Vyas v. State of Gujarat*, (2015) SCC OnLine Guj 6491.

13. The Indian Telegraph Act, 1885, § 5(2).

14. *Mazdoor Kisan Shakti Sangathan v. Union of India*, AIR 2018 SC 3476.

15. Software Freedom Law Centre, *Living in Digital Darkness: A handbook on Internet Shutdowns in India* (Aug. 29, 2020, 9:30 PM), <https://sflc.in/living-digital-darkness-handbook-internet-shutdowns-india>.

High Court tried to serve its purpose by observing that internet disruptions cannot be used as a tactic to prevent cheating in exams as it does not fall in the ambit of “public emergency” or “public safety”<sup>16</sup>

### **IS THE NECESSITY FOR INTERNET SHUTDOWN IS JUSTIFIED?**

India which accounts for 67% of blackouts in 2018 is a front-runner in arbitrary network disruptions<sup>17</sup>. It was observed that out of 385 blackouts documented in between 2012- 2020, 237 were imposed by anticipating “law and order breakdowns”<sup>18</sup> and 148 were carried out for controlling ongoing “law and order situations”. According to Jan Rydzak, internet access during protests leads to cooperation which is essential for peaceful protests and abrupt shutdown can result into frustration among people which stimulates violent protests and create chaotic public order situation<sup>19</sup>. Some experts have also contended that there is no evidence and research whether qualitative or quantitative to prove that arbitrary network disruptions will reinstate normalcy.

As per Access Now, some of the justifications for ordering blackouts were hate speech, prevention of cheating during examinations, avoid destruction to human life and property, fake news, national security etc<sup>20</sup>. Governments control the dissemination of information and curtail the dissent through indiscriminate shutdowns. It was stated by Marietje Schaake, president of Cyberpeace Institute during the Raisina Dialogue, 2020 that “Internet Shutdowns are problematic and have a detrimental impact on innocent individuals who don’t certainly pose a threat to national security”<sup>21</sup>. Also, there is a threat to personal security due to network disruptions and clampdown of information.

### **JUDICIAL ANALYSIS**

The constant interference and penetration into right to access the internet resulted into the

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16. Mansi Sharma, The Legality of Internet Shutdowns in a Democracy, Black N’ White Journal (Aug. 22, 2020, 4:00 PM), <https://bnwjjournal.com/2020/08/20/the-legality-of-internet-shutdowns-in-a-democracy/>.

17. Prithvi Iyer, From Fears to Conviction: Why Internet Shutdowns Don’t Work, Observers Research Foundation (Aug. 30, 2020, 7:45 PM), <https://www.orfonline.org/research/from-fears-to-conviction-why-internet-shutdowns-dont-work/>

18. Software Freedom Law Centre, Internet Shutdown Tracker (Aug. 24, 2020, 3:30 PM), <https://internetshutdowns.in/>.

19. Jan Rydzak, Of Blackouts and Bandhs: The Strategy and Structure of Disconnected Protest in India (Aug. 21, 2020, 2:40 PM), <https://ssrn.com/abstract=3330413>.

20. Supra note 1.

21. Prabhjote Gill, As 2G returns to Kashmir after 5 months, these are some strong arguments against internet shutdowns in the future, Business Insider (Aug. 23, 2020, 3:41 PM), <https://www.business-humanrights.org/en/latest-news/as-2g-returns-to-kashmir-after-5-months-these-are-some-strong-arguments-against-internet-shutdowns-in-the-future/>.

declaration of access to internet as a basic human right by United Nations<sup>22</sup>. Courts have always been trying to balance the national security and fundamental rights of the citizens but there are not directly linked with each other. Courts have always favored “national security” when there exists a conflict between the two of them.

The Supreme Court in *Modern Dental College & Research Centre v. State of UP*<sup>23</sup>, laid down certain conditions like rational connection, necessity and legitimate goal which would ultimately fulfill the test of proportionality. The balance between both the fundamental rights and the restrictions imposed by the law should be maintained.

The freedom of access to internet was substantially recognized in *Shreya Singhal v Union of India*<sup>24</sup>. The judiciary laid that the fundamental right to freedom of speech and expression is facilitated through the medium of internet. The government was suggested to protect freedom of speech and expression without infringing the modern technologies like Internet.

In the landmark judgement of *Faheema Shirin v. State of Kerala*<sup>25</sup>, right to access the internet was considered as a fundamental right to privacy as well as right to education under the ambit of Article 21 of the Constitution of India. Court further held that an individual should not be deprived of internet in an arbitrary manner. This judgement is a well-known example of the progressive constitutionalism in which freedom of expression holds supreme importance.

However, the Apex Court of the country abstained itself from declaring access to internet as a part of Article 21 of the Constitution. Supreme Court hold back its power of acting as a backbone in the thunderstorm of injustice. The judgement in *Anuradha Bhasin v. Union of India & Ors*, 2019, was much awaited after the dilution of Article 370 and it was observed that under the Temporary Services of Telecom Rules, 2017 internet services cannot be indefinitely suspended. Also, any order suspending internet for temporary period is subject to judicial review. But the judgement undermines rule of law as it did not hold Right to Internet as Fundamental Right<sup>26</sup>; *secondly*, no expert committee was constituted to look into the impact of this shutdown and assess the ground reality and; *thirdly*, the argument related to the “chilling effect” on freedom of

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22. Office of the High Commissioner for Human Rights, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (Aug. 26, 2020, 2:45 AM), [https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf).

23. *Modern Dental College & Research Centre v. State of MP*, (2016) 7 SCC 353.

24. *Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

25. *Faheema Shirin v. State of Kerala*, AIR 2020 KER 35.

26. Mitushi Garg, *The Right to the Internet: A Persistent Conundrum*, India Law Journal (Aug. 30, 2020, 12:35 PM), <https://www.indialawjournal.org/the-right-to-the-internet-a-persistent-conundrum.php>.

press due to internet shutdown was rejected as there was no evidence<sup>27</sup>. The constitutional court just suggested recommendations to the government instead of a decree. The state machinery took the advantage of the ambiguity and doubtfulness which resulted from the judgement. The arbitrary exercise of power is limited by stating that repetitive orders under Section 144 CrPC would be considered as an abuse of power. The Court concluded by stating that complete suspension of telecom services should be considered as last resort when there is no presence of alternate less intrusive remedy. Further, the effect of the word “temporary” in suspension rules leads to dis proportionality so procedural safeguard should be laid down by the legislature to cure the lacunas<sup>28</sup>.

Subsequently, a matter was initiated by Foundation for Media Professionals and Private School Associations of J&K v. Union Territory of Jammu & Kashmir<sup>29</sup> due to the dubious stand of the Supreme Court in which it abstained itself from declaring Right to Access the internet as a Fundamental right. The petitioners contended to restore the 4G services and end throttling of the internet during the coronavirus outbreak as it is impacting the health care services, education and human rights of the citizens of the valley. It was alleged that the Articles 14, 19 and 21 of the Constitution are violated. But, the Apex Court once again failed to perform its judicial responsibility by disposing off the petition. Instead, a special committee of secretaries was directed to be constituted consisting of national, state, Ministry of communication etc. who would examine the contentions and look for the alternative remedy. The decision was criticized by lawyers, human rights organizations by stating that “Executive will decide whether executive violated fundamental rights”<sup>30</sup>. Subsequently, the 4G internet services have been restored in 2 districts of Kashmir on trial basis. Therefore, Supreme Court’s decision of prioritizing national security over fundamental rights resulted into disproportionate infringement of the right to internet.

## **IMPACT OF INTERNET SHUTDOWN ON CITIZEN’S RIGHTS**

### **ECONOMIC IMPACT**

The emergence of the digital economy due to the advancement of the technology has seen

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27. TheWire, Why the SC Judgement on Kashmir Internet Shutdown falls Short of Expectations (Aug. 26, 2020, 3:00 AM), <https://thewire.in/law/sc-judgment-kashmir-internet-shutdown-why-it-falls-short-of-expectations>.

28. *Id.*

29. Foundation for Media Professionals v. Union Territory of Jammu & Kashmir, (2020) S.C.C. OnLine SC 453.

30. Shrutanjaya Bhardwaj, Supreme Court verdict on 4G in J&K undermines the Rule of Law, The Wire (Aug. 28, 2020, 1:20 PM), <https://thewire.in/law/supreme-court-4g-jammu-and-kashmir>.

precipitous hike in the usage of the internet. 69 to 95% of the businesses around the world rely on the broadband internet connection for the functioning and the expansion of their business<sup>31</sup>. There has been tremendous increase in the cross border and domestic trade due to the developments in the e-commerce industry. Network disruption acts as a hindrance by impacting economic prosperity of both developed and developing economies of the world.

According to Indian Council for Research on International Economic Relations, Internet Shutdown of 16315 hours during 2012-2017 cost \$3.04 billion to the Indian economy<sup>32</sup>. Effective internet connectivity plays a vital role in the expansion of business activities and in the development and growth of the country. It was reported by Cellular Operators Association of India that Indian economy was affected badly from blackouts and the loss caused went up to Rs. 24.5 million per hour in 2019<sup>33</sup>. With the advent of the business to consumer e-commerce transactions, breakdown of communication channels due to lack of access to internet leads to severance of ties with payment gateway operators, prospective customers and other parties.

Further, temporary disruptions have led to economic loss due to hindrance in productivity, loss of time sensitive information and reduction in investments. The economic growth of the country is directly proportional to the amount of the foreign direct investment which is eventually linked with fixed and mobile communication networks. It has been concluded that due to the shutdown of online services like e-mail, messaging, online banking etc. during temporary shutdowns, economy is impacted by reduction in labor productivity, increase in transaction costs, restriction in accessing new markets and limitation in internet banking. Economy is also affected through throttling in which speed of internet is reduced which leads to difficulty in the functioning of the business activities. Network disruptions in India cost Rs. 6485 crore business losses, as reported by Brookings Institution in 2015-16<sup>34</sup>.

According to a report released by Kashmir Chambers of Commerce & Industry, network

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31. Deloitte LLP, The economic impact of disruptions to Internet Connectivity, Global Network Initiative (Aug. 17, 2020, 6:24 PM), <https://globalnetworkinitiative.org/wp-content/uploads/2016/10/GNI-The-Economic-Impact-of-Disruptions-to-Internet-Connectivity.pdf>.

32. Rajat Katuria et al., The Anatomy of an Internet Blackout: Measuring the Economic Impact of Internet Shutdowns in India, Indian Council for Research on International Economic Relations (Aug. 20th, 2020, 5:00 PM), [https://icrier.org/pdf/Anatomy\\_of\\_an\\_Internet\\_Blackout\\_ppt.pdf](https://icrier.org/pdf/Anatomy_of_an_Internet_Blackout_ppt.pdf).

33. Rachit Seth, Protests in the time of Internet Shutdowns, WION (Aug. 19, 2020, 2:53 PM), <https://www.wionews.com/opinions/protests-in-the-times-of-internet-shutdowns-271396>.

34. Darrell M. West, Internet Shutdowns cost countries \$2.4 billion last year, Center for Technology Innovation at Brookings (Aug. 30, 2020, 4:00 AM), <https://www.brookings.edu/wp-content/uploads/2016/10/internet-shutdowns-v-3.pdf>.

disruption resulted into loss of jobs of more than 5,00,000 people<sup>35</sup>. The 3 worst hit sectors are handicrafts, tourism and horticulture as the entire economy of Kashmir is majorly dependent on the revenue which is generated by these sectors. The impact of communication blackout by restoring services at 2G speed in Kashmir during this deadly pandemic makes lives of people miserable. Many business startups are having difficulty in surviving due to delay in access of essential information. Competitive firms and companies are having hard time in sharing and exchanging information to meet the demands of essential commodities and healthcare products because of reduction in speed of internet.

### **HEALTH CARE SECTOR**

According to Article 12 of International Covenant on Economic, social and cultural rights, “Everyone has a right to enjoy physical and mental health of the highest attainable standard”<sup>36</sup>. Internet act as a necessary public utility service in the efficient functioning of the healthcare sector. Many hospitals maintain online records, documents and patient information repositories on online servers. Further, many doctors take advice from their colleagues and consult them in the difficult and complicated situations. Moreover, the development of the technological infrastructure has resulted into efficient communication through the help of internet. Availability of life saving drugs and surgical instruments are dependent on the connectivity of internet as they are transported from across the globe. The communication blackout has resulted into improper functioning of online servers and all the services related to shipment like digital payments, tracking etc. became obsolete. In a petition which was raised by *Foundation of Media Professionals*, it was contended that citizens of the valley are deprived of health care services during this global pandemic. Health services which are very essential during this global health crisis are impacted. Accurate and timely information of new vaccines and medicines, access to efficient health care treatments are very important to know during corona outbreak. It was put forth that Article 21 of the Constitution of India<sup>37</sup> is violated as right to health is a constitutional obligation of each state. Continuous flow of information is a prerequisite to limit the spread and impact of this highly infectious disease when there is increase in coronavirus cases in Jammu and Kashmir.

Additionally, the throttling of internet renders some services impossible like online video

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35. Jammu Kashmir Coalition of Civil Society, Kashmir’s Internet Siege (Aug. 24, 2020, 12:56 PM), <https://jkccs.net/report-kashmirs-internet-siege/>.

36. ICESR art. 12, cl. 1.

consultation and telemedicine, which are indispensable services at this odd hour<sup>38</sup>. The doctor to patient ratio in Kashmir is not as per the standards laid down by World Health Organization and the existing health care professionals are not sufficient to run the health establishments effectively<sup>39</sup>. Thus, efficient network connection is required by both private and public hospitals to fight against this communicable disease and protect the health of its citizens.

### **HUMAN RIGHTS**

According to UN Human Rights experts, internet disruption and inaccessibility of telecommunications is not in consonance with fundamental standards of necessity and proportionality when the actions of the Government are not justified. "Communication blackout is also understood as a collective punishment of the people of Jammu and Kashmir, without there being any reason of a precipitating offence."<sup>40</sup> A resolution was passed in 2016, by United Nations Human Rights Council condemning the internet blackouts and the measures adopted by the state to curtail internet access and dissemination of information<sup>41</sup>. The Special Rapporteur on freedom of expression condemned the government surveillance through communication blackout and listed some measures to protect the digital expression.

The Court held in *Anuradha Bhasin v. Union of India & Ors.* that Right to access to Internet is an integral part of Freedom of speech and expression under Article 19(1) (a) and Freedom of trade and commerce under Article 19 (1) (g), both are constitutionally protected rights with certain reasonable restrictions<sup>42</sup>. It was laid down that these rights are not absolute and have some reasonable restrictions which are provided in Article 19 (2) and 19(6).

The UN Sustainable Development Goal 9 encourages access to Information and Technological Communications and aims to provide universal and affordable access to the Internet in least developed countries by 2020<sup>43</sup>. So, states are not complying with international commitments by

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37. India Const. art. 21.

38. Adi Radhakrishnan, Covid-19: Restricted Internet Impacts on Health in Kashmir, *Health & Human Rights Journal* (Aug. 21, 2020, 8:10 PM), <https://www.hhrjournal.org/2020/04/covid-19-restricted-internet-impacts-on-health-in-kashmir/>.

39. *Id.*

40. Office of the High Commissioner for Human Rights, UN rights experts urge India to end communications shutdown in Kashmir (Aug. 25, 2020, 9:28 AM), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24909>.

41. Access Now, U.N. passes landmark resolution condemning internet shutdowns (Aug. 27, 2020, 11:32 AM), <https://www.accessnow.org/un-passes-resolution-condemning-internet-shutdowns/>.

42. India Const. art. 19, cl. 1.

43. Internet Society, *The Internet & Sustainable Development* (Aug. 30, 2020, 4:55 PM), <https://www.internetsociety.org/wp-content/uploads/2015/06/ISOC-ICTs-SDGs-201506-Final.pdf>.

disrupting the networks without confirming to legal standards.

As per Articles 19-22 of Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, freedom of expression also includes online dissemination of information and intentional disruption of internet connectivity is violation of international human rights law. All the above mentioned rights are recognized in the Constitution of many countries and state is obligated to protect and respect the citizen's enjoyment of these rights. Article 19 (1) (a) of the Constitution of India is in consonance with Article 19 of UDHR which protects freedom of speech and expression<sup>44</sup> but it is not an absolute freedom. The three-part test of meeting legality, legitimacy and necessity and proportionality should be followed before disabling the network<sup>45</sup>. Online access is often used for connecting with friends and families, share and access information, expand business and hold organizations accountable. These blackouts also lead to camouflage of abuse of human rights by violating right to bodily integrity by the government. Right to free press is considered to be 4th pillar of democracy and act as a society's watchdog on government<sup>46</sup>. These blackouts impacts journalism sector directly as right to free press is restricted and curtailed<sup>47</sup>. The major change in the special status of the state and revocation of Article 370 of the Constitution of India resulted into complete network disruption for almost 5 months and freedom of expression was arbitrarily violated in the name of national security. It was also found that only 126 websites could be accessed out of 301 websites provided for usage<sup>48</sup>. The rights of the residents of Kashmir were infringed as free expression of ideas was restricted, unemployment was created and people were mentally affected.

#### **PSYCHOLOGICAL AND MENTAL HEALTH OF CITIZENS**

Internet shutdowns also have a social impact on the lives of the people who are dependent on it for their survival, entertainment and their growth. Good network connectivity has facilitated and encouraged people to participate in cultural life and take advantage from scientific progress<sup>49</sup>.

44. UDHR art. 19.

45. Rashi Rawat & Himanshu Kumar, Revisiting Internet Shutdowns & Right to freedom of Expression, NUALS Law Journal (Aug. 20, 2020, 6:08 PM), <https://nualslawjournal.com/2020/07/24/revisiting-internet-shutdowns-and-the-right-to-freedom-of-expression/>.

46. Ivar A. Hartmann, A Right to Free Internet: On Internet Access and Social Rights, 13 J. High Tech. L. 297, 322 (2013).

47. Ishita Mundhra, Analysing the Impact of Internet Shutdown in Kashmir, Constitutional Law Society, NUJS (Aug. 27, 2020, 2:17 PM), <https://wbnujscls.wordpress.com/2020/02/13/analysing-the-impact-of-the-internet-shutdown-in-kashmir/>.

48. Rohini Lakshané & Prateek Waghre, Even the 301 whitelisted sites in J&K are not entirely accessible: An Analysis, Medianama (Aug. 28, 2020, 2:24 PM), <https://www.medianama.com/2020/01/223-analysis-of-whitelisted-urls-in-jammu-and-kashmir-how-usable-are-they/>.

49. Jan Rydzak, Disconnected: A Human rights approach to Network disruptions, Global Network Initiative (Aug. 19, 2020, 8:48 PM), <https://globalnetworkinitiative.org/disconnected-human-rights-network-disruptions/>.

Thus, disruption of network can also lead to lack of cultural expression which are nowadays promoted through social media platforms.

Additionally, in the petition filed by Anuradha Bhasin regarding the constitutionality of internet blackouts, mental health of citizens of Kashmir was stressed by stating that “Communication blackouts results into anxiety, panic, alarm, insecurity and fear amongst the people”. The most important consequence of network disruptions is the creation of social exclusion among different individuals and groups from their communities.<sup>50</sup> This often leads to unequal opportunities amongst the citizens in respect of lack of information, access to essential services and social activities. It also fuels isolation amongst the people as they cannot participate in social and political self-determination. Both Internet and social media have become modern tools for effective communication and socialization.

Further, Government services and policies are negatively affected because of the communication blockade created by Internet shutdowns. The major aim of “Digital India” initiative was to provide the benefits of services, welfare schemes and access to public information digitally. But due to arbitrary use of power by states in employing this tactic of “Network disruptions”, the programme is put into jeopardy<sup>51</sup>. It also adversely affects freedom of expression and speech which allows the citizens to express themselves anonymously<sup>52</sup>. Therefore, unavailability of digitally enabled services in such circumstances would result into emotional and psychological distress amongst the people<sup>53</sup>.

## **EDUCATION**

The importance of the education is expressed through Article 13 of ICESCR which lays down that everyone has a right to education<sup>54</sup>. Education act as a driving factor for the development of the human personality and it enables all citizens to participate effectively in a free society. It is very important for the upliftment and empowerment of the vulnerable and marginalized sections of people who are exploited. With the advancement of the technology and Digital India, online

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50. ZothanMawii et al., Kept in the Dark: Social & Psychological Impacts of Network shutdowns in India, Association for Progressive Communications (Aug. 25, 2020, 11:51 AM), <https://www.apc.org/en/pubs/kept-dark-social-and-psychological-impacts-network-shutdowns-india>.

51. *Id.*

52. Scott M. Ruggiero, Killing the Internet to Keep America Alive: The Myths and Realities of the Internet Kill Switch, 15 SMU Sci. & TECH. L. REV. 241,256 (2012).

53. Kavya Mathur & Varsha Raman, COVID19-XX: The pandemic and the shutdown in Kashmir, Law School Policy Review (Aug. 18, 2020, 10:06 AM), <https://lawschoolpolicyreview.com/2020/06/05/covid19-xx-the-pandemic-and-the-shutdown-in-kashmir/>.

54. ICESR art. 13, cl. 1.

education is used as a tool in accessing knowledge and for greater learning opportunities for students. Further, online application forms of colleges cannot be accessed when there is disruption in network connectivity.

It was argued in a petition by *Foundation of Media Professionals*, that online educational content is limited and restricted due to the reduction in the speed of internet in the light of Covid-19<sup>55</sup>. Students are not able to access online materials which are available in abundance on their college and school websites. The throttling of internet acts as a restriction in downloading research papers, communicating with journals and access to literature which eventually becomes frustrating for PhD students. Article 21 A of the Constitution is violated as the fundamental right to education of children of Jammu and Kashmir cannot be exercised. It was also found that due to low bandwidth, applications like zoom, google classroom which are necessary for imparting education do not function properly<sup>56</sup>. The interaction with the students lacked creativity and communication as sound and video has to be disabled due to throttling. The poor connectivity of internet has led to frustration among the students because they are not able to access online diplomas, courses and videos offered by renowned educational institutes for free.

#### **THE ROAD AHEAD**

1. Communication blackouts should not be arbitrarily ordered by Centre/States as it results into violation of human rights. Digital rights are fundamental for a democratic organization and internet shutdown should be the “last resort” preferred by the government institutions while maintaining public peace and order.
2. Government should adhere to principle of proportionality consisting of necessity, legitimate aim and rational nexus while reviewing any network connectivity order.
3. The Right to access to Internet should be declared as a fundamental right under Article 21 of the Constitution by Supreme Court and some procedural

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55. Snehal Walia, The Internet is the key to the Right to Education in J&K, *Jurist* (Aug. 20, 2020, 4:34 PM), <https://www.jurist.org/commentary/2020/07/snehal-walia-internet-education-jammu-kashmir/>.

56. Khalid Shah, How the world’s longest Internet shutdown has failed to counter extremism in Kashmir, *Observer Research Foundation* (Aug. 30, 2020, 5:27 PM), <https://www.orfonline.org/expert-speak/how-the-worlds-longest-internet-shutdown-has-failed-to-counter-extremism-in-kashmir/>.

safeguards must be laid down to cure the loopholes which exists in Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017.

4. The internet shutdown orders should be made public so that there is transparency and citizens have a right to approach the Court to challenge the order as mentioned in the judgement of *Anuradha Bhasin v. Union of India*.
5. Government must ensure that network disruptions are surveilled by unprejudiced, independent and experienced judicial authorities confirming that such measure was adopted to prevent unprecedented danger.
6. Judicial authorities should not reject the contention of “chilling effect” on freedom of press which is a sacred right as no evidence was established.
7. UN Special Rapporteur recommended that corporate human rights accountability measures should be designed and implemented for strengthening user’s rights to freedom of expression. Also, participation and inputs of stakeholders such as civil society, customers and human rights experts should be encouraged to protect the digital expression<sup>57</sup>.

## CONCLUSION

The aforesaid statistics and information indicates that the digital sieges are indiscriminate mechanisms through which government authorities violate civil, political and economic rights of the citizens. Network disruptions have become the “new normal” in the lives of the people. The major stated reasons for communication lockdown are public safety, public security and national security but none of them are defined anywhere. The authorities abuse their power by vaguely interpreting them as per their convenience. Also, such mechanisms should be framed so that states can be held accountable when they are deviating or broadly defining the terms mentioned above. Therefore, they must confirm to rule of law doctrine prior to shut down the internet in an arbitrary manner.

Internet disruption is used as a modern weapon of suppression by authorities in stopping the

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57. Office of the High Commissioner for Human Rights, Report on the role of Digital Service Providers (Aug. 23, 2020, 3:30 PM), <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/SR2017ReporttoHRC.aspx>.

spread of information so that there is no social unrest or protests. However, there is no evidence with regard to the fact that disruption of the internet would lead into peace and harmony in the country. This further leads into creation of agitation in the minds of people which is antithetical to the main objective of communication blockades. Also, it leads into breakdown of democratic values and mistrusts into the government by the citizens as Internet shutdown is an extreme measure in itself. Such opinions and feelings should be considered and addressed by the authorities to protect the autonomy of the country.

Additionally, the mobile penetration in India is 24% which is very low and the internet connectivity cannot be afforded by everyone due to poverty and unemployment. So, it can be said that there are various limitations to access to the Internet. Government as a welfare state has the responsibility to assure unconditional access to Internet for the development and empowerment of the citizens of the country.

Internet shutdown leads to restriction and control on dissemination of information about the abuse of human rights in a particular territory to the world. The speedy justice delivery mechanism sometimes becomes ineffective because less number of human rights violations are reported due to network disruption. One of the recent example can be difficulty faced by J&K courts in conducting virtual hearings during this global pandemic.

Government should resort to alternative mechanisms for maintaining peace and harmony like educational drives can be organized for educating masses about the responsible use of internet so that they can be digitally sound and literate. Also, authorities and internet service providers can work together to find an effective alternative to internet shutdowns balancing fundamental rights and national security of the state.

India has been considered as the “undisputed champion” of communication lockdown as it tremendously affected the human rights by infringing fundamental rights of its citizens. The outbreak of Covid 19 has already led to lots of troubles in access to education, lack of essential services, loss of business etc. But the union territory of J&K continued to restrict the internet through “bandwidth throttling” which resulted into difficulties in online education, justice delivery mechanism, healthcare sector, etc. No strict action was taken by J&K government even after the criticisms of human rights organizations and the order of Supreme Court. Therefore, law and enforcement agencies should not override fundamental rights and use the less restrictive measure to curb the social unrest.

## THE CITIZENSHIP (AMENDMENT) ACT, 2019: AN ANALYTICAL GLANCE AND GLIMPSE

Dr. Bharat\* & Mukesh Kumar\*\*

### INTRODUCTION

*“A man’s country is not a certain area of land, of mountains, rivers, woods, but it is principle; and patriotism is loyalty to that principle.”*

– George William Curtis<sup>1</sup>

Citizenship, a formal reflection of individual’s membership of a political community,<sup>2</sup> not only strengthens the relationship between the citizens and the country, by enabling rights to the citizens, but also develops a sense of oneness among the citizenry and the country. It creates a reciprocal relationship of rights and duties between an individual and political community besides making the citizens different from a mere resident for democratic participation<sup>3</sup> where they take decisions for themselves.<sup>4</sup> It is also considered as a legal status of an individual regulated by the national law and recognized by the international law, comprising of civil and political rights protected by the State with corresponding duties and the loyalty of the citizens towards the State.<sup>5</sup>

India, since *Vedic ages*, has always followed the principle of *Vasudhaiva Kutumbakam* (whole world is one family). Even in the era of sovereign nation-states, with strong perception of citizenship, India has kept its commitment towards rich cultural heritage as well as humanity. According to the 2011 Census of India, the total population was 1,210,854,977; out of which 966,257,353 were Hindus; 172,245,158 Muslims; 27,819,588 Christians; 20,833,116 Sikhs; 8,442,972 Buddhists; 4,451,753 Jains; 7,937,734 other religions & persuasions and 2,867,303 not stated religion but residing in India<sup>6</sup> with unity and unanimity.

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1. A.R. Panday, *Law Of Nationality, Citizenship & Immigration*, at i (2012).

2. *Contemporary Political Concepts: A Critical Introduction* 73-74 (Georgina Blakeley and Valerie Bryson eds.), <http://www.jstor.com/stable/j.ctt18fs3n8.8>.

3. Richard Bellamy, *Citizenship: A Very Short Introduction* 1-2 (2008).

4. *Id.* at 12.

5. Subhash C. Kashyap, *Constitutional Law Of India* 366-67 (2008).

6. Office Of The Registrar General & Census Commissioner, India (Aug. 15, 2020, 09:45 PM), [https://censusindia.gov.in/2011census/Religion\\_PCA.html](https://censusindia.gov.in/2011census/Religion_PCA.html).

## LEGISLATIVE DOMAIN ON CITIZENSHIP UNDER THE CONSTITUTION OF INDIA

Prior to the commencement of the Constitution of India (Constitution) there was no formal law which provided for the Indian citizenship. In India, the law and procedure for acquisition, determining and termination of citizenship are the derivative of the Part-II of the Constitution and the Citizenship Act, 1955,<sup>7</sup> thereunder; besides the Rules made and amended from time to time.

The opening words of the Preamble of the Constitution, “We the People of India...” gives a clear dictum that the Sovereign, Socialist, Secular Democratic and Republic character of India, as a nation, was resolved to secure Justice, Liberty, Equality and Fraternity “to all its citizens”. This philosophy aims to differentiate between citizens and mere residents or aliens.

Articles 5 to 11 (under Part II) of the Constitution provides for the citizenship. The Parliament of India (Parliament) has exclusive jurisdiction to determine the citizenship by the virtue of Articles 11 and 246 read with Entry 17 of the Union List under the Seventh Schedule. Further, Articles 15, 16, 19, 25, 29 and 30 guarantees the Fundamental Rights to the citizens of India only.<sup>8</sup> In the case of Mohd. Ayub Khan v. Commissioner of Police, Madras<sup>9</sup> the Supreme Court (SC) observed:

“The power of Parliament to enact legislation to make provision with respect to the acquisition and termination of citizenship is as a matter of abundant affirmed by Article 11.”<sup>10</sup>

In another case of Izhar Ahmad Khan v. Union of India, the SC observed:

“While making provisions for recognizing the right of citizenship in the individuals as indicated by Articles 5 to 9 and guaranteeing the continuance of the rights of citizenship as specified by Article 10, Article 11 authorise the Parliament to make any provision pertaining to citizenship. Thus, it would be open to the Parliamentary to affect the rights of citizenship and the provisions made by the parliamentary statute in that behalf cannot to impeached on the ground that they are

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7. The Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India). It came into force on Dec. 30, 1955 and has been amended in 1985, 1986, 1992, 2004, 2005, 2015 and 2019. It provides for the acquisition of Indian Citizenship by Birth (s 3), Descent (s 4), Registration (s 5), Naturalization (s 6), under Assam Accord (s 6A), and Incorporation of territory (s 7), and also, through Registration of Overseas Citizen of India Cardholder (s 7A).

8. India Const. art. 14 and 21 are granted to every person irrespective of his citizenship.

9. Mohd. Ayub Khan v. Commissioner of Police, Madras, AIR 1965 SC 1623 (India).

10. Subhash C. Kashyap, *Supra note 5* at 398.

11. Izhar Ahmad Khan v. Union of India AIR 1962 SC 1052 (India).

inconsistent with the provision contained in Articles 5 to 10 of Part II. In this connection, it is important to bear in mind that Article 11 has been included in Part II in order to important to make it clear that the sovereign right of the Parliament to deal with citizenship and all questions connected with it is not impaired by the rest of the provisions of the said Part.”<sup>11</sup>

Therefore, the sovereign legislative competence of the Parliament is unfettered and wide enough to deal with the citizenship exclusively.

### **THE CITIZENSHIP (AMENDMENT) ACT, 2019**

The Citizenship (Amendment) Act, 2019<sup>12</sup> (CAA) is broadly based on the Citizenship (Amendment) Bill, 2016 which was cleared by the Joint Parliamentary Committee (JPC) consisting of thirty members.

CAA has amended the definition of ‘illegal migrant’ under section 2(1)(b); as an illegal migrant is prohibited from acquiring the citizenship of India. An illegal migrant is a foreigner who either enters into India illegally, i.e., without valid travel documents (visa/passport), or enters India legally, but stays beyond the time period permitted in the travel documents. An illegal migrant can be prosecuted in India, for imprisonment or deportment. Hence, in the following provision was added:

*“Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made thereunder, shall not be treated as illegal migrant for the purposes of this Act”.*

This amendment provided that the specified class of illegal migrants i.e. Hindus, Sikhs, Buddhists, Jains, Parsis and Christians (*hereafter* mentioned as ‘persecuted communities’) from Afghanistan, Bangladesh and Pakistan will not be treated as illegal migrants, and made them eligible for citizenship as they have already entered in India with or without documents and are residing in the different parts of India after the expiry of the documents and have been exempted by the the Passport (Entry into India) Act, 1920 or the Foreigners Act, 1946.

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12. The Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament, 2019 (India), passed by Lok Sabha on Dec. 9, 2019; Rajya Sabha on Dec. 11, 2019 and received the assent of the President on the Dec. 12, 2019 and came into force on into force from Jan. 10, 2020.

13 The Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India), Third Schedule, cl. (d).

To provide social, economic and political justice to the persecuted communities, CAA granted 'one-time', fast track citizenship to them by naturalisation, who on acquiring citizenship, shall be deemed to be Indian citizens from the date of their entry into India and they will be protected from all legal proceedings, of their status, as illegal migrant, thereafter.

The law allows a person to apply for citizenship if they fulfil conditions for Indian citizenship specified in section 5 or the qualifications under the provisions of the Third Schedule. One of the qualifications states the cut-off date required for granting the citizenship i.e. that the applicant should have entered in India on or before December 31, 2014 and the other qualification states that the person must have resided in India or been in central government service for the last twelve months and at least eleven years of the preceding fourteen years.<sup>13</sup> CAA relaxes the number of years of residency from eleven years to five years for the specified class of illegal migrants.<sup>14</sup>

CAA also amended section 7D so as to empower the government to cancel the registration as Overseas Citizen of India Cardholder in case they violate any of the provisions of the law by following the principle of natural justice, which happens to be the integral part of the Rule of Law, i.e. '*Audi Alteram Partem*' (nobody should be condemned unheard).

CAA clarifies that the citizenship to the above class of illegal migrants will not apply to certain areas so as to protect the constitutional guarantee given to indigenous populations of the tribal areas of Assam, Meghalaya, Mizoram, and Tripura in the North Eastern States covered under the Sixth Schedule of the Constitution<sup>15</sup> and the statutory protection given to areas covered beneath "the Inner Line Permit" under the Bengal Eastern Frontier Regulation, 1873.<sup>16</sup>

It is worth mentioning that, earlier also, in 2015 and 2016,<sup>17</sup> the government has exempted

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14. CAA with the insertion of Section 6B and amendment in Section 7D and 18, also amended the Third Schedule of the 1955 Act to facilitate the naturalization. The Amendment of Third Schedule provided that:

15. "Provided that for the person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community in Afghanistan, Bangladesh or Pakistan, the aggregate period of residence or service of Government in India as required under this clause shall be read as "not less than five years" in place of "not less than eleven years".

These Sixth Schedule tribal areas include Karbi Anglong (in Assam), Garo Hills (in Meghalaya), Chakma District (in Mizoram), and Tripura Tribal Areas District.

16. The Inner Line Permit regulates visit of all persons, including Indian citizens, to Arunachal Pradesh, Mizoram, and Nagaland.

17. The Government exempted the said migrants from the adverse penal consequences of the Passport (Entry into India) Act, 1920 and the Foreigners Act, 1946 and rules or orders made thereunder vide notifications, dated Sep. 07, 2015 and July 18, 2016 respectively. Subsequently, the Central Government also made them eligible for long term visa to stay in India, vide, orders dated Jan. 08, 2016 and Sep. 14, 2016.

18. By introducing new exceptions for Hindus, Sikhs, Buddhists, Jains, Parsis or Christians from Afghanistan,

certain illegal migrants from being imprisoned or deported.<sup>18</sup> According to the JPC report based on the inputs of Intelligence Bureau (IB), after CAA, total 31,313 persons (25447 Hindus, 5807 Sikhs, 55 Christians, 2 Buddhists and 2 Parsis) were the immediate beneficiary. It is pertinent to mention here that CAA aims to bestows citizenship and has nothing to do with the citizens who already residing in India irrespective of their religion.<sup>19</sup>

#### **WHY AFGHANISTAN, BANGLADESH AND PAKISTAN ONLY?**

*“It is a historical fact that trans-border migration of population has been happening continuously between the territories of India and the areas presently comprised in Afghanistan Bangladesh and Pakistan.”<sup>20</sup>*

Amid early references in the *Vedas, Ramayana and Mahabharata*, Afghanistan (once known as *Gandhara*) was the part of India till its separation, on November 13, 1893; through an agreement between Sir Mortimer Durand, (a Secretary of the British Indian government), and Abdur Rahman Khan, (head of the state of Afghanistan) by marking “Durand Line”<sup>21</sup>. Further, on August 14, 1947 India was divided to create Pakistan (East and West) as an independent domain on religious lines. And, on March 26, 1971, East Pakistan became an independent nation as Bangladesh. After these partitions, some Hindus, Sikhs, Buddhists, Jains, Parsis and Christians remained in these countries as minority.

#### **CONSTITUTION OF AFGHANISTAN, BANGLADESH AND PAKISTAN: GERMANE INSIGHT**

*“The constitutions of Pakistan, Afghanistan and Bangladesh provide for a specific state religion. As a result, many persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have faced persecution on grounds of religion in those countries. Some of them also have fears about such persecution in their day-to-day life where right to practice, profess and propagate their religion has been obstructed and restricted.”<sup>22</sup>*

The Constitution of Afghanistan mentions that it is made “*In the name of Allah, the Most Beneficent and the Most Merciful*”. The Article One, Two and Three of the Constitution

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Bangladesh or Pakistan “who were compelled to seek shelter in India due to religious persecution or fear of religious persecution”.

19. Bharat, Manvata ke Paksh mai Nagrikata Kanoon, AMAR UJALA, Dec. 20, 2020.

20. The Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India), Statement of Objects and Reasons.

21. Mary Schons, The Durand Line, National Geographic (Jan. 21, 2011), <https://www.nationalgeographic.org/article/durand-line/>.

22. *Supra note 20*.

provides that Afghanistan is an Islamic Republic.<sup>23</sup>

The Constitution of Bangladesh, 1972 incorporated the provision for secularism, however, by virtue of the Fifth Amendment in 1979 the principle of secularism was substituted by the '*Faith in one Almighty Allah*' and incorporated *Bismillah-ar-Rahman-ar-Rahim (in the name of Allah, the Beneficent, the Merciful)*.<sup>24</sup> By the Eighth Amendment in 1988, Article 2A was added to declare Islam as the official religion of state.<sup>25</sup>

In Pakistan, the Islamic fundamentalism was exposed when the members of the Constituent Assembly of Pakistan resolved that "Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings of Islam as set out in the Quran and Sunnah" as a part of Objectives Resolution of the Constitution and the non-Muslim members had protested against the insertion of the terms "the teachings and requirements of Islam". Speaking against it Bhupendra Kumar Dutta, a Hindu member from East Bengal said:

*"Politics, comes within the sphere of reason while religion within that of faith. If religion and politics are intermingled then there is a risk of subjecting religion to criticism, which will rightly be presented as sacrilegious and it would also cripple reason and curb criticism as far as the state policies are concerned."*

The preamble of the Constitution of Pakistan along with Article 1 and 2 reflects the pure Islamic nature of the Constitution.<sup>26</sup> And as per Article 31 the State is duty bound to protect and nurture an Islamic way of life.

From the above mentioned germane insight, in the constitutional positions of these countries, it is evident that minorities have to follow a religious Constitution, undermining equal rights and protection to them and there by failing to secure their life and liberty. Consequently, persecuted

23. Article one reads: "Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state."; Article two reads: "The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals."; and Article Three reads: "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan." Afghanistan Const., [https://www.diplomatie.gouv.fr/IMG/pdf/The\\_Constitution\\_of\\_the\\_Islamic\\_Republic\\_of\\_Afghanistan.pdf](https://www.diplomatie.gouv.fr/IMG/pdf/The_Constitution_of_the_Islamic_Republic_of_Afghanistan.pdf).

24. "The High Court Division (HCD) of the Supreme Court of Bangladesh declared the removal of secularism from the Constitution illegal in 2005. The Appellate Division of the Supreme Court of Bangladesh upheld the decision of the HCD and the Constitution was amended in 2011 by the Parliament so that the provision for secularism was restored. The Constitution still lists the state religion as Islam and retains the declaration Bismillah-ar-Rahman-ar-Rahim, but these inclusions have been deeply controversial."

25. Bangladesh Const., <http://extwprlegs1.fao.org/docs/pdf/bgd117108E.pdf>.

"Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust; And whereas it is the will of the people of Pakistan to establish an order..."

26. Article 1 (1) read: "Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan, hereinafter referred to as Pakistan." And Article 2 read: "Islam shall be the State religion of Pakistan."

communities have faced the religious persecution in daily life.

### **STATISTICS AT GLARE**

The despicable human rights record in these countries became more prone to religious persecution due to Islamic statehood, as enshrined, in their respective Constitutions. In 1947 Hindu population in East Pakistan (now Bangladesh) was 30% of total population of East Pakistan but till 2011 it declined to 9.7%. Since 1947, more than 5.3 crore Hindu lost their existence. These Hindus were either killed or forced to convert or they left the country due of oppression.<sup>27</sup> As per the report of Union Ministry of Home Affairs (MHA), GoI 1988-89, 6,086,995 Hindus came to India after 1947. More than 15,000 Sikhs migrated to Delhi from Afghanistan in last 30 years. In Bangladesh 80%<sup>28</sup> and in Pakistan 70%<sup>29</sup> of rape victims are Hindu females. In 1947, there were near about 1,000 Hindu temples in Pakistan but presently today their number is not more than 20.<sup>30</sup> More than 135,000 acre properties of Hindus are under the control and possession of the Evacuee Trust Property Board in Pakistan. Since 2003 to 2013 two lacs Hindu families lost their 40,667 acre of properties in Bangladesh.<sup>31</sup>

### **RELIGIOUS PERSECUTION AND MINORITIES**

Religious freedom is a imperative which is endorsed as fundamental human right. Anticipating the problem of religious persecution, Mahatma Gandhi on July 07, 1947, promised to the citizens of undivided India:

*“Hindus and Sikhs living in Pakistan have a right to come here if they do not want to live there. Indian government is bound to provide them employment, citizenship and comfortable life.”<sup>32</sup>*

At the time of partition, in 1947, Jawaharlal Nehru promised to the religious minority in Pakistan that if they face atrocities, India would grant them citizenship and ensure a dignified life with equal protection of law. But these commitments of Nehru and Gandhi were not meant for the majority community as they had accepted Pakistan by choice and the chances of religious

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27. Soptik Mukharjee, *Ahat Hinduon ko Bandhi Aash*, Panchjanya, Jan. 2020 at 25.

28. Parshant Bajpay, *Hamare Hai, Hamare Rahainge*, Panchjanya, Dec. 2019 at 11.

29. Ashvini Uppdhaya, *Adhikar aur Lamba Intjar*, Panchjanya, Dec. 2019 at 9.

30. 100-year-old Temple demolished in Pakistan, angry Hindus ask govt to arrange tickets to India, INDIA TODAY, Dec. 3, 2012, <https://www.indiatoday.in/world/pakistan/story/100-year-old-temple-demolished-in-pakistan-angry-hindus-asks-govt-to-arrange-tickets-to-india-123121-2012-12-03>.

31. Parshant Bajpay, *supra* note 28.

32. Arif Mohammad Khan, *Citizenship Act Fulfills Gandhi, Nehru's Promise to Minorities of Pak*, Republic World.com, Dec. 23, 2019, <https://www.republicworld.com/india-news/general-news/kerala-governor-says-citizenship-act-is-not-discriminatory.html>.

persecution were very bleak.<sup>33</sup> Baffled by religious persecution, on September 02, 1947 Sardar Vallabhbhai Patel mentioned to Jawaharlal Nehru that:

*“From morning till night these days, my time is here fully occupied with the talks of woes and atrocities which reach me through Hindu and Sikh refugees from all over western Pakistan.”*<sup>34</sup>

Even the Congress Working Committee on November 25, 1947 through its resolution promised: *“To afford full protection for all those non-Muslims from Pakistan who have crossed the border and come over to India, or may do so, to save their life and honour.”*<sup>35</sup>

Astonished by the rampant incidents of religious persecutions, alongside the United Nations (UN) Charter, world leaders drew up a road map to guarantee the rights of individuals across the globe. Universal Declaration of Human Rights (UDHR) is born out of the international community’s resolution recognizing inherent dignity, equal and inalienable rights to all humans. *“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”*<sup>36</sup>

On January 26, 1950, Dr. Rajendra Prasad, speaking on the issue of migrants from Pakistan during oath ceremony as the President of India said:

*“We are ready to resettle those migrated people who are facing hardship and adverse situations in life there.”*<sup>37</sup>

In 1950, the fact of oppression of minorities in Pakistan and Bangladesh was also revealed by Jogender Nath Mandal.<sup>38</sup> On April 18, 1950, India and Pakistan through ‘Nehru-Liaquat Pact’ resolved for equal citizenship to the religious minorities for protection of their life, dignity, liberty, property, freedom of speech, worship and occupation. These rights were resolved as

33. Arif Mohammad Khan, Citizenship Act is not Discriminatory, Republic World.com, Dec. 23, 2019, <https://www.republicworld.com/india-news/general-news/kerala-governor-says-citizenship-act-is-not-discriminatory.html>.

34. Rajiv Tuli, India's neighbours have persecuted Minorities. It is time to give them Justice, THE HINDUSTAN TIMES, Dec. 10, 2019, <https://www.hindustantimes.com/analysis/india-s-neighbours-have-persecuted-minorities-it-is-time-to-give-them-justice/story-tleFnQI2mSVnUWz6YaxXqM.html>.

35. Subramanian Swamy, Speech in Rajya Sabha, Dec.11, 2019, [http://164.100.47.5/newsynopsis1/English sessionno/250/Suppl.%20Synopsis%20\\_E\\_%20dated%2011.12.pdf](http://164.100.47.5/newsynopsis1/English%20sessionno/250/Suppl.%20Synopsis%20_E_%20dated%2011.12.pdf).

36. G.A. Res. 217A (Dec. 10, 1948). Article 18(1), Universal Declaration of Human Rights, 1948. UDHR was drafted by representatives with different legal and cultural backgrounds from all regions of the world proclaimed by the United Nations General Assembly in Paris.

37. Rasaal Singh, Bhranti se Purvotter Mai Ashanti, Panchjanya, Jan. 2020, at 27.

38. Team My Nation, When Jogendra Nath Mandal, a Pak Hindu minister rushed to India alleging anti-Hindu bias, MYNATION.COM, Dec. 18, 2019, <https://www.mynation.com/india-news/when-jogendra-nath-mandal-a-pak-hindu-minister-rushed-to-india-alleging-anti-hindu-bias-q2pbal>.

fundamental for the protection of minority's interest in respect to holding public office or employment.<sup>39</sup>

Further, Article 27 of the International Covenant on Civil and Political Rights (ICCPR)<sup>40</sup> recognises the rights of religious minorities to 'profess and practise their own religion' and grants 'collective human rights to members of all religious groups'<sup>41</sup>. Also, the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief<sup>42</sup> is the 'most important international instrument regarding religious rights and prohibition of intolerance or discrimination based on religion or belief'<sup>43</sup>. All States are required to take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.<sup>44</sup> The rights and freedoms set forth in the present declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.<sup>45</sup> On the issue of religious persecution in Pakistan, Edward Kennedy, Senator, States of America's submitted a report to Senate Committee testifying to the violence against the Hindus:

*"Hardest hit have been members of the Hindu community who have been robbed of their lands and shops, systematically slaughtered, and in some place, painted with yellow patches marked "H". All of this has been officially sanctioned ordered and implemented under martial law from Islamabad."*<sup>46</sup>

On December 18, 2003, Manmohan Singh, the then leader of the Opposition in *Rajya Sabha* has raised the issue of religious persecution in Pakistan and demanded citizenship for them, stating:

"After the partition of our country, minorities in countries like Bangladesh have faced persecution, and it is our moral obligation that if circumstances force... unfortunate people to

39. An exponent of Muhammad Ali Jinnah, Jogender Nath Mandal supported the partition of India. He became Law and Labour Minister of Pakistan. He had keen belief that Jinnah's Pakistan would provide the equal status to non-Muslims specially Dalit (deprived and oppressed) communities. But soon he faced anti-Hindu biased in Pakistan and being oppressed by Pakistan's bias towards non-Muslims he left Pakistan in 1950 and came back to India. He highlighted various incidents of ill treatments and massive social injustice in Pakistan against non-Muslims. When a Minister of Pakistan (being non-Muslim) faced ill treatments then it can easily perceived that how ordinary citizens (non-Muslim) were subject to the atrocities in Pakistan.

40. G.A. Res. 2200A (XXI) (Dec. 16, 1966) w.e.f. 23, 1976.

41. The Protection of Minorities and Human Rights (Y. Dinstein and M. Tabory eds.).

42. G.A. Res. 36/55 (Nov. 25, 1981).

43. Religious Human Rights In Global Perspective, Legal Perspectives (J.D. van der Vyver and J. Witte Jr, eds., 1996).

44. UN DEAFIDBRB, art. 4, cl. 1.

45. UN DEAFIDBRB, art. 7, cl. 1.

46. Jnanendra Barman, Moral Obligation, Organiser, Dec. 2019, at 18.

seek refuge in our country, our approach to granting citizenship to them should be more liberal.”<sup>47</sup>

In 2012, Ashok Gehlot, the then Chief Minister of Rajasthan asked P. Chidambaram the then Union Home Minister for enabling citizenship to the people who migrated from Pakistan due to religious persecution.<sup>48</sup> In 2013, Farahnaz Ispahani (Former Parliamentarian of Pakistan) exposed the cleansing of minorities in Pakistan stating that religious intolerance against non-Muslims are increasing in Pakistan. She also emphasized on ‘Blasphemy Law’<sup>49</sup> which was used as a weapon against non-Muslims especially against Christians and near about 1274 people were prosecuted under this law since 1986 to 2010.<sup>50</sup>

In 2014, Dr. Ramesh Kumar Vankwani, the then member of National Assembly of Pakistan, said in the Assembly that more than 5,000 persons from minority communities are going to India because they are subject to forced conversion and oppression by the Muslims in Pakistan and the government failed to protect their freedom of worship and equality.<sup>51</sup> In 2018, according to a research conducted by University of Birmingham, in Sindh region of Pakistan, it was found that Sindh is the center point where the incidents of kidnaping, conversion and forced marriage of the girls belonging minorities took place as routine. It also mentioned that Muslim fundamentalist used to rape Hindu and Sikh women by taking them to Masjid.<sup>52</sup> The Schedule Tribes females of Koli, Bheel and Meghwal communities of Pakistan are more prone as they are less protected by the government.<sup>53</sup>

Dr. Rashid Askari, Professor of Kushtia Islamic University of Bangladesh on the issue of religious persecution observed that:

47. Manmohan Singh, Speech in Rajya Sabha on Dec. 18, 2003, <https://www.opindia.com/2019/12/citizenship-amendment-bill-manmohan-singh-2003-statement/>.

48. When Congress leader Ashok Gehlot demanded Citizenship for Hindu, Sikh refugees coming from Pakistan, TIMES NOW NEWS, Dec. 23, 2019, <https://www.timesnownews.com/india/article/when-congress-ashok-gehlot-demanded-citizenship-for-hindu-sikh-refugees-coming-from-pakistan/532104>.

49. Pak. Penal Code, section 295-B reads:  
Defiling, etc., of Holy Quran : Whoever wilfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life. section 295-B added by P.P.C. (Amendment) Ordinance, I of 1982.

section 295 C reads:

Use of derogatory remarks, etc., in respect of the Holy Prophet: Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

50. Farahnaz Ispahani, Cleansing Pakistan of Minorities, Hudson Institute, July 13, 2013, <https://www.hudson.org/research/9781-cleansing-pakistan-of-minorities>.

51. Irfan Haider, [5,000 Hindus migrating to India every year, NA told](https://www.dawn.com/news/1105830), The Dawn, May 13, 2014, <https://www.dawn.com/news/1105830>.

52. Ashvini Mishr, Sach Beparda, Panchjanya, Oct. 2019, at 10-11.

53. *Id.* at 13.

*“This steep decline has mostly resulted from overall effect of the persecution inflicted on the Hindus over the decades... the people who once constituted one-third of the total population, have been reduced almost to a vanishing breed always threatened with extinction.”*<sup>54</sup>

Even the Human Rights Commission of Pakistan (HRCP) admitted that the religious minorities are facing oppression as they were deprived of freedom of religion. According to HRCP, the religious oppression of minorities is motivated by religious leaders through inequality and violence. The religious minorities of Sindh and South Punjab are continuously facing forced abduction, conversions and marriages and they feel insecure and defenseless due to antagonism and mob-attacks over allegations of blasphemy. Since partition, Hindu communities in Pakistan have been targeted and forced to join Islamic studies; further, both Hindus and Christians have not enough grounds for even performing the last rituals. The members of minority communities are struggling for education, employment, place of worship and legislation against forced conversion.<sup>55</sup>

Interestingly, the operative part of CAA doesn't use the phrase, “religious persecution” anywhere as such; but the notion is being incorporated indirectly through the Passport (Entry into India) Act, 1920 and the Foreigners Act, 1946. Thus, CAA is an attempt to answer and end rampant incidents of religious persecution by granting religious freedom in Secular India besides citizenship to lead a dignified life.

#### **CITIZENSHIP: A FUNDAMENTAL RIGHT FOR FOREIGNERS?**

A foreigner (illegal migrant or who is not citizen) cannot enjoy the right guaranteed in the Constitution under Article 19(1)(e) to reside or settle in India as citizen. However, a foreigner can claim protection under Articles 20, 21, and 22. In *Anwar v. State of J&K*,<sup>56</sup> the SC held:

*“Foreigner not being a citizen, he was clearly not entitled to any fundamental right guaranteed by Article 19.”*<sup>57</sup>

In another case of *Louis De Raedt v. Union of India*,<sup>58</sup> while deciding the matter whether foreigner has right to claim right under Article 19(1)(e) as extension of Article 21, the SC held:

54. Jnanendra Barman, *Why Amendment of the Citizenship Act is necessary?* Organiser, Dec. 8, 2019, <https://www.organiser.org/Encyc/2019/12/8/Why-Amendment-of-the-Citizenship-Act-is-necessary.amp.html>.

55. *Horrific, religiously motivated attacks on Pak Hindus, Christians*, Outlook India, May 6, 2020, <https://www.outlookindia.com/newscroll/horrific-religiously-motivated-attacks-on-pak-hindus-christians/1825977>.

56. *Anwar v. State of Jammu and Kashmir*, AIR 1971 SC 337.

57. Gurbax Singh, *Laws of Foreigners Citizenship and Passports in India* 13 (2003).

“The Fundamental Rights of the foreigner is confined to Article 21 relating to life and liberty and does not extend to a foreigner the right to reside and settle in India as stated in Article 19(1)(e).”

The SC further, by referring the judgment of Hans Mullar of Nurenburg v. Superintendent, Presidency Jail, Calcutta<sup>59</sup> held:

*“The Executive Government has unrestricted right to expel a foreigner and that there cannot be any hard and fast rule so far as the right to be heard is concerned. The power of the Government of India to expel the foreigner is absolute and unlimited and there is no provision in the Constitution fettering this discretion.”*

The power to expel a foreigner was also reiterated in P. Mohamad Khan v. State of Andhra Pradesh<sup>60</sup> and Tudor Guansekar Jayavadene v. Government of India.<sup>61</sup> Further, in Devid Johan Hopkins v. Union of India,<sup>62</sup> SC held:

*“The Government has got unrestricted power to refuse citizenship without assigning any reason whatsoever and the appellant being a foreign national cannot claim equal rights under Article 14 with that of the Indian nationals. Section 14(1) of the Citizenship Act, 1955 is not ultra vires to Article 14 because the foreign nationals do not have any fundamental right guaranteed for the grant of citizenship of India.”*

A foreigner has no right to claim citizenship as a Fundamental Right and it is the sovereign legislative power of the Parliament to deal with the matter of citizenship.

### **Religious Minorities and Reasonable Classification**

CAA makes the classification, as permitted under Article 14, of persecuted communities who were victimized in these three countries. This classification is in tune with the Seven Judges Bench judgment of SC in State of West Bengal v. Anwar Ali Sarkar:<sup>63</sup>

*“The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, as the varying needs of different classes of person often require separate treatment. It would be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all in one go.”*

Accordingly, the classification on the basis of persecution of the religious minorities is quite rational. It is momentous to mention here that even, muslims community have been granted

58. Louis De Raedt v. Union of India, AIR 1991 SC 1986.

59. Hans Mullar of Nurenburg v. Superintendent, Presidency Jail, Calcutta, AIR 1955 SC 367.

60. P. Mohamada Khan v. State of Andhra Pradesh, 1978 2 Andh WR (HC) 408.

61. Tudor Guansekar Jayavadene v. Government of India, 1982 Mad LW (Cri.) 175.

62. Devid Johan Hopkins v. Union of India, AIR 1997 Mad 366.

63. State of West Bengal v. Anwar Ali Srakar, A.I.R. 1952 S.C. 75.

citizenship and long term visas, in India in yesteryears, as more than 560 muslims from these countries have applied under Standard Operation Procedure issued on December 29, 2011 by the MHA.<sup>64</sup>

### **THE CITIZENSHIP (AMENDMENT) ACT, 2019 AND ITS LEGITIMACY**

The legitimacy of CAA has been challenged in the SC under Article 131 alleging that it is blatantly opposed to the basic structure of the Constitution. Further, it was alleged that it is discriminatory to a particular religion as it segregates them and grants the benefit of naturalization, if they belong to a certain religion from three neighboring countries and is also based on unreasonable classification on the ground of religion and geography violating Article 14.<sup>65</sup> However, the SC did not stay the operation of CAA but issued notice to the Government.

In response to the notice, the government contended that CAA has nothing to deal with any existing legal, democratic and secular rights of the citizens and is enacted under sovereign legislative powers of Parliament. As the matter is sub-judice, the question of constitutional validity is yet to be adjudicated by the visionary judiciary.

### **IMPACT OF COVID ON THE CITIZENSHIP (AMENDMENT) ACT, 2019**

The MHA was to frame the Rules under CAA, for its application, implementation and subsequent operationalisation, within the stipulated period of six-months, i.e. July 10, 2020, as per the Manual on Parliamentary Work. As of now, as the SC has not struck down CAA, so the MHA can notify the Rules pertaining to designation of the authority, procedure for application, cut-off date and other bare requirements. But since the onset of COVID-19 pandemic has affected the work and the Rules are yet to see light. The MHA has sought three months extension, from the Committee on Subordinate Legislation, stating the reasons, to frame the Rules.

### **CONCLUSION**

*“Every nation has a message to deliver, a mission to fulfill, a destiny to reach. The mission of*

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64. Subimal Bhattacharjee, *Respecting to the Human Rights*, Organiser, Dec. 2019 at 13.

65. The three Judge Bench consisting of Chief Justice S.A. Bobde, Justice B.R. Gavai and Justice Surykant at the Supreme Court heard 60 petitions on December 18, 2019 and 144 petitions on January 22, 2020.

66. CAA “Legal, Can't Be Questioned Before Court”: Centre To Supreme Court, NDTV, March 17, 2020, <https://www.ndtv.com/india-news/citizenship-amendment-act-caa-perfectly-legal-constitutional-cant-be-questioned-before-the-court-gov-2196141>.  
<http://ignca.gov.in/vaishnavjanto/>

*India has been to guide humanity”.*

-Swami Vivekananda

India has lead the world in offering shelter to persecuted people like Tibetans, Sri Lankan Tamils, Jews, Parsis, relatives of Muhammadji, etc., since long times and CAA is only the continuation of that incredible compassion and commitment for humanity. Citizenship law is a matter pertaining to the constitutional power of Parliament and the Parliament has exercised its sovereign power to extend citizenship to the victims of the religious persecution in neighboring countries considering the protection of value of human life and its prosperity as duty of a nation. The very nature of Indian Republic being Socialist and Secular, empowers it to tie hope, happiness and humanity together.

CAA is in furtherance of the international commitments in general and ‘Nehru-Liaquat Pact’ in specific. It is a timely step on the right path, as it is conferring citizenship to the individuals who normally have a place in India to curb religious persecution and is very well part of the social fabric and cultural heritage of India.

CAA is upholding the promise for justice and pledge for humanity. To sum up, India has always considered humanity first, as a follower of the payer cited below:<sup>67</sup>

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67. One who is a Vaishnav (Devotee of Vishnu), knows the pain of others, does good to others Without letting pride enter his mind. [https://allpoetry.com/Vaishnava-janatho-\(With-English-Translation\)](https://allpoetry.com/Vaishnava-janatho-(With-English-Translation)).

## NATCO v. BAYER: A RIGHT TO HEALTH PERSPECTIVE

Dify Doyil\* & Dr. Mamta Sharma\*\*

### COMPULSORY LICENSE

Compulsory Licensing means granting of the right to make, use, sell or export any product under patent, by an authority to any individual or company without that patent owner's consent.<sup>1</sup> Chapter XVI of the Indian Patents Act, 1970, specifically deals with compulsory licensing of patented products. Section 84 and section 92 of the said act deal with the conditions to be fulfilled in order to obtain a compulsory license on a patented product. In order to grant a compulsory license on a patent, the controller of patents will ensure that the following condition have been fulfilled :-<sup>2</sup>

- i) that the reasonable requirement of the public with respect to the patented invention have not been satisfied<sup>3</sup>, or
- ii) that the patented invention is not available to the public at a reasonably affordable price<sup>4</sup>, or
- iii) that the patented invention is not worked within the territory of India.<sup>5</sup>

### WHY IS COMPULSORY LICENSING OF PATENTED PHARMACEUTICAL MEDICINES SO IMPORTANT?

The Indian Patents Act, 1970 was an excellent brain child of the Ayyengar Commission Report.<sup>6</sup> This act recognized only "process patent" for food, medicines and drugs and that too for a limited period of 7 years.<sup>7</sup> This allowed the Indian Pharmaceutical companies to engage in reverse engineering and reproduce the highly expensive patented medicines at less than half the cost. For instance, in the year 1998, in Philippines, the cost of 150 mg of anti AIDS drug was \$

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1. WTO, Glossary, (Jul.1,2020,4:53 PM),  
[https://www.wto.org/english/thewto\\_e/glossary\\_e/compulsory\\_licensing\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/compulsory_licensing_e.htm).

2. Section 84(1), The Patents Act, 1970

3. *Id.* At 4

4. *Id.* At 5

5. *Id.* At 6

6. Linda L. Lee, TRIPS and TRIPSulations : Indian Patent Law and Novartis AG v. Union of India, Berkeley TechL.J.281, 290, (2008)

7. Section 5(1), The Patents Act, 1970

817, \$ 703 in Indonesia and \$ 697 in Malaysia, whereas the same drug costed only \$55 in India.<sup>8</sup> *Ciproflaxin* (500 mg), an anti-infective, produced by an MNC costs Rs.979.80 in UK, Rs. 506.58 in Pakistan, and Rs.1548 in USA, while the same drug costs only Rs. 39.60 in India.<sup>9</sup> 10 mg of *Vinblastine*, an anti-cancer drug costs Rs. 976.35 in U.K., Rs.1743.22 in U.S., Rs. 400 in Pakistan, whereas, the Indian version of the same drug costs only Rs. 195.<sup>10</sup> This led to the glorious growth of the Indian Pharmaceutical Industry.<sup>11</sup> India attracted pharmaceutical companies like Torrent, Dabur, Wockhardt, Lupin, Cadila and Cipla to establish large production facilities.<sup>12</sup> These Companies started thriving and flourishing in India.<sup>13</sup> The Indian Pharmaceutical Industry witnessed a record growth from 15% to 18%.<sup>14</sup> The annual turnover of the Indian pharmaceutical industry was \$3.5 billion, which conveniently enabled it to meet the domestic demands.<sup>15</sup> However, this glorious period came to an end when India signed the Marrakesh Agreement.<sup>16</sup> India was now obligated to amend its Patent Act in accordance with the TRIPS agreement.<sup>17</sup> This means that India was now required to provide Product Patent for medicines as well. This was a huge setback for the Indian Pharmaceutical industry, as India could no longer engage in reverse-engineering and reproduce the expensive patented medicines and lesser costs. As far as the poor countries are concerned, India was their lifeline for medicines.<sup>18</sup> In the U.S., the cost of AIDS Triple therapy for a year was \$ 10,000.<sup>19</sup> However, India through reverse engineering, could provide the same treatment for as low as \$ 200 per

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8. U.N. Development Report 2000, UNDP, Oxford University Press, New Delhi, at p. 84.

9. G.B. Reddy, Impact of TRIPS Agreement On Patent Regime in India With Special Reference to Health Care-Strategies For The New Millenium, ACE, 11, 17, 2003

10. B.L. Wadehra, Law Relating to Patents, Trade Marks, Copyright, Designs & Geographical Indications, 133, (2nd Edn., Universal Law Publishing Co. Pvt. Ltd., 2000)

11. Biswajit Dhar, C. Niranjana Rao, Dunkel Draft on TRIPS Complete Denial of Developing Countries' interests, EPW, 275, 276, (1992).

12. Chautvedi K. and Chataway J, Strategic Integration of Knowledge in Indian Pharmaceutical Firms: Creating Competencies for innovation, IJBIR, 27, 34, (2006).

13. *Id.* At 14

14. Gopakumar G. Nair, Impact of TRIPS on Indian Pharmaceutical Industry, J Intellec Prop Rights, 432, 433, (2008).

15. Pradeep Agrawal and P. Saibaba, "TRIPS and India's Pharmaceutical Industry", EPW, 3787, 3788, 2001

16. A.D. Damodaran, Indian Patent Law in the post-TRIPS Decade : S&T Policy Appraisal, J Intellec Prop Rights, 413, 416, (2008).

17. *Id.* At 18

18. Brenda Waning, A Lifeline to treatment : The role of Indian generic manufacturers in supplying Antiretroviral medicines to developing countries, Journal of the International AIDS Society, (Jul.13,2017, 2:17 PM) <https://link.springer.com/article/10.1186/1758-2652-13-35>.

19. Medecins Sans Frontieres, Untangling the web of Antiretroviral Price Reductions, (Jul.13,2017, 2:23 PM), [http://www.doctorswithoutborders.org/sites/usa/files/MSF\\_Access\\_UTW\\_16th\\_Edition\\_2013.pdf](http://www.doctorswithoutborders.org/sites/usa/files/MSF_Access_UTW_16th_Edition_2013.pdf).

year.<sup>20</sup> This was possible only because the Indian Patent system provided for only process patent for drugs.

The inclusion of IPR in GATT was vehemently opposed by India and Brazil.<sup>21</sup> However, India had to give in to the proposal due to the immense pressure from the U.S. India feared restriction on its exports if it did not align its patent act in accordance with the international standards.<sup>22</sup> U.S.A. had threatened to use the special 301 Law against India, if it did not introduce Product Patent regime for medicines.<sup>23</sup> The inclusion of IPR in TRIPS severely affected the access to affordable medicines in the Least developed countries and the developing countries. The intention behind inclusion of IPR's in TRIPS was to promote development process through greater transfer of technologies and enhanced flow of FDI.<sup>24</sup> However, with the acceptance of TRIPS the development divide between the developed countries and the developing countries started growing. This becomes evident from article 67 of the TRIPS agreement which requires the developed countries to provide technical and financial assistance.<sup>25</sup> The glitch in this article is that there is no obligation on the developed countries to assist the LDC's or the developing countries.<sup>26</sup> The TRIPS agreement failed to understand that as far as public health is concerned, a uniform level of IPR protection could not be applied to all the countries, as the degree of development of all the countries especially the developing countries and the LDC's were not the same.<sup>27</sup> The UN Sub commission on Human Rights realized that the implementation of the TRIPS Agreement could adversely affect human rights and therefore adopted the Resolution 2000/7 on 'Intellectual Property Rights and Human Rights'<sup>28</sup>. This realization dawned upon the UN Sub- commission when it saw that not even 5 percent of the people in the developing

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20. Randeep Ramesh, Cheap AIDS Drugs Under Threat, The Guardian, (Jul.13,2017 2:29 PM), <https://www.theguardian.com/world/2005/mar/23/india.aids1>.

21. Anitha Ramanna, India's Patent Policy and Negotiations in TRIPS: Future Options for India and other Developing countries, (Jul.23,2017, 4:54 PM), [https://www.iprsonline.org/ictsd/docs/ResourcesTRIPSanita\\_ramanna.doc](https://www.iprsonline.org/ictsd/docs/ResourcesTRIPSanita_ramanna.doc).

22. Janice M. Mueller, "In depth Analysis of Indian Patents Law", (Jul. 7,2017, 9:38 AM), <http://www.nalsarpro.org/CL/Articles/InDepthAnalysisofIndianPatentLaw.pdf>.

23. *Supra note 21*

24. Correa C., Review of the TRIPS Agreement: Fostering transfer of Technology to developing countries, TWN Trade and Development Series, (Jul.4,2020, 4:44PM), <https://www.twn.my/title2/t&d/tnd13.pdf>.

25. Article 67, The TRIPS Agreement, WTO Analytical Index, (Jul.4,2020 4:53 PM) [https://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/trips_e.htm).

26. Vaish & Haji, Is there a need to substantially modify the TRIPS Agreement?, J Intellec Prop Rights, 197, 203, (2012)

27. Report of the UK Commission on Intellectual Property Rights, Commission on Intellectual Property Rights, (Jul.4,2020 5:09 PM), [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm).

28. Written submission by the World Health Organization before the UN Sub-Commission for the promotion and protection of Human Rights, Intellectual Property and Human Rights, (Jul.4,2020 5:18 PM), <https://www.who.int/hhr/information/Written%20submission%20to%20SCHR%20031.pdf>.

countries could have access to the anti-retroviral treatment.<sup>29</sup> As far as LDC's were concerned only 1 percent of the people could have access to the said treatment.<sup>30</sup>

There was a growing concern regarding the ability of the developing countries to be able to access the highly expensive patented medicines, which was in turn increasing the tension between the developing nations and the developed nations.<sup>31</sup> In order to pacify the same, the Doha Ministerial conference, in its 4th conference, adopted the Doha Declaration on the TRIPS Agreement and Public Health.<sup>32</sup> The main aim of the Declaration was to ensure that flexibilities mentioned in the TRIPS agreement could be employed to ensure the developing nations have access to the highly expensive patented drugs at a cheaper cost.<sup>33</sup> The main flexibility that this declaration focused on was that of compulsory licensing mentioned under article 31 of the TRIPS Agreement.<sup>34</sup> In the Post-TRIPS era, *Natco v. Bayer* is the first case ever in India, where a compulsory license was issued to an Indian Pharma company to reproduce a generic version of a patented drug.

#### **HIGHLIGHTS OF THE CASE**

Bayer is a German Multinational Pharmaceutical Company. This company produced a drug called "Sorafenib Tosylate" which is used to treat kidney and liver Cancer. In 2008, Bayer obtained a patent on "Sorafenib Tosylate" in India and later started marketing the same drug worldwide under the trade name "Nexavar."<sup>35</sup> The cost of this drug for a month's course was Rs. 280,428.<sup>36</sup> Natco is an Indian Pharmaceutical Company. This company gave a proposal to reproduce a generic of "NEXAVAR" at a price of Rs. 8800 for a month's course.<sup>37</sup> This was a staggering difference. India is a country where still 70% of the population lives in rural areas.<sup>38</sup> An average Indian consumer will not be able to afford such an exorbitantly priced

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29. Thompson D, WHO coordinates 2002, Charting progress against AIDS, TB and Malaria, (World Health Organization, Geneva),2002, p.1

30. *id.* At 31

31. *Supra note 26*

32. M.D. Nair, TRIPS and Access to affordable drugs, Journal of Intellectual Property Rights, (Jul.4,2020 9:13 PM), <http://nopr.niscair.res.in/bitstream/123456789/14458/1/JIPR%2017%284%29%20305-314.pdf>.

33. WTO, Declaration on the TRIPS Agreement and Public Health, (Jul.4,2020 9:20PM), [https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm).

34. *id.* At 35

35. *Natco v. Bayer*, Compulsory License Application No. 1 of 2011, (Jul.6,2020 5:41 PM), <http://www.gnaipr.com/CaseLaws/Controller%20Order%20-%2012032012.pdf>.

36. *id.* At 37

37. *id.* At 38

38. Anonymous, About 70 per cent Indians live in rural areas : Census Report, The Hindu, (Jul.7,2020, 2:10 PM), <https://www.thehindu.com/news/national/About-70-per-cent-Indians-live-in-rural-areas-Census-report/article13744351.ece#>.

drug. Therefore in order to make the drug more affordable and accessible to the poor and down trodden sections of the Indian society, Natco approached Bayer for a Voluntary license to reproduce a generic version of “Nexavar”<sup>39</sup>. Bayer did not grant the same. In April 2011, Natco, however managed to obtain a license from the Drug Controller General of India to reproduce the generic of the drug and market the same in India.<sup>40</sup> Bayer filed a patent infringement suit against Natco, on 5th June 2011.<sup>41</sup> Natco however, instead of responding to the suit for infringement, applied to the Controller of patents for a Compulsory license under section 84(1) of the Indian Patents Act 1970, which allows any interested person to make an application to obtain a license to reproduce a patented product after the expiry of three years from the grant of patent, on any of the following grounds:-

- i) that the reasonable requirement of the public with respect to the patented invention have not been satisfied,<sup>42</sup> or
- ii) that the patented invention is not available to the public at a reasonably affordable price,<sup>43</sup> or
- iii) that the patented invention is not worked within the territory of India<sup>44</sup>

Natco claimed that Bayer had not met the reasonable requirements of the public, nor was the drug available at a reasonable price and that the drug had not worked within the territory of India.<sup>45</sup> The Controller of Patents admitted the application of Natco for compulsory license to reproduce “NEXAVAR”. Hurt by the decision of the Controller of Patents, Bayer filed an appeal at the IPAB. The appeal was dismissed by the IPAB on the grounds of right to health upheld by the article 21 of the Constitution of India.<sup>46</sup> IPAB granted 7% royalty on sales to Bayer.<sup>47</sup>

## INTERPRETATION OF THE CASE

### **Issue a) : Bayer did not meet the reasonable requirements of the public with respect to the patented drug**

39. Gautama, Savita, Meghna Dasgupta, Compulsory Licensing : India’s Maiden Experience, ARTnet Working Paper series no.137,(Jul.7,2020, 2:25 PM), <https://www.unescap.org/sites/default/files/AWP%20No.%20137.pdf>.

40. *Supra note 37*

41. *id.* At 42

42. Section 84(1), The Patents Act, 1970

43. *id.* At 44

44. *id.* At 45

45. Rachna Bakhru, India grants first Compulsory License under Patents Act, Intellectual Property Magazine, (Jul.6,2020 3:44 PM), [https://www.rouse.com/media/126620/india\\_grants\\_first\\_compulsory\\_license.pdf](https://www.rouse.com/media/126620/india_grants_first_compulsory_license.pdf).

46. Mansi Sood, “Natco Pharma Ltd. v. Bayer Corporation and the Compulsory Licensing Regime in India”, NUJS Law Review,99, 105, (2013).

47. Vindhya S. Mani, Compulsory License : High Court upholds IPAB Order, Lakshmi Kumaran & Sridharan Attorneys, (Jul.7,2020, 4:53 PM), <https://www.lakshmisri.com/insights/articles/compulsory-license-high-court-upholds-ipab-order/#>.

As per Bayer, the number people afflicted with Cancer in India was 8,900.<sup>48</sup> However, as per the research data of GLOBOCAN, the number of people affected with Cancer in India was much higher than the estimation of Bayer. India had about 20,000 kidney Cancer patients and 8900 liver cancer patients.<sup>49</sup> Form 27 filed by Bayer clearly denotes that between the year 2008-2010, only 200 bottles of the patented drug were imported into India.<sup>50</sup> Therefore the controller of patents held that Bayer failed to meet the requirements of the Indian public. In response, Bayer contended that the drug was meant to be administered only to those patients who are at stage IV Cancer.<sup>51</sup> Bayer claimed that it's estimation of number of patients requiring the drug was correct. However, the controller held that even if one was to assume that the total number of patients actually requiring the drug was 8,900, still the supply made by Bayer into India was grossly inadequate. In the year 2011, only 593 bottles of the drug were imported into India.<sup>52</sup> This insignificant amount of import would have catered to only 2% of the number of patients estimated by Bayer.<sup>53</sup> Hence, the controller held that Bayer has failed to meet the requirements of the public. On an appeal to the IPAB, it upheld the Controller's decision and further opined that exorbitant cost of the patented drug itself was sufficient to hold that an average Indian consumer would not be able to afford or able to have access to the drug. The price of the patented drug is Rs. 280,428 for month's treatment, whereas, the generic version of the same drug produced by Natco costed only Rs. 8800 per month. The difference is almost 31 times or 3100%! Hence, the Controller of patents and the IPAB gave utmost importance to public interest. A comparison of the demand with the working statement (form 27) filed by Bayer, clearly shows that the public demand was not being met by Bayer :-<sup>54</sup>

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48. *Supra note 39*

49. WHO, A publication by GLOBOCAN project of the World Health Organization, (Jul.7, 2020, 5:00PM), <http://globocan.iarc.fr/>.

50. Aditi Jha, Milind Antani, & Gowree Gokhale, Strategy, Pharma Asia Issue, (Jul.7, 2020, 2:15 PM), [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/First\\_Compulsory\\_License\\_Likely\\_to\\_impact\\_the\\_pharmaceutical\\_industry\\_in\\_India.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/First_Compulsory_License_Likely_to_impact_the_pharmaceutical_industry_in_India.pdf).

51. *Supra note 37*

52. *Supra note 50*

53. N.S. Gopalakrishnan & M. Anand, Compulsory License Under Indian Patent Law, 22 (1st edition, Reto M. Hilty, Kung-Chung Liu, 2015)

54. *Supra note 51*

	Total Patients	Demand for 80% of Patients	Bottles Per Month Required	Bottles Imported In 2008	Bottles Imported In 2009	Bottles Imported In 2009
Liver Cancer	20,000	16000	16000	Nil	200	Unknown
Kidney Cancer	8,900	7120	7120	Nil		Unknown

**Issue b) The patented drug was not made available to the public at a reasonably affordable price**

There are a number of methods to ascertain the affordability of a drug. First approach can be taking into consideration the number of days the lowest paid government worker will have to work in order to be able to purchase the patented drug from the public sector.<sup>55</sup> “Nexavar” is priced at Rs. 2,80,428. In order to be able to afford purchasing this drug, the lowest paid government worker in India, will have to work for at least three and a half years.<sup>56</sup> Clearly, the patented drug is not available at a reasonable price.

Another method of determining whether a patented drug is affordable or not is by ascertaining whether the purchase of the same would push a person below the poverty line.<sup>57</sup> It is important to take into consideration the effect of “impoverishment” in order to determine whether a drug is affordable or not.<sup>58</sup> As per the planning commission of India, taking into consideration the household expenditures, the poverty line in rural areas was fixed at Rs.4080 and in urban areas it was Rs.5000.<sup>59</sup> With such a low poverty line, if an individual were to purchase a drug costing Rs.2,80,428 per month, he would undoubtedly be pushed below the poverty line.

55. Shanti Mendis et al, The availability and affordability of selected essential medicines for chronic diseases in six low and middle- income countries, Bulletin of the World Health Organization, (Jul.8, 2020, 5:55 PM), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636320/>.

56. *id.* At 57

57. Laurens M. Niens et al, “Quantifying the impoverishing effects of purchasing medicines : A Cross Country Comparison of the Affordability of Medicines in the Developing World”, Bulletin of the World Health Organization, (Jul.8, 2020, 6:12 PM), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2930876/>.

58. L.M.Niens et al, “Practical measurement of affordability : an application to medicines”, Bulletin of the World Health Organization, (Jul. 8, 2020, 6:22 PM), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3314216/>.

59. IndivjalDhasmana, In 2011 only 21.9% Indian were below poverty line, Business Standard, (Jul.8, 2020, 6:35 PM), [https://www.business-standard.com/article/economy-policy/in-2011-12-only-21-9-of-indians-were-below-poverty-line-113072300629\\_1.html](https://www.business-standard.com/article/economy-policy/in-2011-12-only-21-9-of-indians-were-below-poverty-line-113072300629_1.html).

The patented drug costed Rs.2,80,428, whereas the generic version costed only Rs.8800. It is quite evident from the price difference itself that an average Indian consumer would never be able to afford such an exorbitantly priced drug, unless the same is produced at a cheaper cost under compulsory licensing. Bayer contended that the concept of “affordability” should be looked at from not only the public point of view but also the patent holder’s point of view.<sup>60</sup> Bayer claimed that a lot of time and R&D goes into developing a drug.<sup>61</sup> Therefore the drug is priced in a way that the cost of R&D may be recovered. The controller however held that “affordability” of a patented article should predominantly be looked at from the public point of view.<sup>62</sup> The drug was so expensive that an average Indian consumer could not access the same.

### **Issue c) The patented drug has not been worked within the territory of India**

Bayer failed to pass the test of “working” the drug within the territory of India as per section 84(1) of the Indian Patents Act.<sup>63</sup> Bayer contended that the term “working” need not necessarily mean manufacturing within the territory of India<sup>64</sup>. It contended that in certain circumstances, where it is not feasible to locally manufacture a drug, the term “working” could be interpreted as “importing”<sup>65</sup>. However, the IPAB flatly rejected the interpretation of Bayer and held that “working” could not be interpreted as “importing”<sup>66</sup>. It further held that whether “working” means “locally manufacturing” or “importing”, could only be decided from case to case.<sup>67</sup> Since Bayer failed to prove why it did not locally manufacture the drug within the territory of India, the IPAB, granted Natco the compulsory license to reproduce “NEXAVAR”.<sup>68</sup>

### **CONCLUDING REMARKS**

This case most importantly demonstrates that it not prudent on the part of a patentee to out rightly reject an application for voluntary license for a drug.<sup>69</sup> When a patentee is approached for

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60. *Supra note 51*

61. *Id.* at 62

62. *Id.* at 63

63. Anu Singhai & Manu Singhai, A Study of Natco v. Bayer Case : Its Effect and Current Situation, MIT International journal of Pharmaceutical Sciences, 21, 22, (2016).

64. Madhvi Mira Chopra, Of the Big Daddy, the Underdog, the Motherhen and the Scapegoats : Balancing Pharmaceutical Innovation and Access to Healthcare in the enforcement of Compulsory Licensing in India, its Compliance with TRIPS and Bayer v. Natco, Santa Clara Int'l L., 333, 365, (2015).

65. *Id.* at 66

66. Ankita Mathew et al, Bombay High Court upholds India’s First Compulsory License, Nishith Desai Associates, (Jul.9, 2020, 4:09 PM), <https://www.mondaq.com/india/patent/337360/bombay-hc-upholds-indias-first-compulsory-license>.

67. Jodie Liu, “Compulsory Licensing and Anti-Evergreening: Interpreting the TRIPS Flexibilities in Sections 84 and 3(d) of the Indian Patents Act, Harvard International Law Journal, 207, 217, (2015).

68. *Id.* at 69

69. *Supra note 66*

a voluntary license, he must first enquire whether the applicant has the ability to locally manufacture the drug.<sup>70</sup> If the applicant is capable of the same, then the patentee can go ahead and negotiate on the terms and conditions of the application.<sup>71</sup> If the terms and conditions are not reasonable as per the patentee, then he may refuse to grant the voluntary license.<sup>72</sup>

The controller of patents, with this decision, has granted the utmost importance to the right to health as enshrined under article 21 of the Constitution of India.<sup>73</sup> However, this decision has led to a global outcry on the part of the multinational pharmaceutical companies.<sup>74</sup> Post the grant of Compulsory License on “Nexavar”, India had to face several attacks from the U.S. This decision as not well received by them. India was ranked lowest by Global Intellectual Property Centre (GIPC) of the U.S. Chamber of Commerce, in its new IP index.<sup>75</sup> This index ranks 11 countries, based on their IP strengths and weaknesses. U.S. was ranked the highest and India was ranked the lowest.<sup>76</sup> The GIPC has stressed that India should grant compulsory licenses only in extreme emergency cases.<sup>77</sup> Another attack on India, was placing of India in the “Priority Watch list” by the United States Trade Representative (USTR), in its Special 301 Report.<sup>78</sup> The report clearly states that India’s compulsory Licensing “developments” will be closely monitored by the United States.<sup>79</sup> This is a pressure tactic on the part of U.S. on India in order to inhibit India from issuing any compulsory licenses on drugs in the future. This is highly unethical as India has acted within its rights under the International Trade rules and is ensuring access of drugs to millions of patients.<sup>80</sup>

Natco v. Bayer was the first and the last case of compulsory licensing on patented drugs in India. There has been no issue of compulsory license in India since then. There is a large body of theoretical and empirical literature which clearly shows that while determining the IPR regime of a country in question, one must take into consideration its capability level and technological

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70. *Id.* at 71

71. *Id.* at 72

72. *Id.* at 73

73. *Supra* note 46

74. Medecins Sans Frontieres, A Timeline of U.S. Attacks on India’s Patent Law & Generic Competition, (Jul.12, 2020, 10:43 AM), [www.msfaccess.org](http://www.msfaccess.org).

75. *Id.* at 76

76. *Id.* at 77

77. *Id.* at 78

78. 2013 Special 301 Report, Office of the United States Trade Representative, (Jul.12, 2020, 10:53 AM), <https://ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf>.

79. *Id.* at 80

80. *Supra* note 77

learning.<sup>81</sup> There is sufficient evidence to prove that the developed nations took sufficient time and flexibilities during their development process to adopt an IPR regime.<sup>82</sup> However, when India, being a developing country, did the same by producing cheaper drugs through reverse-engineering, it was denied this opportunity. Even though, Compulsory licensing has been provided by TRIPS as a flexibility for developing nations to ensure access to drugs, the use of the same requires a strong political will and a thriving generic industry.<sup>83</sup> The multinational Pharmaceutical companies always state that the reason for the high prices of the patented drugs is the research and development carried out for the development of that drug. This however is not completely true. There are many other costs that are added up to the price of a drug. These costs<sup>84</sup> include marketing and administration costs<sup>85</sup> and political lobbying costs. Pharmaceutical industry repeatedly claims that its development of a drug involves a high risk. However, despite the risk involved, what is surprising is the profit margin of the pharmaceutical industry. In the year 2016, the profit margin of the pharmaceutical industry was 21.6%.<sup>86</sup> The pharmaceutical industry was declared the most profitable sector of the year 2016.<sup>87</sup> Apart from this, tax provisions such as Orphan Drug tax credit, Research and Experimentation credit, Foreign tax credit and Possessions tax credit enable the pharmaceutical industry to make significant savings.<sup>88</sup> From the year 1993-1996, the tax rate of the pharmaceutical industry averaged at 16%, whereas for all the other industries it was 27%<sup>89</sup>. All of this clearly shows that the high prices charged by the multinational pharmaceutical companies for their patented drugs, is not justified. In order to strike a balance between right to health and rights of patentees, the pharmaceutical companies should consider lowering their prices and should acknowledge voluntary licenses for royalty. This will ensure that there is no profiteering at the cost of the lives of the poor and the suffering in the developing nations.

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81. Ramakrishna B. & Anil Kumar H.S., *Fundamentals of Intellectual Property Rights: For Students, Industrialists and Patent Lawyers*, (2017)

82. *Id.* at 83

83. Frederick M. Abott, *WTO TRIPS Agreement and its Implications for Access to Medicines in Developing Countries*, Study Paper 2a for Commission on Intellectual Property Rights, p.14

84. Families USA, *Off The Charts: Pay Profits and Spending by drug companies, Act Up*, (Jun.29, 2017 7:36 PM), <http://www.cptech.org/ip/health/econ/fu07102001.pdf>.

85. Nadia Kounang, *Big Pharma's big donations to 2016 presidential candidates*, CNN Health, (Jun.30, 2020, 9:02), <http://edition.cnn.com/2016/02/11/health/big-pharma-presidential-politics/index.html>.

86. Liyan Chen, *The Most Profitable Industries in 2016*, Forbes, (Jun.30, 2017, 10:57 AM), <https://www.forbes.com/sites/liyanchen/2015/12/21/the-most-profitable-industries-in-2016/#523f1055716f>.

87. *Id.* at 88

88. Congressional research service memorandum, "Federal Taxation of the Drug Industry", December 1999

89. *Id.* at 90

## LEGAL FRAMEWORK FOR THE MANAGEMENT OF EPIDEMICS AND HEALTH EMERGENCIES IN INDIA: WITH SPECIAL REFERENCE TO COVID-19

Dr. Gurpreet Pannu\*

### INTRODUCTION

Infectious disease epidemics occurring more often and spreading faster than ever, in different areas of the world. The fundamental causes of this threat are, inter alia, biological, environmental and behavioral changes. A potentially lethal combination of newly discovered diseases and the re-emergence of many long-established diseases, demand urgent responses in every region. Managing epidemics is designed to provide expert input on such responses. Fortunately, prevention systems for certain recognized infectious diseases, such as cholera, HIV infection, influenza, meningitis, malaria, tuberculosis and yellow fever, are now well developed and widely implemented. However, even though medical countermeasures are available, these diseases pose a threat to many communities around the world, either because of their rapidly changing existence (e.g. influenza) or because it is difficult to achieve equal access to successful public health measures. In addition, the failure of the current health care system in many affected countries prevents successful access to medical intervention (diagnostics and treatment).<sup>1</sup>

Coronavirus is extremely infectious, which is why incoming travelers from corona hit countries and people who came into contact with Corona infected persons are being held under surveillance to determine their medical condition. Although, we have had many cases of people at airports refusing health screening, escaping quarantine, denying their travel records and not observing the guidelines recommended by the authorities concerned for self-isolation. It is tragic because these people's reckless behavior has threatened the health of their families, friends, and fellow countrymen.<sup>2</sup> Globally, as on June 28, 2020, there have been 98,25,539 confirmed cases of COVID-19, including 4,95,388 deaths, reported to World Health Organization.<sup>3</sup> In India, as on June 28, 2020, there have been 5,28,859 confirmed cases of COVID-19 with 16,095 deaths.<sup>4</sup>

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1. Managing epidemics: Key Facts About Major Deadly Diseases, (June 26, 2020 11:30 AM), <https://www.who.int/emergencies/diseases/managing-epidemics-interactive.pdf>.
2. Vageshwari Deswal, Covid-19: Laws related to quarantine in India, The Times of India, March 26, 2020.
3. WHO Coronavirus Disease (COVID-19) Dashboard, (June 29, 2020 12:15 PM), <https://covid19.who.int/>.
4. Data Provided by World Health Organization, (June 28, 2020, 10: 45 AM), <https://covid19.who.int/region/searo/country/in>.

**STRENGTHENING HEALTH SYSTEMS: ESSENTIAL IN EPIDEMICS**

Stronger health systems are required to reduce the effects of epidemics, protect health care workers and ensure quality of health services during and after them. Epidemics and pandemics put big strain and stress on these processes. The rapid inflow of large numbers of sick people into health care facilities strains the capability and resources of the systems, even more so and more significantly where services are already limited. Once an outbreak occurs and progresses it immediately draws the attention of most health responders and monopolizes the human and financial resources of the health system, as well as medical supplies and technologies. Personnel, resources, and medical equipment all move to the emergency response. That also results in the lack of important basic and routine health services. Individuals with health conditions not linked to the epidemic find access to health care facilities more difficult. As a consequence, others can die, if the interruption overwhelms the health care system. Rates of mortality from other diseases for which people could not receive care may increase. Additionally, health care settings, and especially emergency rooms, can become transmission hubs. There, a lot of people get infected if prevention and control measures are not implemented properly. That applies especially to unknown and emerging pathogens. A delay in the identification of the disease may result in delay in the implementation of the proper preventive measures. The disease will be spread by untreated patients and health care staff, family members and other patients do not know how to protect themselves. Since healthcare environments and emergency rooms are typically busy, the lack of adequate prevention and control of infections can be very severe, for example by triage, isolation and other precautions.<sup>5</sup>

**EPIDEMIC MANAGEMENT**

Epidemic management has been defined as the method to predict, avoid, plan, identify, react and monitor epidemics to reduce health and economic impacts. It's an all-encompassing word that explains all that needs to be done before, during and after epidemics. This requires anticipating or preventing an epidemic so as to prevent it from happening. If the outbreak could not be avoided entirely, however, it requires preparedness so that there is readiness to respond. In order to restrict its spread, early detection through a sensitive surveillance system is needed to know when and where the outbreak occurs. Most significantly, to explain the outbreak and identify approaches, a coordinated and swift investigation is required. After which an effective response

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5. *Supra note 1.*

is required for the implementation of appropriate control measures. Preparation is a branch of epidemic management, from the preceding. Epidemic preparedness is all the measures that must be conducted from the national to the level of the health facility to be able to respond effectively to outbreaks of illness. Also though epidemic management requires sufficient medical and/or public health expertise, successful management requires careful coordination of all the areas of specialization involved in response activities. Data from reference books and/or disease experts could be accessed easily. Expertise in epidemiology, clinical medicine, health education, and laboratory medicine are needed for an effective epidemic response. Political and public health authorities, as well as administrative and logistics experts must be supporting the technical groups. The epidemiologists are active in the detection of outbreaks, monitoring, including touch tracking and follow-up as well as disease prediction. The doctors must help manage the uncovered, the injured and the dead.<sup>6</sup>

#### **CONCEPT OF LOCKDOWN AND CURFEW**

Lockdown is not described under any law, but this concept is used by government officials and others to describe a situation where the free movement of goods is prohibited, except for essential items declared by the Government of India pursuant to sections 2, 3, 4 of the Epidemic Diseases Act. Lockdown is not same as curfew. One of the key distinctions between the two being that, in the lockdown, state enforcement authorities like the police can not arrest citizens for not enforcing the lockdown without the competent court's permission. Nevertheless, Lockdown may be enforced by the mechanism provided for under section 188 (disobedience to the directions issued by a public servant), section 269 (negligent act likely to spread life-threatening disease infection), and section 270 (malignant act likely to spread life-threatening disease infection) of the Indian Penal Code, 1860. It is shocking to see that the words 'lockdown' and 'curfew' were not established in Indian law but are still used to curb the fundamental right to movement enshrined in Article 19(1) to the Indian Constitution. It cannot be called unconstitutional because under Article 19(2), its right is subject to fair restrictions. The closest interpretation of 'lockdown' can be construed from the Epidemic Disease Act (EDA), 1897. sections 2 and 2(A) of the Epidemic Diseases Act, 1897 grants the state and central governments the power to take the required steps in the situation of an epidemic to contain its spread, even if

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6. Akinola Ayoola Fatiregun, Epidemic preparedness and management: A guide on Lassa fever outbreak preparedness plan, Nigerian Medical Journal, January, (2017).  
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5715560/>.

the steps are not stated in any practice or theory of law in the country.<sup>7</sup>

### **CONCEPT OF QUARANTINE AND ISOLATION**

Quarantine is an isolation state in which people exposed to an infectious disease are put for a specified period of time to prevent further spread of that disease. Quarantine is assumed to be the oldest mechanism for reducing the rapid spread of bacterial infections and viral attacks. This has been legally approved for the protection of public health and the prevention of disease transmission by all governments around the world. Societies have been practicing isolation since ancient times, enforcing a travel or transportation ban and resorting to maritime quarantine of individuals. Such steps have also been forcefully imposed in order to deter or reduce the wider spread of disease and to safeguard the health of non-exposed people. Within the list of diseases that could need quarantine provided by the Centers for Disease Control and Prevention, the new ones — cholera, diphtheria, infectious tuberculosis, influenza, smallpox, yellow fever and viral hemorrhagic fever — have recently been added to the Severe Acute Respiratory Syndrome that may go on to become pandemic. This demonstrates that quarantine is a medically accepted method of reducing transmission to the community. However, the imperative need in the public health arena is a constructive alternative method of treating patients exposed to infectious illnesses.<sup>8</sup>

The Great Council passed the first medical isolation law in 1377, when the plague quickly ruined European countries. Detention was justified for medical purposes, and disobedience was a punishable offence. Over 30 days, the statute recommended isolation called a 'trentino.' Many countries subsequently introduced similar legislation to protect the public. When adopting the Latin *quadragesima*, which referred to a 40-day detention on ships, the term also changed to 'quarantine' as the length of the isolation was extended to 40 days. 'Quarantine' and 'isolation' are used interchangeably in common parlance, but they express two distinct concepts and are two distinct processes of public health practice. Quarantine is imposed to separate and limit the movement of people who may have been exposed to infectious disease but who are not yet considered to be sick. But, isolation is a total separation of a person suspected or fairly believed to be infected with communicable diseases from others.<sup>9</sup>

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7. Tanay Goyal, COVID-19: The Law of the Lockdown, *Jurist: Legal News & Research*, April 25, 2020, <https://www.jurist.org/commentary/2020/04/tanay-goyal-india-lockdown/>.

8. L.S. Sathiyamurthy, Quarantine and the law, *The Hindu*, April 03, 2020, <https://www.thehindu.com/opinion/lead/quarantine-and-the-law/article31241185.ece>.

9. *Ibid.*

**INTERNATIONAL PERSPECTIVE**

On March 30, 2020, the Director of the World Health Organization (WHO) announced that the outbreak of COVID-19 constituted an international public health emergency and provided provisional recommendations for quarantines of individuals. The guidelines allowed practices to be limited by separating persons who are not ill but who may have been exposed to an infectious disease within the legal context of the International Health Regulations (2005). It also differentiated quarantine from isolation, which is the separation of people who are sick or contaminated from others, in order to avoid the spread of infection or contamination. The U.K. specific legislation on COVID-19 pandemics was passed as the Coronavirus Act, 2020, which is a comprehensive law dealing with all issues relevant to COVID-19 including emergency registration of healthcare practitioners, temporary closure of educational establishments, audiovisual criminal proceedings facilities, powers to limit meetings, and financial assistance to in fringements. Likewise, Singapore has passed the Infectious Diseases Regulations, 2020, which allows for stay orders to be given that can transfer 'at-risk persons' to a government-specified accommodation facility. The laws of the U.K. and Singapore set out unambiguous terms and legally binding obligations. As such, the violators can be penalised up to \$ 10,000 under Singaporean law, or face six months in jail, or both.<sup>10</sup>

**NATIONAL PERSPECTIVE****i) The Constitution of India, 1950**

India is a federation of twenty-eight states and eight territories with a constitutional division of legislative duties between the central government and the states enumerated in the Seventh Schedule of the Constitution of India by legislative subject lists.<sup>11</sup> Either the government of the union or the governments of state are legally allowed to legislate on public health matters. Port quarantine, even in connection with seamen's and marine hospitals, and interstate quarantine are dealt with in the Union statute. State legislatures can provide for matters relating to public safety and welfare, hospitals, dispensaries and animal disaster prevention. The union government and states have concurrent jurisdiction to prevent infectious or contagious diseases or pests affecting humans, animals or plants from being transferred from one state to another.<sup>12</sup>

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10. Manuraj Shunmugasundaram, India needs to enact a COVID-19 law, *The Hindu*, May 08, 2020, <https://www.thehindu.com/opinion/lead/india-needs-to-enact-a-covid-19-law/article31529036.ece>.

11. The Constitution of India, 1950, schedule 7.

12. Ruth Levush, India's Government Response to COVID-19 Novel Coronavirus, *The Library of Congress*, March 19, 2020, <https://blogs.loc.gov/law/2020/03/falqs-indias-government-response-to-covid-19-novel-coronavirus/>.

**ii) The Indian Penal Code, 1860**

Under the Indian Penal Code, 1860, disobedience to the law of quarantine is punishable by imprisonment of any form for a period of up to six months, or with fine, or both.<sup>13</sup> In spite of being aware of the risk of spreading such an illness or disease, failure to take the required precautions is punishable under the Indian Penal Code, 1860. Someone who, unlawfully or negligently, commits any act which is, and which he knows or has reason to believe to be, likely to transmit the infection of any life-threatening disease shall be punished with imprisonment of any kind up to six months or fine or both. Anyone who malignantly performs any act that is, and that he knows or has reason to believe to be, likely to spread the infection of any life-threatening disease shall be punished with imprisonment of either description for a term of up to two years, or with fine, or both. Malignancy is defined in highly virulent, contagious, and life-threatening diseases. Under the Indian Penal Code of 1860, disobeying the rules prescribed for social distance, coughing or sneezing without covering the nose and mouth, not wearing masks in public, disregarding social isolation rules, roaming in groups on the road, socializing in violation of the prescribed regulations, etc.<sup>14</sup> Any person who disobeys any regulation or order passed under this law shall be punishable under the Indian Penal Code, 1860, for one to six months' imprisonment.<sup>15</sup> For conviction under section 188, it is not mandatory for the defendant to plan to inflict damage, or to regard his disobedience as likely to result in damage. In addition, States can also issue orders to ban public meetings and enforce a curfew by invoking provision of the Code of Criminal Procedure, 1973<sup>16</sup>. Infringement of orders under section 144 of the Code of Criminal Procedure, 1973 is also punishable under section 188 of the Indian Penal Code, 1860.

**iii) The Epidemic Diseases Act, 1897**

The Epidemic Diseases Act 1897 is a British colonial era legislation which is 123 years old and is the primary legal mechanism for the prevention and dissemination of dangerous epidemic diseases at the union level. This was introduced to combat the bubonic plague outbreak that broke out at the time in the then state of Bombay. Historically, it has been used to control the spread of multiple diseases-swine flu, cholera, malaria and dengue. The Act empowers the union

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13. The Indian Penal Code, 1860, section 271.

14. *Id.*, sections 269 and 270.

15. *Id.*, section 188.

16. The Code of Criminal Procedure, 1973, section 144.

government to take the necessary measures and prescribe regulations at the ports of entry and exit to deal with dangerous epidemic diseases. States are encouraged to take special steps or enforce laws within their jurisdictions to deal with epidemics.<sup>17</sup> Thus, any government of a State, if it is concerned that any part of its territory is threatened with an outbreak of a dangerous disease and decides that the ordinary provisions of the law are inadequate for that reason, may take or approve all steps, including inspection of traveling persons and quarantine, to prevent the outbreak of the disease. This also provides for any person to disobey any regulations or orders made under the Epidemic Diseases Act 1897<sup>18</sup>, an offence under the Indian Penal Code of 1860 may be charged and a person is liable for a sentence of one month's imprisonment, a fine, or both, upon conviction. Section 4 states that, under the Act, no claim or legal action shall be initiated against any person or authority for anything done or intended to be done in good faith.

The Epidemic Diseases (Amendment) Ordinance 2020.

On April 22, 2020, the Epidemic Diseases (Amendment) Ordinance, 2020 was enacted. The Ordinance amends the Epidemic Diseases Act, 1897. The Act makes provision to prevent the spread of dangerous epidemic diseases. The Ordinance amends the Act to provide protections for health care workers battling infectious diseases and extends the central government's authority to prevent these diseases from spreading. This seeks to correct the gaps and flaws of our existing state laws that usually do not cover sexual harassment in the home and workplace. It's unfortunate that during the pandemic, our greatest assets are under threat, and the same can not continue.<sup>19</sup>

### **Key Features of the Ordinance**

The Ordinance describes health-care workers as an individual at risk of contacting the epidemic illness while performing epidemic-related duties. It includes:

i) Public and clinical healthcare providers such as physicians and nurses, (ii) any person allowed by the Act to take steps to prevent the outbreak of the disease, and (iii) other persons approved by the State Government as such.<sup>20</sup>

An 'act of violence' comprises any of the following acts committed against a healthcare

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17. *Id.*, section 2.

18. *Id.*, section 3

19. *Ibid.*

20. The Epidemic Diseases (Amendment) Ordinance, 2020, (April 24, 2020, 9: 30 AM), <https://www.prsindia.org/billtrack/epidemic-diseases-amendment-ordinance-2020>.

service personnel: (i) harassment impacting living or working conditions, (ii) harm, injury, hurt, or danger to life, (iii) obstruction in discharge of his duties, and (iv) loss or damage to the property or documents of the healthcare service personnel. Property is defined to include a: (i) clinical establishment, (ii) quarantine facility, (iii) mobile medical unit, and (iv) other property in which a healthcare service personnel has direct interest, in relation to the epidemic.<sup>21</sup>

- Whoever commits or abets the commitment of violence against health care worker, shall be punished with imprisonment ranging from 3 months to 5 years, and penalty ranging from Rs 50,000 to 2 lakh.
- In case of a very serious attack, the imprisonment may be for a minimum period of 6 months and maximum of 7 years, with penalty ranging from Rs 1 lakh to 5 lakh.
- As per the Ordinance, investigation into the incidents of attacks on doctors and healthcare workers has to be conducted by a senior inspector and be completed within 30 days.
- Court proceedings related to these cases shall also be conducted in a time-bound manner, and have to be decided within a year.
- The Ordinance also provides that the court shall presume that such person has committed such offence, unless the contrary is proved.
- The Ordinance states that in case of damage to vehicles or clinics of doctors or healthcare workers, the perpetrators would have to pay double the market cost of the damaged asset as compensation.
- Upon failure to pay the compensation awarded, such amount shall be recovered as an arrear of land revenue under the Revenue Recovery Act, 1890.<sup>22</sup>

The COVID-19 pandemic poses a significant threat and many states have introduced special laws to protect doctors and other medical professionals, such as the new Ordinance. The Ordinance is intended to have a positive effect on morality and to restore faith and trust in our health care system, to enable them to continue to contribute in these difficult times, as well as to underline and uphold the nobility and integrity of their profession and its influence. It is common knowledge that the Epidemic Diseases (Amendment) Ordinance, 2020 has been

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21. *Ibid.*

22. *Supra note 28.*

promulgated to provide healthcare staff with safety.

**iv) The Disaster Management Act, 2005**

Looking at the Disaster Management Act, used to enforce the lockdown, Section 2(d) defines disaster as a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area. This section is not intended to address any kind of epidemics or diseases but causes such as, but not limited to, tsunamis and earthquakes. The Ministry of Home Affairs, however, declared the spread of COVID-19 a "notified tragedy," thus putting Section 2(d) of the Disaster Management Act into effect. This authorized the state governments to use a larger portion of the State Disaster Response Fund (SDRF) to combat virus spread.<sup>23</sup>

The Disaster Management Act, 2005, mandates the establishment at the national, state, and district level of a three-tier Disaster Management Authority to formulate a disaster plan to its level. The details of such a proposal are set out in this Act. This is about addressing the mitigation steps to be taken, and addressing preparedness and efficiency.<sup>24</sup> It also allows the state authority / executive committee to send government agencies guidance on steps to be taken in response to any threatening disaster.<sup>25</sup> Furthermore, this Act empowers state executive committees and district authority to monitor or limit the movement of vehicle traffic or persons from or within a vulnerable or affected area, and to take any steps that may be justified by such a situation. Section 30 replicates this District-Level pattern. The Act requires the Central Government to take steps such as (a) coordinating the work between the different authorities and departments of government (b) deploying powers and (c) other matters to ensure "efficient compliance." This imposes a legislative obligation for compliance with the directions of the national authority on all Central Government departments.<sup>26</sup> The Act sets a one-year imprisonment term (two years in case of loss of life) for persons obstructing the discharge of functions by any official or employee in government. It empowers central government to give legal instructions to state and government authorities.<sup>27</sup>

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23. *Supra note 7.*

24. The Disaster Management Act, 2005, section 11(3).

25. *Id.*, section 22(2)(h).

26. *Id.*, section 36.

27. *Id.*, section 6

The National Disaster Management Authority (NDMA) issued social distancing guidelines on March 24, 2020 coinciding with the Prime Minister's address to the nation, considering the "coronavirus pandemic" to be a "disaster" within the meaning of the Disaster Management Act. Those lockdown guidelines were forwarded by the Union home secretary to the states and UTs by order of the same date. The steps included closing down all non-essential government departments, all commercial and private enterprises, factories, air, rail and road transport, catering facilities, educational departments, worship places, political gatherings, etc. Many exceptions have been made for medical staff, journalists, gas stations, critical shops, etc.<sup>28</sup>

### **GOVERNMENTAL MEASURES IN THE LIGHT OF CORONAVIRUS (COVID-19) CRISIS**

After the 14-hour Janata Curfew, on March 22, 2020, Prime Minister Narendra Modi announced a 21-day nationwide lockdown from March 25, 2020 to April 15, 2020 to contain coronavirus spread in India. To date, it has been effective in limiting numbers, but as the risk of disease spreading is widespread, the authorities have been forced to take stringent steps to avoid the major outbreak of a magnitude under which many countries are currently reeling. Despite our general standards of hygiene, clustered living habits and an ill-equipped and understaffed health care system, India with its large population could be affected in the worst possible way. A vast majority of our gargantuan population lives in slums, providing the ideal breeding ground for epidemics like Coronavirus, which spreads from infected people to those nearby.<sup>29</sup> In the leadership of Prime Minister Modi, a high-level Coronavirus Disease (COVID-19) Group of Ministers (GOM) was "constituted to study, track and assess the preparedness and actions taken in the country with regard to management." The Ministry of Health and Family Welfare (MoHFW) has been coordinating the central government's efforts to "mitigate the effects of India's outbreak." The Group of Ministers (GOM) agreed on March 11, 2020 that the Ministry of Health and Family Welfare (MoHFW) will instruct all state and union territories to invoke section 2 of the Epidemic Disease Act, 1897, so that all advisories provided by the MoHFW, the states and the territories of the union are enforceable. On the same day, section 69 of the Disaster Management Act, 2005, was invoked by the union government to transfer powers to the

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28. Rahul Gul, Explained: The legal framework behind the lockdown, National Herald, May 6, 2020, <https://www.nationalheraldindia.com/india/explained-the-legal-framework-behind-the-lockdown>.

29. Vageshwari Deswal, Covid-19: Laws related to quarantine in India, The Times of India, March 26, 2020, <https://timesofindia.indiatimes.com/blogs/legally-speaking/covid-19-law-related-to-quarantine-in-india/>.

secretary of the Ministry of Health and Family Welfare (MoHFW) from the Home Secretary, who is chairman of the National Executive Committee (NEC), which is a coordinating and controlling body for disaster management.

Unlike the Epidemic Infectious Disease Act, this law "provides for an exhaustive disaster preparedness administrative set-up." On March 14, the union government declared COVID-19 a notified disaster, and assistance is available under the State Disaster Response Fund (SDRF), which was also formed under the Disaster Management Act. Here are a few recently issued guidelines and guidance from the Ministry of Health and Family Welfare (MoHFW)<sup>30</sup>:

- Advisory on social distancing measure in view of spread of COVID-19 disease.
- Guidelines to states/UTs for quarantine of passengers for COVID 19 coming from China, Democratic Republic of Korea, France, Germany, Spain, Italy, Iran for airport screening.
- Discharge policy for suspect or confirmed novel coronavirus (2019-nCoV) cases.
- Guidelines on clinical management of severe acute respiratory illness (SARI) in suspect/confirmed novel coronavirus (nCoV) cases.
- Guidance on surveillance for human infection with 2019-nCoV.
- National guidelines for infection prevention and control in healthcare facilities.
- Guidance for sample collection, packaging and transportation for novel coronavirus.
- Guidelines on use of masks by public.
- Guidelines for home quarantine.
- Standard operating procedure (SOP) for COVID-19 management – international cruise ships at major Indian ports.

Some states and union territories have also issued emergency measures and regulations for their own jurisdictions pursuant to the Epidemic Disease Act to deal with COVID-19:

- The Delhi Epidemic Diseases, COVID-19 Regulations, 2020.
- The Maharashtra Epidemic Diseases COVID-19 Regulations, 2020.
- Punjab Epidemic Diseases, COVID-19 Regulations, 2020.

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30. *Supra* note 12.

- The Himachal Pradesh Epidemic Disease (COVID-19) Regulations, 2020.<sup>31</sup>

Such laws and measures vary, but may include restrictions on duties and responsibilities of hospitals and laboratories, powers of district governments to enforce containment measures (sealing off geographical areas, barring the entry or exit of containment areas, designating quarantine facilities, and closing schools, offices, etc. and banning mass gatherings) and combating COVID-19 related misinformation. The World Health Organization also reported that the ministries of central and state / union territories have taken various steps in terms of strengthened community monitoring, quarantine facilities, isolation wards, sufficient Personal Protective Equipment (PPEs), skilled personnel, rapid response teams for COVID-19 management.<sup>32</sup>

#### **RESPONSE OF INDIAN JUDICIARY IN THE LIGHT OF CORONAVIRUS (COVID-19) CRISIS**

The Hon'ble Supreme Court took into account Coronavirus (COVID-19) and the resultant difficulties that litigants had to face when filing their petition / appeals / suits /etc., within the limitation period specified by the general law of limitation or by special laws (both central and state). In order to escape the above difficulties and to ensure that lawyers or litigants do not have to come to the respective Courts and Tribunals around the world, including the Supreme Court, physically to file these proceedings, In the *suo motu* Writ Petition, the Apex Court has ordered that the limitation period in all such proceedings, irrespective of the limitation prescribed by the General or Special Laws, be extended with effect from 15th March, 2020 or not until further order(s) are made by the Hon'ble Supreme Court in this respect. It has also been stated that the said order is binding on all courts / tribunals and authorities within the scope of Article 141.<sup>33</sup>

The Supreme Court clarified that the extension will extend to all such proceedings, such as the filing of petitions / applications / appeals / all other proceedings, regardless of the restrictions imposed by the general law or special laws, whether to be accepted or not. As far as prescribed limitation period is concerned, the order would have an overriding effect on all the country's legal regulations, including intellectual property laws. This order of the Supreme Court has

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31. *Ibid.*

32. *Ibid.*

33. Supreme Court of India, Record of Proceedings, suo moto, Writ Petition (Civil) No(s).3/2020, (June 26, 2020 8:10 AM), [https://main.sci.gov.in/supremecourt/2020/10787/10787\\_2020\\_1\\_12\\_21570\\_Order\\_23-Mar-2020.pdf](https://main.sci.gov.in/supremecourt/2020/10787/10787_2020_1_12_21570_Order_23-Mar-2020.pdf).

opened up new avenues and thus allowed legal extension to cases that are not available by statute. This Supreme Court step can be seen as an immediate relief to anyone who has to make filings in different courts / tribunals and is unable to be physically present in court, or who undertakes any travel for those filings because of the lockdown measures.<sup>34</sup>

A petition was filed by lawyer Alakh Alok Srivastava on May 14, 2020 which pointed out death of migrant labourers in train and road accidents while they were walking back home. The Supreme Court said that it is impossible for Courts to monitor or stop the movement of migrant workers across the country and it is for the government to take necessary action in this regard.<sup>35</sup>

In March 2020, the Apex Court took *suo motu* cognizance of the impact of the Covid-19 restrictions on compliance with limitation periods and this led to *suo motu* writ petition. On March 8, 2021, the Apex Court issued its final order and said that the extension had served its purpose and should come to an end. The Apex Court observed that in calculating the limitation period in any suit, appeal, application or proceeding, the period from March 15, 2020 to March 14, 2021 is to be excluded, and any balance of the limitation period as of March 15, 2020 will start to run from March 15, 2021. If the limitation period would have expired during the one year extension period, a limitation period of 90 days will be available from March 15, 2021. If the balance of the limitation period remaining on March 15, 2021 is more than 90 days, then the longer period will apply. The one year extension period is also to be excluded when calculating the prescribed periods under section 23(4) and section 29A of the Arbitration and Conciliation Act, 1996, particular provisions of the Commercial Courts Act, 2015 and the Negotiable Instruments Act, 1881 and any other law containing similar prescriptions. The government of India will amend the prescribed guidelines for containment zones to allow for regulated movement for, amongst others, legal purposes.<sup>36</sup>

### CONCLUDING REMARKS

Preparing for the response to epidemics and other public health incidents is an integral aspect of delivering health care services. However, in order to be able to implement a coordinated response to disease outbreaks that will be timely and successful in preventing needless deaths

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34. S.S. Rana & Co, Indian Supreme Court's response to COVID - 19: extends period of limitation for all, Lexology, April 6, 2020, <https://www.lexology.com/library/detail.aspx?g=f20bb3be-8a92-4be5-9bf9-e1607cc2936e>.

35. Can't stop or monitor movement of migrant workers on roads, says Supreme Court, The Hindu, May 15, 2020, <https://www.thehindu.com/news/national/cant-stop-or-monitor-movement-of-migrant-workers-on-roads-says-sc/article31590649.ece>.

36. W.P. (Civil) No 3 of 2020.

and disabilities, particularly in resource-limited settings during disease outbreaks, public health experts should follow a model containing strategies as it has proven to be a successful preparedness framework for disease outbreak control.<sup>37</sup> The COVID-19 virus spreads mainly by droplets of saliva or nose discharge when an infected person coughs or sneezes. There are no unique COVID-19 vaccines or therapies available at this time. There are also several current clinical trials testing new therapies.<sup>38</sup> Being well informed about the COVID-19 virus, the illness it causes and how it spreads is the best way to avoid and slow down transmission.<sup>39</sup>

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37. *Supra note 6.*

38. Coronavirus, (June 22, 2020, 7:00 AM), [https://www.who.int/health-topics/coronavirus#tab=tab\\_1](https://www.who.int/health-topics/coronavirus#tab=tab_1).

39. *Ibid.*

## **DEATH PENALTY IN RAPE CASES: ANALYSING ITS VIABILITY WITH REFERENCE TO NIRBHAYA VERDICT, 2020**

**Dr. Harpreet Kaur\* & Anmol Rai Garg\*\***

### **INTRODUCTION**

A woman is a wonderful and the most beautiful creation of God- a mother, a sister, a wife, a friend, she plays all her roles lovingly and with utmost care and affection. Her status as an individual as well as a group has undergone innumerable upheavals overtime, especially in India. On one hand she has been worshipped as a Goddess and on the other, she has been veiled, confined to the four walls of the house, humiliated, tortured and suppressed. The Indian society based on patriarchy inflicted strictures on her, reducing her status to a mere play thing or a slave of man's whims and fancies. She has been suppressed in the name of adjustment. She has been tortured in the names of customs and usages. The patriarchal society tends to show more of non-acceptance towards women rising and demanding equal rights and status. They are slammed by the orthodox sections of the society and are considered to be a mere creature who is supposed to just obey!

Humiliation, harassment, torture and exploitation of women are as old as the history of family life and in the present era, there has been an alarming decline in the respect and morality towards women which in result has increased crimes against women in the society. Women have been looked upon with disdainful contempt. Incidents of heinous crimes like rapes, acid attacks, dowry deaths, domestic violence have increased at an alarming rate. In spite of the severe punitive approach to criminal law and the efforts to end their suppression and subjugation, they are exploited, abused and assaulted sexually, physically and mentally.

It is unfortunate that in the recent years, the crime against women is on the rise. Of all the crimes against women, rape is the most heinous and disgusting crime which shatters the foundations of their lives. It is a gruesome attack on her integrity and dignity and an unjustifiable disregard of her control over her body. It inflicts wounds not only on the body of the victim but also on her soul. It is an act of physical and mental humiliation, pain, fear and serious injuries. Rape is a crime not only against the person of the woman; it is a crime against the whole society. It destroys her mental equilibrium and pushes her into profound mental crisis. It is the violation of the most basic and cherished right of the victim enshrined under Article 21.

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**MEANING OF TERM 'RAPE'**

The term 'rape' has Latin origin which implies 'to snatch, to carry off, to grab'. It implies forcible seizure.

The Cambridge Dictionary defines rape as, "forcing someone to have sex when they are unwilling, using violence or threatening behavior"<sup>1</sup>.

According to Merriam-Webster Dictionary, "rape is an unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against a person's will or with a person who is beneath a certain age or incapable of valid consent because of mental illness, mental deficiency, intoxication, unconsciousness, or deception"<sup>2</sup>.

Rape is a type of sexual assault usually involving sexual intercourse or other forms of sexual penetration carried out against a person without that person's consent. The act may be carried out by physical force, coercion, abuse of authority, or against a person who is incapable of giving valid consent.

It has been defined under Section 375 of the IPC<sup>3</sup>. It is the unlawful sexual intercourse between a

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1. Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/rape> (last visited on Aug. 20, 2020)
  2. Merriam Webster, <https://www.merriam-webster.com/dictionary/rape> (last visited on Aug. 20, 2020)
  3. The Indian Penal Code, 1860, Sec. 375 A man is said to commit "rape" if he-
    - (a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
    - (b) Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
    - (c) Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
    - (d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-
      - First.-Against her will.
      - Secondly.-Without her consent.
      - Thirdly.-With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt,
      - Fourthly.-With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
      - Fifthly.-With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
      - Sixthly.-With or without her consent, when she is under eighteen years of age.
      - Seventhly.-When she is unable to communicate consent.
- Explanation 1.-For the purposes of this section, "vagina" shall also include labia majora.
- Explanation 2.-Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.
- Exception 1.-A medical procedure or intervention shall not constitute rape.
- Exception 2.-Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

man and a woman without her consent or against her will under the circumstances mentioned under the section.

### **INTERNATIONAL PERSPECTIVE ON RAPE LAWS**

With the growing concern over the status of women and violence against them, various international instruments have been adopted which have recognized their rights. Various policies and guidelines have been laid down to be adopted by the countries to curb crimes against women. The UN Declaration on the Elimination of Violence against Women, 1993 calls out the States to eliminate all forms of violence against women. The Rome Statute of International Criminal Court, 1998 has recognized Rape, along with other crimes, as an offence against humanity.<sup>4</sup>

Different countries have adopted varying methods in order to curb the menace of rapes. Some have adopted zero-tolerance policy while some have adopted time bound and fixed procedure for fast-track trials. The punishment for the offence of rape varies majorly from country to country. Some countries like US have abolished the death penalty for the offence of rape while some countries continue to retain it. The following table puts light on the punishment for the offence of rape in different countries:

<b>Sr. No.</b>	<b>Country</b>	<b>Punishment for Rape</b>
1.	China	Death penalty or Castration
2.	Iran	Hanging or shot to death in public
3.	France	15 years of imprisonment which may extend up to 30 years or life depending on the harm and injuries caused to the victim
4.	Afghanistan	Shot in the head within 4 days of conviction
5.	North Korea	Shot dead by the firing squad
6.	Russia	3 years of imprisonment which may extend up to 30 years depending on the harm and injuries caused
7.	United States	Under federal law- life imprisonment Under state laws- varies from state to state
8.	Egypt	Public hanging
9.	Pakistan	Death penalty
10.	United Kingdom	10 years to life imprisonment depending on the degree of harm and injuries
11.	UAE	Death penalty
12.	Bangladesh	Death Penalty
13.	Greece	Incarceration

4. Rome Statute of International Criminal Court, 1998, Art. 7

## STATUTORY PROVISIONS ON RAPE LAWS IN INDIA

With the changing times, the Indian law has been modified in order to inculcate the rights of the women and to afford adequate protection to them. The Constitution of India recognizes rights of the women and guarantees equality. Various statutes have also been formulated to curb violence against them.

### **The Constitution Of India, 1950**

The Constitution of India guarantees every individual the right to dignity, adequate growth and a life free of discrimination. It also guarantees equality and right to life<sup>5</sup> to all the persons. These are the most cherished rights which are important for the overall development and well being of the person. The Constitution protects the rights of women in a number of ways. Gender equality is ensured through Article 14. It prohibits discrimination on the ground of sex, along with other grounds.<sup>6</sup> The Constitution along with recognizing these principles also empowers the State to enact special provisions for women and children<sup>7</sup> keeping in mind their status and the exploitation they have been subjected to since ages. It also prohibits trafficking and exploitation,<sup>8</sup> something to which women are commonly subjected to. The Directive Principles of State Policy also cast an obligation on the State to protect the rights of the women through various articles like Article 39 and 42. The fundamental duties cast a duty on all citizens through Article 51A(e) to renounce all practices derogatory to the dignity of women.

### **Under Criminal Laws**

The Indian criminal law is governed by 3 major statutes- The India Penal Code, 1860 (IPC), The Code of Criminal Procedure, 1973 (CrPC) and The Indian Evidence Act, 1872 (IEA) out of which IPC is the general penal statute that lays down the offences and their punishments. Many special statutes have also been enacted that protects the rights of the women and aims at curbing violence against them.g. Sexual Harassment of Women at Workplace Act, 2013, The Protection of Women from Domestic Violence Act, 2005, The Protection of Children from Sexual Offences Act, 2012etc.

The Indian Penal Code, 1860

As discussed earlier, the term rape has been defined under Sec. 375 of the IPC. Sec. 376 of the

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5. Indian Const.art.21

6. *Id*Art. 15(1)

7. *Id*Art. 15(3)

8. *Id*Art. 23

IPC prescribes the punishment for rape. Prior to the amendment in 2013, the section provided a meager punishment of 2 years of imprisonment with or without fine. In certain aggravated circumstances the imprisonment extended up to life with a minimum of 10 years of rigorous imprisonment plus fine.

The infamous Nirbhaya gang rape case shook the conscience of the whole nation. A 23 year old medical student was brutally gang-raped by 5 men in a moving bus on the night of December 16, 2012 and consequently she died due to the grave injuries. This case triggered a huge public outcry demanding strict and harsher punishments for the culprits. This led to Criminal Law (Amendment) Act, 2013 which expanded the definition of rape and also enhanced the punishment for rape to a minimum of 7 years which may extend to life imprisonment along with fine and in certain aggravated forms it shall not be less than 10 years which may extend up to life imprisonment (remainder of person's natural life). The amendment also amended other sections related to rape:

SECTION AND OFFENCE	PUNISHMENT PRIOR TO 2013 AMENDMENT	PUNISHMENT POST 2013 AMENDMENT
Sec. 376A- Punishment for causing death or resulting in persistent vegetative state of victim (new addition)	-	RI of not less than 20 years but which may extend to life imprisonment (remainder of natural life) or with death.
Sec. 376B- Sexual intercourse by husband upon his wife during separation	Imprisonment of either description for a term which may extend to 2 years plus fine (earlier Sec. 376A)	Imprisonment of either description for not less than 2 years but which may extend to 7 years plus fine.
Sec. 376C- Sexual intercourse by a person in authority (new compiled offence)	Imprisonment for a term which may extend up to 5 years plus fine. (different heads under Sec. 376B, 376C, 376D)	RI for not less than 5 years but which may extend up to 10 years plus fine.
Sec. 376D- Gang Rape (new addition)	-	RI for not less than 20 years but which may extend to life imprisonment (remainder of natural life) plus fine.
Sec. 376E- Punishment for repeat offenders (new addition)	-	Life imprisonment (remainder of natural life) or death.

Even after providing for strict laws the incidents of rape did not cease. Rape cases of innocent minor girls started escalating. The infamous case of Kathua rape<sup>9</sup> again brought the weak implementation of law into the limelight, public outcry and demand for further enhancing the punishments. The Criminal Law (Amendment) Act, 2018 was a consequence of this heinous rape case.

SECTION AND OFFENCE	PUNISHMENT PRIOR TO 2018 AMENDMENT	PUNISHMENT POST 2018 AMENDMENT
Sec. 376(1)- Punishment for rape	RI of not less than 7 years but which may extend to life imprisonment plus fine	Minimum 10 years RI which may extend to life imprisonment plus fine
Sec. 376(3)- Punishment for rape (new clause added-rape on a woman under sixteen years of age)	-	Minimum 20 years RI which may extend to life imprisonment plus fine
Sec. 376AB- Punishment for rape on woman under twelve years of age. (new addition)	-	Minimum 20 years of RI which may extend to life imprisonment or death.
Sec. 376DA- Punishment for gang rape on woman under sixteen years of age (new addition)	-	Life imprisonment plus fine.
Sec. 376DB- Punishment for gang rape on woman under twelve years of age (new addition)	-	Life imprisonment plus fine or death.

9. An 8-year-old girl was raped in Kathua, a district of Jammu and Kashmir. It has been alleged that she was kept in a Shrine for several days and raped continuously and later murdered.

**Other Statutory Provisions****a. The Protection of Women from Domestic Violence Act, 2005**

The Act aims at providing effective protection of the rights of the women who are the victims of domestic violence. The Act includes sexual abuse<sup>10</sup> within the ambit of domestic violence and empowers the Judicial Magistrate to pass adequate relief orders.

**b. The Sexual Harassment of Women at Workplace (Prevention, Prohibition And Redressal) Act, 2013**

This Act aims at preventing and prohibiting all forms of sexual harassment of women at their workplaces. The Act was enacted after the highlighted and landmark case of Vishaka v. State of Rajasthan.<sup>11</sup> Under the Act, any unwelcome act or behavior of sexual nature or physical contact shall be construed as sexual harassment. Provisions have been laid down for the setting up of Internal Complaints Committee in every office to inquire into the complaints filed by the aggrieved woman.

**c. The Protection of Children from Sexual Offences Act, 2012 (POCSO Act)**

This Act aims at strengthening the laws for the protection of children from sexual offences. The term 'rape' has not been used in this Act, rather the term 'penetrative sexual assault' has been used to indicate the same. Prior to the amendment in 2019, the maximum punishment under the Act was life imprisonment. Now it has laid down death penalty for the offence of aggravated penetrative sexual assault.<sup>12</sup>

**DEATH PENALTY IN RAPE CASES- IS IT A VIABLE SOLUTION?**

In India, death penalty is awarded only in the "rarest of rare" cases, an option that courts have exercised under a range of statutes including those related to murder, terrorism, kidnaping with murder, rioting with murder, drug offences and murder with rape. More than 40% of those sentenced to death in 2018 and half (52.9%) of those in 2019 were convicted for cases that included sexual offences and murder, said Death Penalty India 2019, an annual report by the

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10. The Protection of Women from Domestic Violence Act, 2005, Sec. 3 Explanation 1 (ii)- Sexual abuse includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman.

11. Vishaka v. State of Rajasthan(1997) 6 SCC 241

12. The Protection of Children from Sexual Offences Act, 2012,Sec. 6

National Law University (NLU), New Delhi.<sup>13</sup>

As it can be observed, prior to the amendments the punishments were nominal. Keeping in view the brutality and gravity of the offence, such punishments have no deterrent effect on the minds of the potential criminals. Also the increasing incidents of rapes have compelled the legislators to rethink about the existing provisions and the need to amend the same. The amendments done in 2013 and 2018 have created new provisions and have enhanced the punishments as well. With the 2013 amendment, death penalty was prescribed under Sec. 376A which provides for the offence of rape that results in death or in persistent vegetative condition of the victim and also under Sec. 376E which deals with punishments for the repeat offenders. With the 2018 amendment, death penalty has been prescribed for the offence of rape and gang-rape wherein the victim is less than 12 years of age.

Generally with these cases comes the common slogan: “Hang the rapists”. The demand of hanging the rapists has seen an increasing trend over the past few years and death sentences are increasingly being meted out for cases involving sexual violence as a response to public anger and anxiety. But this also poses certain questions that need to be answered. Will death penalty stop this menace? Is death penalty the answer to the gender-based violence that is deep-rooted in the Indian culture? Is death penalty a viable solution for controlling the rape cases? There are arguments both in favour and against the contention of imposing death penalty in rape cases which will be discussed in this paper.

#### **ANALYSIS OF NIRBHAYA GANG-RAPE CASE**

On the night of 16th December, 2012, a paramedical student was brutally beaten, tortured, robbed and gang-raped in a moving bus who later on died due to the grievous injuries inflicted upon her by the 6 rapists, out of them one being a juvenile. This incident led to huge public outcry and protests with the major demand of hanging the rapists. The Court indeed sentenced the 4 accused (one of the accused Ram Singh committed suicide in the jail and the juvenile was sentenced to 3 years stay in special correction home by the Juvenile Justice Board) to death. The courts at various levels have constantly been upholding the death penalty imposed on the accused keeping in view the brutality with which they raped her and placed the crime in the category of rarest of rare cases and fit for the imposition of death penalty. The mercy pleas were

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13. India Spend, <https://www.indiaspend.com/death-penalty-for-sexual-offences-up-53-in-2018-but-most-rape-cases-stuck-at-trial/> (last visited on Aug. 21, 2020)

also rejected by the President and they were finally executed on March 20, 2020 after a 7 year long litigation.

The case took 7 years to reach its conclusion, even though it was being tried by a fast-track court setup for the hearing. This indicates the loopholes that are present in the criminal justice system that are exploited by the accused to the fullest. The legal remedies available to the accused in cases where death penalty is imposed on them are many. From review petitions to the appeals, from mercy pleas to curative petitions, the time gap in between exercising their rights and availing these remedies evidently highlights the faulty system that though talks about ensuring speedy justice but fails miserably. The legal remedies available to them were availed by the 4 accused on different dates with long gaps in between. These are the basics tactics used by the accused these days to delay the matter. Such delay and the possibility of creating such delay are provided by the law itself. These delay and pendency not only creates hurdles in the path of justice for the victim and her family but it also affects the society at large and in many ways the family of the accused as well!

#### **DEATH PENALTY IN RAPE CASES: PROS**

Death penalty in rape cases is favored by a large section of the society and is the foremost demand put forward to ensure justice to the victim in such cases. They put forward many contentions in its favor like:

**i. Deterrent effect**

One of the basic contentions favoring death penalty for rape cases is that it will act as a deterrent for the potential criminals. Imposing death penalty for the offence of rape will create fear in the minds of the potential offenders and they will not commit such offence. Imposition of most harsh and strict penalties will dissuade them from committing such violent crimes. It will set an example for the society.

**ii. Increased reporting**

With the strict laws coming into force, people's faith in the criminal system and justice delivery is strengthened. This gives hope to the victims who keep quiet under pressure and fear to come out with their stories and report them. The National Crime Record Bureau's report (2019) showed a spike in the reporting of the rape cases after the Nirbhaya case.

**iii. Justice Delivery**

Imposition of death penalty is considered as justice delivery. It is believed to be a just form of retribution. It is taken to be a way to impart justice to the victim and to ensure safety of the public at large. By keeping capital punishment as an option within society, we create an appropriate consequence that fits the actions taken by the criminal. The death penalty ensures that the individual involved will no longer be able to create havoc for the general population because they are no longer around. That process creates peace for the victims, their families, and the society in general.<sup>14</sup>

**iv. Death penalty brings closure of the victim's family**

It is argued that death penalty brings closure for the family of the victim. The execution satisfies the retributive feeling that grows in their minds and it helps them to move on in their lives by putting aside their loss.

**DEATH PENALTY IN RAPE CASES: CONS**

Being the other side of the same coin, there also exist a section of the society that demands abolition of death penalty in such cases and puts forward the contentions against it:

**i. Failure to act as an absolute deterrent**

The increasing cases of rapes even after the enactment of strict and stringent laws clearly points out that such penalties have failed to act as a deterrent. Further, nobody has been able to conclusively say that the death penalty is an effective deterrent. Especially in countries like India, where the certainty of punishment is relatively low and legal trials are often harder on victims than on the accused (leading to them withdrawing the case), simply changing the quantum of punishment owing to few famous incidents is unlikely to deter others, as most cases either languish in the courts or are dismissed due to lack of evidence.

**ii. Increased risk of murder and extreme violence**

Once it is clear that the death penalty is highly probable in rape cases, it may in fact have the opposite impact – instead of acting as a deterrent, it could lead to

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14. Connect Us, <https://connectusfund.org/16-advantages-and-disadvantages-of-the-death-penalty-and-capital-punishment> (last visited on Aug. 21, 2020)

perpetrators making sure the victims are left dead or in no state to make a complaint or recognise the perpetrators.<sup>15</sup> There is an evident risk of increased violence and murder of the victim. Further, various reports and statistical data has constantly pointed towards the fact that death penalties have not acted as a deterrent especially for the hardened criminals and they end up killing the victim in order to escape the punishment and to avoid being caught.

Justice Malimath Committee had out rightly rejected death sentence for rapists and the Committee was not in favour of imposing death penalty for the offence of rape because in its opinion, the rapists may kill the victim. Instead, the Committee recommended sentence of imprisonment for life without commutation or remission.

**iii. Fear of reporting**

With the argument of increased reporting coming in favour of death penalty, there is a counter reaction to it as well. People opposing death penalty state that with the increased risk of murders by the rapists, the victims might keep quiet instead of reporting the cases. In many instances there is family pressure on the victim for non-reporting, especially in cases which involve family members as offenders.

**iv. Automatic assumption that the person cannot be reformed**

In many cases the crime of rape is committed in an unprecedented and uncontrollable lust. The offence shatters the life of the woman and brings along the automatic assumption that the offender is a hardened criminal and cannot be reformed and deserves to die. Death penalty leads to an assumption that the only way to curb the crime is to eliminate the offender instead of making an effort to reform the offender.

**v. Risk of an innocent person being executed**

The criminal system prevalent in the country is faulty and there is no doubt in that. There is always a risk of an innocent being punished for the deeds of someone else. There is always a risk of manipulation and withholding of

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15. The Wire, <https://thewire.in/women/rape-death-penalty> (last visited on Aug. 21, 2020)

evidences or giving false evidences in the court which may lead to the conviction of innocent persons and in such cases might lead to the imposition of death penalty.

**vi. Advocacy for abolition of death penalty by human rights activists**

The human rights activists and organizations, especially Amnesty International opposes the death penalty in all circumstances, regardless of the circumstances or the nature of the crime. It is the ultimate cruel and inhuman punishment, and a violation of a fundamental human right - the right to life.

**vii. Killing in the name of justice?**

Killing someone for the bad deeds he did is not justified in any sense. By legitimizing the very behavior that the law seeks to repress i.e. killing, capital punishment is counterproductive in the moral message it conveys and it won't make the things right. Taking a human life is unethical, whether it is a crime or whether it is done in the name of 'justice'<sup>16</sup>.

### CONCLUSION & SUGGESTIONS

People celebrated the execution of Nirbhaya rapists by chanting 'death to the rapists'. But the point here is that whether such stringent laws and imposition of death penalty makes the women safer? The very obvious answer is NO. The arguments put forward in favour of death penalty gets right away negated with more incidents of rape taking place in the country even after the passing of stringent laws and imposing death penalties to the offenders. The rape and murder of 27-year old vet in Hyderabad, killing of the witnesses and the father of the victim in the Unnao rape case clearly points towards the direction in which the criminal system is moving. The death penalty has failed to act as deterrence, it has failed to deter the offender from satisfying his sexual gratification and sadism by overpowering another human being and this is clearly evident. Offenders make sure that the victim is not left alive in order to escape law. Though it may be said that it brings closure to the family of the victim but on the other side, it creates a void in the family of the accused.

It can securely be concluded in general that in all instances of rape, death penalty is not the viable solution aside those instances of genuine gravity like gang-rapes and child-rapes. Instead of

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16. Debating Europe, <https://www.debatingeurope.eu/focus/arguments-death-penalty/#.XzUTnPMzb3g> (last visited on Aug. 21, 2020)

focusing on the punishment we need to focus on the patriarchal thinking and the mentality that treats women as a mere property. The wrong piece of the problem is being reflected up on and focused. We ought to be more worried about how we handle the rape cases in the nation. When we talk about the death penalty, we also need to discuss about the accepted social norms that perpetuate rape culture and the systemic failings that either silence women or victimize them further.

With the huge public protests, slogan raising, dharnas, the death penalty acts as a distract or. This is where the media needs to step in. When we quote a leader's effusive praise for the death penalty, and when we report on a convict being sentenced to death without adding context, we feed into a populist narrative that regards capital punishment as some sort of magic bullet. We do a disservice to the cause of fighting violence against women.

Hence it can be said that merely raising of slogans and dramatic statements about castrating rapists or accusing the police cannot bring the ideal outcome. Rather a "Zero Tolerance" policy should be embraced.

Further, to check the crime against women there must be the establishment of special courts which must hold speedy trials to ensure that any man who insults a woman's sexuality is punished quickly and adequately. Therefore, there is a need for appropriate implementation of laws with utmost sincerity rather than referring to severe punishments provided in Criminal code.

## **MIZO MARRIAGE, DIVORCE AND INHERITANCE LAWS: SOCIO AND LEGAL IMPLICATIONS FOR WOMEN**

**Irwin Lalmuanpuii Hnmate\***

### **INTRODUCTION**

Tribal societies are predominantly community- based and assign a high value to women. However this does not make them equal to men. Customary laws are age old practices of the community and are considered intrinsic to the identity of the people. Customary laws are accepted as tribal jurisprudence. They are recognized, approved and followed by the community and considered as an important factor in societal structure. A feature common to the tribal societies in the Northeastern region of India is that they are governed by their customary laws. Mizos are one such tribe and their customary law has important significance in their society. With the advent of Christianity, education was ushered in by the missionaries and this has predominantly contributed to the fading of most of their customary laws. In spite of this the modern Mizosociety continues to retain its customary practices and is still considered as an important reinforcement of their traditions.

The origin of the Mizos cannot be traced back too far as there are no written records. The bulk of their history has been passed down from generation to generation based on oral traditions and legends. There are many legends and beliefs regarding the origin of the Mizo tribe and the sub-tribes in Mizoram. Mizos were formerly known as the Lusei tribe or the Lushais. It is not known as to where they originally came from except that they must have come from Burma, as they are undoubtedly Mongolians.<sup>1</sup>

Gender equality has become an important area for women, the primary reason being access to property which is predominantly viewed from a patriarchal angle with implications in the socio-cultural system of the society. There are many laws enacted that addresses gender inequality both at the national and international level. 'The Constitution of India' not only assures equality to all persons as a fundamental right<sup>2</sup> but provides affirmative action and positive discrimination through Article 15 as well. Most importantly the 'Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)' to which India is a party seeks to

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1. L.B. Thanga, *The Mizos: A Study in Racial Personality* 3 (1978).  
2. Constitution of India.art.14

advance appropriate measures to eliminate discrimination against women in all matters concerning marriage and family relations.<sup>3</sup>

It was as early as 1928 that the then British pioneer, N.E. Parry had documented Mizo Hnam Dan (Mizo customary law). After Independence, Mizoram was granted a special provision by the 'Government of India under the Sixth Schedule' for establishing District and Regional Councils for the conduct of proper administration in the State. The aim of this provision 'was to preserve traditional autonomy and local self- governance of the people wherein the village level bodies run in accordance with the customary law.' The customary law of the Mizos was constitutionally recognized by the 53rd Amendment to the Constitution of India in 1986 through Article 371 G. With the establishment of the of the District Council and on powers conferred to it for better administration of the State, the Mizo Customary Laws, 1956 was enacted and came into force on 30th November, 1956. The Mizo Customary Law was compiled in 2005 as a Handbook and was notified in the Mizoram Gazette in 2005. In exercise of power granted under 'Sixth Schedule to the Constitution of India, the Mizo District (Inheritance of Property) Act, 1956' was also promulgated and received assent of Governor of Assam on 13th May, 1956.

Presently, the Mizoram State Legislative Assembly has passed the 'Mizo Marriage, Divorce and Inheritance of Property Act' on 12th November, 2014. The customary law was patriarchal and women in the state did not have any rights with respect to property especially on grounds of divorce irrespective of whether she was at fault or not. The newly enacted law has even been termed by some as 'a crow-bar that has knocked out the shackles worn by women in Mizo society' as it has done away with 'many shackles worn by women from days of their forefathers.' The Act is a huge milestone in changing not only the position of women in the society but towards achieving progress for the people of Mizoram as a whole. An attempt is made to study and analyse the Act to see whether the provisions are adequate to safeguard the rights of the women it has sought to protect in the first place.

### **RESEARCH QUESTIONS**

A woman's position is determined extensively on her capability of acquiring 'rights and privileges' through roles given to her. The methodology of research is secondary method based on data collection and interviews (December 2019) and the main objective of the paper is to

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3. Article 16(1) Convention on Elimination of All Forms of Discrimination Against Women.

bring out important observations and questions relating to 'socio- legal status of women'. Some questions are mentioned hereunder:

- Are particular laws in some societies the cause of gender bias?
- Is 'marriage, divorce and inheritance of property' law of Mizos the cause of discrimination on social and economic inequality of women in Mizoram?
- How do women look at acquiring land and inheritance to property law?
- How do social and customary practices of the people contribute to development and empowerment of women?

### **MARRIAGE**

The Marriage, Divorce and Inheritance of Property Act, (hereinafter the Act) defines marriage in Section 3(r) as a 'union between a man and a woman' who are both major upon the happening of a sequence of events.<sup>4</sup> Further the Act makes it compulsory for the marriage to be solemnized<sup>5</sup> after which the *lawichal*<sup>6</sup> escorts the bride to the bridegroom's house to live with his family. Irrespective of whether the marriage is done according to customary law or solemnized according to the provisions of the Act, the marriage becomes binding and complete.<sup>7</sup>

The marriage price or bride price continues to remain the same as customary law. The bride price or *manpui* (main marriage price) as per the customary law is fixed at not less than Rs. 420/-. This includes *thutphah* or Rs.20/- as security money which is returned to the bridegroom's family. It is a symbol to let the bridegroom's family know that they are not sending their daughter to burden their family, but that the amount is to be utilized for her to invest and contribute to her marital home. The Act provides for compulsory recording of *man pui* that has been received through *palai* as per Schedule I of the Act.<sup>8</sup> Two copies must be made and one copy must be given to the bride's family and the other to the bridegroom's family. The distribution of bride price by the head of the family amongst the relatives of the bride is known as *man tang* (subsidiary

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4. These events are similar to the customary law i.e., once a male finds a suitable woman to marry it is intimated to the *Palai* who settle and finalize the marriage on behalf of the parents of both the man and the woman. After finalizing of marriage date, place and time, the bride price is handed over to the 'woman's family' through the *palai*.

5. Section 3(r)(iv) Mizo Marriage, Divorce and Inheritance of Property Act. The solemnization of marriage is done by a Licensed Officer who is authorized by any religious denomination to solemnize marriage.

6. *Lawichal* is defined as in Section 3(k).

7. Section 3(r)(vi).

8. *Id.*, at s 5.

marriage price) and such distribution is to be done according to Schedule II of the Act.<sup>9</sup>

A notice of intended marriage<sup>10</sup> is to be made known to the Licensed Officer<sup>11</sup> who shall then fix the date and time of marriage in consultation with the parties and solemnization of marriage may be done by the Licensed Officer in the presence of atleast two witnesses.<sup>12</sup> A marriage certificate<sup>13</sup> issued by the Licensed Officer is conclusive proof of marriage and such marriages shall be registered under the Mizoram Compulsory Registration of Marriages Act, 2007<sup>14</sup>.

The Act recognizes valid marriage, voidable marriage and void marriage. A valid marriage must satisfy the conditions laid down in Section 2(r) of the Act. A marriage is said to be voidable if a man and a woman are living together without being married according to customary rites and procedure. This includes *inru, tlandun, fan and luhkhung*.<sup>15</sup> All these acts involve the living together of a man and woman having no valid sanctity to it. A marriage is said to be void when (i) two persons of the same sex are living together as husband and wife (ii) a person is having a living spouse at the time of living with another person and (iii) either one of them or both of them are underage.<sup>16</sup>

An illegitimate child is recognized under the act. Illegitimate child is 'sawn' and an amount of Rs. 40/- is paid as 'sawn man' to the woman who has begotten the illegitimate child.<sup>17</sup>

The customary law on marriage has been retained in the newly enacted Act. The lawful recipients of bride price are male relatives of the bride (father or brother). Such differentiation to

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9. Ibid. Schedule II retains all the members or relatives to whom bride price is to be paid under customary law. The price also remains the same.

Sum hmahruai an amount of Rs. 60/- 'paid to the father of the bride' or the bride's brother or nearest relative.

Sumfang which is Rs./- 50 is paid to the maternal grandfather of the bride and in his absence the bride's uncle i.e., her mother's brother.

Pusuman amount of Rs. 40/- 'paid to the bride's maternal grandfather' or in his absence the bride's mother's brother.

Palal is 'paid to a person whom the bride considers as her adoptive father' and the amount is Rs. 30/-. The man who receives Palal has a responsibility to give the bride a fowl and a pot of beer or Zu bel or monetary equivalent of it. He is seen as a trustee and is supposed to look after the bride's interest throughout her married life.

Ni-ar is an amount of Rs. 20/- paid to the paternal aunt of the bride. If there are many aunts the eldest aunt is given Ni-ar of the eldest niece and the second aunt takes that of the second niece and so on.

Naupuakpuan Rs.20/- is 'paid to the elder sister of the bride' for looking after the bride as a baby. It is especially given to her as a token for having held the bride who is her younger sister on her back when she was a baby and the cloth used is known as puakpuan (or carrying cloth).

10. *Id.*, at s 6.

11. *Id.*, at s 2(j).

12. *Id.*, at s 7.

13. *Id.*, at s 11.

14. *Id.*, at s 12.

15. *Id.*, at s 8 and Explanation.

16. *Id.*, at s 10.

17. *Id.*, at s 2(w).

payment of bride price only *lendssupport* to the power men have over women in the society. The man tang (or subsidiary bride price) also reinforces importance of men in *Mizo* society and shows that paying bride price only denotes 'exchange of control over the woman by the father to the husband'. Again all of them are men (*Sumhmahruai, Sum fang, Palal, Pusum*) and the woman who receives man tang as Ni-ar is also sister of the bride's father. The bride's sister is paid bride price of *Naupuakpuan*, for looking after her younger sister which is of the least amount. The authority that men have can be easily seen in the distribution of bride price. 'The father of the bride and in his absence the brother of the bride' is paid the man pui and the mother nowhere figures as a recipient. This further shows that a son holds more importance in the society than a mother.

The most important feature that portrays gender disparity is exhibited in the domination of males in the system of bride price. The bride price does not attach any monetary value and is a nominal amount of Rs. 420/-. The Act has kept the same amount and did not make any changes to it. It is a mere depiction of social value and prestige. As has been rightly pointed out by one elderly person, "The status of women will not change as long as they have a price tag on them. They have been bought, a man can divorce (or ma) her anytime he wants. They are no less than slaves. I wish we will do away with the bride price." Even if it is said that bride price is still prevalent because it is tradition and does not in any way signify selling of the bride, there are those who still spew words like "Are you going to sell your daughter?" The women not only have a price tag which is really minimal but it also makes it easier for the men folk look down on them. The customary law is not being followed in its entirety and the mindset of the people is still very much driven by days of old.

### **DIVORCE**

The bonds of marriage are not strict in *Mizo* society and *Inthen* or divorce is not much regarded as a stigma. A couple may separate simply due to a disagreement. However, having embraced Christianity as a religion, divorce is now seen as an abhorrent act and is taken seriously. Religion does not permit it but customary law recognized divorce of many kinds. Divorce in *Mizo* society can therefore be seen as a conflict between religion and the law. There are various forms of divorce recognized in customary law. Most divorces are settled on payment of money. "The woman goes back to her parental home and the man renounces all claims to any portion of her

price which he may have paid unless the woman agrees to its being partially returned.”<sup>18</sup> Since the validity of marriage is determined on payment of bride price, once a woman is driven out of her matrimonial home and bride price is paid in full, it denotes an end to the marriage. The customary law makes a distinction between a woman who commits adultery during subsistence of her marriage and after death of her husband. If adultery is committed while her husband is alive it carries with it severe punishment. The *Mizo* society puts female chastity on a high pedestal and a woman is required to uphold high standard of principles. This is not required in men and they are rarely judged on this basis. Uire as a form of divorce is associated only with women and the woman has no legal recourse when the man commits the same act. However, the society ensured that allegations of husband were not baseless and frivolous. If allegations claimed by the wife as false are proved to be true, the husband must take her back and if he does not take her back then it was considered as *Ma* or *mak* with all its consequences.

Customary law was not favorable towards the woman when it came to economic entitlement because she was usually sent away empty handed if her husband divorced her irrespective of her being at fault or not. Divorce is generally avoided by the woman as it is because of marriage they gain their identity, security and respect from the society. In addition to this divorced women are victim to social and economic insecurity. Divorce for a Mizo woman generally entails losing custody of her child/or children with no economic security for her future. The fact that she is divorced also lends to her a reputation of being a bad woman thereby leaving her stigmatized in a male dominated society. It was only when the husband voluntarily left the wife and children in *nupuitlansan* that the wife was entitled to have rights over the property and house left behind by the husband. It is therefore very evident that the customary law of the Mizos gave importance to the male and reflects the superior status that they hold in the society.

#### **DIVORCE PROCEDURE IN THE NEW ACT**

The Act defines divorce in Section 3(g) as “dissolution of marriage or separation amongst the Mizo by means of the Mizo custom namely: ‘Mak’<sup>19</sup>, ‘*Sumchhuah*’<sup>20</sup>, ‘*Kawngka Sula Mak*’<sup>21</sup>,

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18. *Supra note 5* at p. 93.

19. *Mak* or *Ma*: is a divorce given to the wife against her wishes. This is the a very common type of divorce. The man only has to say “*Ima you*” and send her out from the matrimonial home. However, if the woman committed adultery the husband had a right to keep the property.

20. *Sumchhuah*: This divorce happens at the behest of the woman who no longer wants to live with her husband. It is the woman who leaves the husband’s house voluntarily. *Sumchhuah* literally means ‘releasing the money’. Money here signifies the bride price.

21. *Kawngka Sula Mak*: Sometimes a married man falls in love with another woman because of whom he divorces his wife and marries a different woman on the very same day or next day of the divorce. Such divorce is termed

‘Uire<sup>22</sup>’, ‘AtnaavangaInthen<sup>23</sup>’, ‘NupuiFanauchhuahsan<sup>24</sup>’, ‘Sumlaitan<sup>25</sup>’.” Section 13 of the Act retains grounds for divorce according to customary law and provides additional grounds like cruelty, virulent and incurable form of leprosy or communicable disease, spouse has not been heard of as being alive for a period of seven years or more. Another significant ground for dissolution of marriage mentioned in the Act is “wife refusing to go on *lawi*”<sup>26</sup>. Sub-section 2 of section 13 further provides that a spouse found guilty of rape, sodomy or bestiality may also present a petition for dissolution of marriage. Judicial separation may be granted by a court on these grounds as well.<sup>27</sup>

The Act has a designated chapter dealing with distribution of property on divorce.<sup>28</sup> This chapter provides the manner in which property should be divided on grounds of divorce. The Act recognizes three kinds of property: acquired property, ancestral property and personal property. All movable and immovable property which is not registered in the name of any member of the family is deemed to be the property of the head of the family and the head of the family has the right to dispose of such property in any manner as he or she likes. Such property however excludes service/pensionary benefits. Also a ‘woman’s personal property<sup>29</sup> shall not be disposed without her consent’. The customary law regulating the division of property depending on the form of divorce has been changed as different kinds of property are now recognized under the Act. Therefore, *now under* the Act, ‘when a woman leaves her husband on ground of *sumchhuah*’, she only has a right to take her personal property and has no right over the property

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kawngkasulamak. Kawngkasulamak literally translated is the old wife goes out of the door as the new wife enters in.

22. Uire or Adultery: If married woman has committed adultery during marriage or within three months of the death of her husband she is known as uire. A woman who has committed adultery has to be ‘driven out of her husband’s house naked and will have to return whole bride price’. She will not be allowed to claim her *thuam* and property.
23. AtnaavangaInthen: It is divorce on grounds of mental illness or insanity. The customary law laid down that if after marriage the wife becomes insane and does not recover from it after a period of three years, then her husband was at liberty to divorce her on grounds of *peksachang* (retain the amount of marriage price). If it is the husband who has become insane after the marriage and the wife leaves him before three years then it is *sumchhuah* divorce and the wife shall refund the entire amount of marriage price to the husband.
24. NupuiFanauchhuahsan: When a man leaves his wife and children and goes and makes a home elsewhere, it is a ground for divorce.
25. Sumlaitan: This form of divorce happens on agreement or by mutual consent. As and when both parties agree to separate, the marriage price shall be divided equally between them.
26. *Id.*, at s 13(1)(vii). ‘*Lawi* is an act of the bride entering the home of the bridegroom after leaving her own home upon marriage.’
27. *Id.*, at s 14.
28. *Id.*, at Chapter VI.
29. *Id.*, at s 3(x) defines “woman’s personal property as any property purchased or gifted or inherited and owned by a woman as her personal property and includes ownership of property registered in her name and brought by her to her husband’s house at the time of marriage.”

acquired by the family. However, if “due to domestic violence or cruelty of her husband, or her husband is wantonly sexually unfaithful or her husband has become insane, or if she is deprived of her conjugal right except on ground of health and she is compelled to leave her husband because of such reasons, then she cannot be deprived of her right over the acquired property.<sup>30</sup>” If the husband divorces his wife on mak provided such divorce is not on ground of adultery or the wife having deprived her husband of conjugal right, she is entitled to a share of any type of acquired property and her personal property. When the husband divorces the ‘wife on ground of adultery or deprivation of his conjugal right except on ground of health’, the wife is entitled to a share of the ‘acquired property not exceeding 25% alongwith her personal property’. When the husband voluntarily leaves the wife on ground of *kawngkasulamak*, she is to be given a share of upto 50% of the acquired property. If divorce happens on mutual consent both will share the acquired property as mutually agreed between them. The acquired property will be equally divided between the man and woman on grounds of divorce due to “incurable unsound mind, virulent and incurable form of leprosy or any incommunicable disease. A person who has deserted the family shall have no share over the acquired property.” The Act has therefore made inroads into the possibility of the female having rights to acquired property which she was not entitled to under the customary law. The strict rule of customary law that denied the woman to take any property when she committed *uire* or adultery has been diluted under the Act. As we have already mentioned the new Act has now done away with old notion that says that a woman cannot take any property alongwith her on being divorced in certain situations.

### **INHERITANCE OF PROPERTY**

Inheritance as a general rule means the legal transfer of property from an ancestor to his or her descendants on the death of the ancestor through succession or will. The customary laws of Mizo on inheritance are based on certain principles. The youngest son in the family is appointed to inherit the ‘father’s land and property’, although occasionally the eldest son also claims a share.<sup>31</sup> The youngest son is chosen to inherit the father’s property because he is expected to ‘look after his elderly parents in their old age’. In some families, the property is also divided amongst all the sons but the youngest son still inherits a major portion in this case as well. However, it is customary practice that if inheritance is from father’s property, it is must

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30. *Id.*, at proviso to s 25.

31. Dev B.J&D.K.Lahiri, *Lushai Customs and Ceremonies* (1983).

beallocated to all his sons. When the father ‘divides his property among his sons before he dies’, it must be accepted by the sons. A man can disinherit his son when the son refuses to look after him when circumstances demand it. As a customary practice a daughter has no share in her father’s property except when there are no sons. In such situations, the daughter will inherit property and if there is more than one daughter then the father will divide it equally between them. If this is not done then it is the next kin or nearest male relatives or his brothers or father (if he is still alive) will get a share. A married daughter very rarely inherits property in her own right. But if a man having no son dies then the married daughter inherits his property or failing the daughter his widow. A man cannot will property contrary to customary law.<sup>32</sup>

The customary law recognises various kinds of inheritance. These are as follows:

**Pa Rokhawm:** When the son directly inherits from his father’s property it is known as Pa Rokhawm.

**PamiRokhawm:** Property inherited from a father’s brother or paternal uncle.

**Unau Rokhawm or Inheritance from Brother:** If a man having no child or children dies, his entire property is succeeded to by his brother. If however, there are minor children and his property inherits the property, it is the responsibility of the brother to look after the deceased’s brother family. The widow of the deceased is allowed to look for someone else to support her and her children if the brother is unable to support his deceased brother’s family.

**Pu Rokhawm:** Property inherited from paternal grandfather.

**Fa Rokhawm:** Property inherited by father from a deceased son.

**Ni Rokhawm:** Property inherited from paternal aunt.

**Chawmhlum Rokhawm:** Property inherited by someone other than a relative or clansman, who lived in the house with the deceased and supported him during his lifetime.

**‘MichuangRokhawm or Inheritance from a Vagabond’:** If a vagabond dies in the house of a man as his guest, the man in whose house he dies has a right to inherit all his property.

Inheritance from distant relative or clansman: Such persons are considered as heirs where there is failure of nearest blood relatives to inherit property. The inheritance is governed by the same rules as inheritance by full brother.

A child adopted for purpose of inheritance with consent of village authority was considered valid and was termed Roluah Tura Siam or Faro Luah.

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32. *Supra note 20* at p. 103.

The law dealing with inheritance of property is provided under Chapter VIII of the Act. The Act in these sections has retained the customary law in its entirety, giving preference to the male child. Since the Mizo society is patrilineal in nature, inheritance is determined from the male line. The youngest son is chosen to inherit the father's property because he is expected to look after his other siblings who are still unmarried. The Act provides that 'on the death of the head of the family', the property will be divided in equal shares between all the sons and the widow of the deceased and that an extra share will be given to the youngest son.<sup>33</sup> This portrays the responsibility given to their brothers by women in the Mizo society. However, with change in time and scenario according such responsibility to a brother can become a burden. Also, if the youngest son is married, his responsibility shifts and it becomes embarrassing for the sister to look upon her brother for everything. It can cause tension between the brother's wife and her as well. All families may not be in the same position with respect to the property held and owned by it. However, keeping in mind the future of females and position of property in the family, the time has come to distribute property in a manner that will help and benefit her. It is only in the absence of male sons that the female daughter is considered eligible to inherit. An exception has been carved into the Act wherein it is stated that 'if an unmarried daughter is the main bread earner and has been providing for her parents and siblings, then she becomes eligible for a share that is equal to the share of the son or sons and wife of the head of the family.'<sup>34</sup> One of the main reasons a daughter has not been given importance to inherit as an heir is largely because of the belief that upon her marriage she ceases to be member of her father's family. But it is important to keep in mind that no one knows the kind of husband that the daughter will get married to, neither the kind of family she will be married into. It becomes unclear as to what the future holds for her. The society seems to have ignored all such matters and have considered her as eligible to inherit only if she is the 'bread earner' in the family.

The Act has made it possible for an unmarried daughter to inherit her father's property on his death, when there is no male son. She inherits the property with her mother. This is a welcome provision as this was not possible under the customary law. However, even when women inherit land and property there are difficulties faced by them. There are cases like the case of Mathiangi who was named as a legatee in her aunt's property. She claims she had to undergo prolonged

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33. *Id.* at s 30(2).

34. *Id.*, at proviso to s 30(2).

legal proceedings because of objections raised by her relatives. She had strained relations with them as she was not the lawful heir according to custom and tradition. This case is an example of how law can be manipulated in the hands of those who have upper hand in the family and society. Ignorance of law and habitual adherence to what society sees as 'how things should be' makes a woman vulnerable and ultimately pushes her to choose customary laws to decide disputes relating to 'marriage, divorce and inheritance of property' which as we have seen is favorable towards men.

### **CONCLUSION**

The 'Marriage, Divorce and Inheritance of Property Act, 2014' is an important legislation and has come a long way. A closer look at the codified law merely reflects a modification of the existing customary law so that it is updated according to the needs of the present society. Nevertheless, several new provisions have been incorporated in the Act and has tried to empower and strengthen the position of women in marriage, divorce proceedings and rights to inheritance of ancestral property. The social and economic status of a woman has found place in her 'father's property as well as the ancestral property' of the family.

The Act has now made it possible for a divorced 'wife to have a share in the acquired property' of the husband and wife. The Mizo customary law did not have any such economic provision except where the husband deserted the wife as in *Nupui Tlansan* and the wife acquired rights over the house and property left behind by the husband. As we have already mentioned the new Act has now done away with old notion that says that a woman cannot take any property along with her on being divorced in certain situations. While the Act may have been hailed as emancipating the rights of a divorced wife, it remains to be seen whether courts can provide the relief to the woman/wife who has made equal contribution to the family home or to the one who has been the sole bread earner in the family. Does the law provide an answer to the question where all properties belonging to the family were acquired by the earning wife?

The law is still consciously repressive so far as inheritance rights of the father's property are concerned and the daughter/female is still the second in line to the son. On closer analysis of the provisions on inheritance it seems that the legislature did not make any significant change in so far as the line of descent from the male ancestor is concerned. One of the most prominent features on inheritance in the Mizo society is the custom that says that the youngest son is appointed heir to the land and property belonging to the head of the family.

Change is inevitable but change does not always come the way we want and expect them to. However, it is a welcome change. The women from Northeast are not equipped with formal laws which recognize and protect their rights unlike their counterparts in the rest of India. Although many of the provisions in the Act may not formally recognize all the rights that the women from this region are entitled to, provisions that say a woman on divorce or being divorced will be entitled to a share of the acquired property is a huge milestone. The strictly patriarchal set up of the society that never permitted a woman to have any share in the property of the family has now changed. So far as how effectively this new law will be implemented is concerned, we will have to wait and see how the courts apply them in the coming days.

## REGULATION OF 'BIG DATA' UNDER COMPETITION LAW IN INDIA: THE BRAVE NEW WORLD

Kritika Singh\* & Sarthak Mishra\*\*

### INTRODUCTION

The transition from an isolated world to an interdependent world and thereafter to the interconnected world at present has been greatly influenced and facilitated by the technological advances. The advent of Globalisation in the early 1990s led to increased interaction and integration of human resource and capital resource, leading to unwarranted implications of both positive and negative nature. However, the turn of the millennium witnessed a new global phenomenon i.e. digitization of the economy, which was characterised by a meteoric rise of the e-commerce and other online platform-based services.<sup>1</sup>

The functioning of these online platforms in question has a stark difference to that of the functioning of the brick and mortar businesses, which put them on a different pedestal. Unlike, the brick and mortar businesses which rely on factors such as, brand value, monetary strength etc. to build upon their '*visibility amongst the consumers*' and '*market presence*', the e-commerce is entirely dependent on information relating to the personal life of a person. The business models of these platforms are based upon collection and monetisation of the data about several facets of an individual's personal life. This data owing to their nature and relevance in terms of giving insight to an individual's psyche is termed as 'Big Data'<sup>2</sup>.

Around 2016, OECD (Organisation for Economic Co-operation and Development) took the first step in the analysis of "Big Data"<sup>3</sup>. OECD started the deliberations and two essential features of big data came into light:

1. Large dimensions of data sets.
2. Use of large-scale computing power and non-standard software to extract value from data in a reasonable amount of time (Volume Value Velocity Variety).<sup>4</sup>

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1. Maurice E Stucke & Ariel Ezrachi, How Digital Assistants Can Harm Our Economy, Privacy, and Democracy 32 Berk. Tech. L. J. 1239 (2018) [stucke & Ezrachi, 2018]
2. Sasa Batistic & Paul van der Laken, The History, Evolution, and Future of Big Data & Analytics: A Bibliometric Analysis of its Relationship to Performance in Organizations, 30(2) BRIT. J. MGMT. 229 (2019).
3. Organisation for Economic Cooperation and Development, Summary of Discussion of Hearing on Big Data, DAF/COMP/M(2016)2/ANN2/FINAL, 1-8, (2017). [oecd Big Data Summary Discussion]
4. Andrea De' Mauro et. al., A Formal Definition of Big Data based on its Essential Features, 65(3) LIB. REV. 122 (2016).

Given the current economic dynamics, where the growth prospects of the digital markets are on an upward trend, it would not be wrong to suggest that data indeed is the currency of the present world. In the digital markets (including e-commerce), data plays a rather significant role as it allows the players in the market to have a better understanding of the consumer preferences, leading to more precise advertisements and increased targeting possibilities for multinational giants. Thus, the information and knowledge so derived from this data have a direct implication on the competitiveness and growth of a player in the digital market.

The concerns of Big Data, however, are not limited to economic or privacy issues only but one can see the impact to the extent on the political arena and democratic value as could be seen and highlighted from the Facebook - Cambridge Analytica data breach case.<sup>5</sup> This case was a major political scandal in 2018 where revelations were made that Cambridge Analytica harvested millions of Facebook's user's data without their knowledge or consent and used it for political advertising.<sup>6</sup> Therefore, given the wide import of the possible impact of big data, there is a growing concern worldwide to put a leash on the unchecked powers of Digital Platforms and accumulation of data in few hands.

Resultantly, the scope antitrust laws have been widened to such online markets and digital platforms within its ambit, and mechanisms have been put in place to keep a check on the competitive strength of these digital markets are determined by quality, amount and variety of big data they accumulate.<sup>7</sup>

In India, the regime Competition Law has developed exceptionally in recent years owing to regulation by antitrust authorities not only traditional activities of businesses but also in areas which in antiquity were natural monopolies of the government like telecommunications and the energy sector. Owing to the recent spurt in the digital platforms in India over the last decade, necessitated the revisiting of the competition regulatory regime of the country, to cater to changing dynamics and technological integration.<sup>8</sup>

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5. Elena Boldyreva, Cambridge Analytica: Ethics and Online Manipulation with Decision Making Process, in EUROPEAN PROCEEDINGS OF SOCIAL AND BEHAVIORAL SCIENCES 91-102 (Prof. Valeria Chernyavskaya, Prof. Holger Kube (eds.), 2018) [BOLDYREVA].

6. Ibid.

7. D Daniel Sokol & Roisin Comerford, Does Antitrust Have A Role to Play in Regulating Big Data?, in THE Cambridge Handbook of Antitrust, Intellectual Property, And High Tech (Roger D Blair and D Daniel Sokol (eds.), 2017).

8. Injeti Srinivas, Report of The Competition Law Review Committee (2019).

Resultantly, on January 8th, 2020 Competition Commission of India (CCI) submitted a report on the Market study on E-Commerce in India where it highlighted the rapid growth and the rising importance of online trade-in of large no. of product categories. The report also attempted to gain a better understanding in terms of the functioning of e-commerce/digital economy in India and its plausible implications on market and competition law.<sup>9</sup>

The coming chapters in this paper the authors will attempt to draw analysis from various jurisdictions in the global developments and provisions concerning e-commerce and to see whether India has the flexibility to include Digital markets and Big data issues in our existing framework of competition laws and regulations or do we need to amend our laws specifically to deal with what digital markets necessitate.

#### **INTERPLAY OF DATA IN DIGITAL ECONOMY AND MERGER CONTROL REGIME: A CONUNDRUM WITHOUT SOLUTIONS**

The term big data was used for the first time in popular culture by John Mashey Though across the world we haven't defined Big data properly and what it constitutes, but it can commonly be understood as using computing power on a large scale and technologically advanced software to collect, process and analyze data characterized by a large volume, velocity, variety, and value.<sup>10</sup>

In this paper, the authors have looked into the three already defined characteristics or features common to the attempts made to define big data. They being:<sup>11</sup>

- Volume: The amount of data from Madrid sources.
- Variety: The type of data for that is structured semi-structured and unstructured.
- Velocity: The speed at which the data is generated.

Furthermore, three more features have been added to supplement the above characteristics:

- Veracity: Which implies the degree to which big data can be trusted.
- Value: Which is the business value of the data so collected.
- Variability: Which is how big data can be used and configured.

The significance of data in digital markets including e-commerce plays a very key role in delivering more precise advertisement targeting possibilities for multinational giants. The information and knowledge that can be derived from this data is a basis for individual players

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9. Competition Commission of India, Market Study On E-commerce In India: KEY FINDINGS AND Observations (2020).

10. Oecd Big Data Summary Discussion, Supra note 3.

11. Isaac R. Porche, Big Data: Challenges And Opportunities, 8 (Rand Corp. 2014).

competitiveness and growth in digital markets, it is for this reason, they have been referred to as the '*currency of the new digitised economy*'<sup>12</sup>. This, however, does not discount the possibility where the accumulation of big data leading to negative welfare effects, in particular, having control over and being able to analyse large volumes of data may become a source of absolute and incumbent power within the market players in the digital economy.<sup>13</sup>

But having stated the same, one cannot dismiss the pro-competitive effects of big data like the companies or business entities willing to provide heavily subsidized, often free, services to consumers as consumers allow those companies to monetize consumer data on the other side of their business, resulting in better service delivery, enhanced innovation and technology, and low entry barriers also in the concerned relevant market.<sup>14</sup>

Here what the authors concern is that these big tech companies use "data" as the radar system to track competitive threats which are upcoming companies in that specific industry and then they acquire these upcoming new entrants before they become significant threats and then become too big to fail. The use and access of this data after the merger with companies with low turnover confer the acquiring enterprise a market power by which it can have an edge over its competitors in the market which will ultimately harm the competition in the market.

This has necessitated for most advanced jurisdictions to currently explore the possible strategies to seize and address the concerns presented by the digital economy. Hence the interplay of Antitrust regulations and Data privacy laws with developments in the digital markets especially with strong network effects is the are of research the authors are trying to focus upon.

#### **UNDERSTANDING THE IMPLICATIONS OF BIG DATA**

Data as an antitrust issue has come into light in the current era is because of the dramatic change in the size and scope of data collected by firms these days. This chapter engages arguments where authors are trying to comment as to how Big Data can be used to perpetuate an unfair competitive advantage by enterprises and consequently distort competition and harm consumers.

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12. MAURICE & EZRACHI, 2018, Supra note 1.

13. Peter Schepp & Achim Wambach, On Big Data and its Relevance for Market Power Assessment, 7 JECLAP 2 (2016).

14. David S. Evans & Richard Schmalensee, The Antitrust Analysis of Muti-sided Platform Businesses, in 1 Oxford Handbook On International Antitrust Economics 404 (Roger Blair and Daniel Sokol (eds.), 2014) [evans And Schmalensee].

Now the basic question that is needed to be answered here is whether the use and access of Big Data by various enterprises confer them a market power by which they can have an edge over their competitors? To be simply put, given the data analysis tools and the development of complex self - learning computational algorithms entail substantial investment, can the possibility of highly focused, highly concentrated market entry barriers due to the exposure to big data be discounted.<sup>15</sup>

Before answering the above question, an understanding regarding the working of such a system becomes rather pertinent. Explaining the same through an example, let's say an enterprise has employed algorithms which analyses and records the search terms being entered by a user. Thereafter, a detailed user profile is created, which includes the whole collection of data obtained from applications such as data processing services and e-mails. These user profiles, which include unique and individual details, are then marketed to retailers and online marketers for target advertising. E-Commerce platforms, using such data, may collect information about the user's search history.

In such circumstances, there might arise two major implications, first, with regards to inequitable distribution of big data leading to a concentration of the market in a hands of few big market players and secondly, concerning the valuation of this data for determining the thresholds under section 5 of the Competition Act.

#### **i. UNEQUITABLE DISTRIBUTION OF DATA: A PRECURSOR TO DOMINANT POSITION?**

Before discussing abuse dominance by data-driven mergers, it is pertinent to answer the following two questions, *first*, whether the accumulation of big data in a standalone capacity or conjunction with other relevant factors, lead to a dominant position? and second, whether the use of big data might result in a possible abuse of such a dominant position?

It is important to clarify at the outset that access to Big Data has the potential to play a pivotal role in improving the quality of the products and services. Access to the information about the consumer's preferences will enable the enterprises to streamline their efforts in developing products which are better suited for catering to the consumers' needs.<sup>16</sup> The necessary

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15. Autorité de la concurrence & Bundeskartellamt, Competition Law and Data, (2016) [JOINT REPORT].

16. European Data Protection Supervisor, Privacy And Competitiveness In The Age Of Big Data: The Interplay Between Data Protection, Competition Law And Consumer Protection In Digital Economy (2014).

conclusion that follows is that the enterprises having better access to such data will be in a better position to exploit and cater to the consumer needs, thereby, increasing their consumer base and consequentially their market presence. It is in this context, access to big data or big data accumulation becomes relevant in attaining a dominant position by an enterprise.<sup>17</sup>

For example, big search engines have the opportunity and ability to prioritize paid advertising over organic search results that are more appropriate, of better quality. More visibility shown more prominently on a search engine benefits both the advertiser and the search provider. Further ads increase the user click chances. That, in effect, implies a greater probability for the platform provider of a pay - per - click conversion, and a better chance for the advertiser to sell a product.

As a common knowledge, under the Competition Act having a dominant position is per se illegal, but its abuse is. In a scenario, where access to big data translates into a better quality of products and increased market presence, the competition to accumulate data of such nature becomes inevitable. Such competition between firms become the root cause of concerns about big data and the plausible situation of abuse of dominance.<sup>18</sup>

The smaller enterprises, due to lesser resources in comparison to their bigger and well-established competitors, are often on the receiving end of such competition and fail to gain access to a large amount of data and hence may not able to provide quality services in comparison to these larger enterprises.

As this data gap (which may also translate in to the quality gap), widens between the bigger firms and its smaller competitors, it destabilises the status quo of the various players in the market, thereby, adversely affecting the existing competition in the market. The decreasing competition in the longer run undeniably strengthens the market presence of the bigger players leading to a concentration of market power and creation of a dominant position.<sup>19</sup>

Further, broadening of the gap might also result in a smaller enterprise being unable to have sufficient volume of data, to deter its bigger rival from losing any degree of search efficiency in favour of increasing profitability on the paying side. The fact that a large search engine has exposure to a higher volume of data, and thus can improve quality to a much higher degree.

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17. Joint Report, *Supra note 15*.

18. OECD, 'Big Data: Bringing Competition Policy to the Digital Era' DAF/COMP(2016) 14 (27 October 2016).

19. Maurice E. Stucke & Ariel Ezrachi, When Competition fails to Optimise Quality – A Look at Search Engines, 18 YALE L. J. 70 (2016) [MAURICE & EZRACHI, 2016].

When this position is coupled with the dominant position being enjoyed by an enterprise, a reasonable implication may follow, that the possibility of compromising on the quality of services being compromised in favour of profiteering is rather high.<sup>20</sup>

### **1. Accumulation of Big Data leading to Stifling of Innovation: The TRIVAGO Instance**

Where the value proposition of an enterprise is focused on the collection and monetization of user data, if that enterprise collects so much user data that it is reinforced, it can obtain both the capacity and the opportunity to use that data in various ways to remove potential challengers.<sup>21</sup> As this happens, smaller rivals are blocked from accessing the necessary data and there is reduced incentive for these enterprises to innovate and compete with larger dominant enterprises.

The best example of this situation real life is the TRIVAGO acquisition of TRIPL. This Hamburg-based company had developed an artificial intelligence-based platform an algorithm which can imitate the way a travel agent would recommend hotel experiences<sup>22</sup> Now Tripl algorithm makes recommendations based on the social media activity of a user, as well as similar user data in-ap. Tripl pulled interests data from Facebook (“I like kitesurfing”) and a questionnaire (“Which of these are your vacation goals? Culture, Party, Relaxing, Romance, and Luxury?”) to make destination and activity recommendations based on what like-minded people tend to book.<sup>23</sup>

Other factors, like weather forecasts and pricing, affect its recommendations, too.<sup>25</sup> Though the acquisition deal was never made public TRIVAGO acquired this small company at the time when there were only two employees co-founders Hendrik Kleinwaechter, and Christian Heimerl, respectively and the deal was only about \$270,000, or €230,000, which is undoubtedly very small. Now the announcement from Trivago came just weeks after Booking.com revealed it had acquired a tiny software company called Evature.

Now, this example of a dominant firm with access to Big Data acquiring a small start-up which

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20. EPDB, Statement of the EDPB on the Data Protection Impacts of Economic Concentration (27th August 2018).

21. Maurice & Ezrachi, 2016, Supra note 19.

22. Linda Fox, Trivago acquires Tripl for Personalisation Drive, Phocus Wire (Sep. 26, 2017), <https://www.phocuswire.com/Trivago-acquires-Tripl-for-personalisation-drive> (last accessed Aug. 15, 2020).

23. Sean O'Neill, Trivago makes a Tech Acquisition that bolsters and Industry Trend, Skift (Oct. 04, 2017, 12:30 am), <https://skift.com/2017/10/04/trivago-makes-a-tech-acquisition-that-bolsters-an-industry-trend/> (last accessed Aug. 21, 2020).

24. *Ibid.*

has the potential to become a competitor in future for this dominant firm acquired this start-up thereby stifling rising competition by limiting or preventing their access to necessary data, or by acquiring them like in this case. Where market leaders with deep pockets acquire potential or actual new entrants, a source of innovation is removed, and competition suffers and thereby stifling innovation eventually.

As it has been already observed by the CCI as well by the Hon'ble Supreme Court, a dominant position although not prohibited, yet, should be avoided as it often proves to be the antithesis to quality maximisation and innovation.<sup>25</sup> Thus, one can reasonably conclude that the larger firm in this scenario is not driven to innovate or to maximize quality for the consumer.

## **ii. EXCESSIVE DATA ACCUMULATION AND THREAT OF ABUSE OF DOMINANCE**

Section 4, Competition Act provides that no dominant enterprise/group shall abuse its dominant position.<sup>26</sup> There has been a long-standing tradition, where the competition regulatory authorities have penalised enterprises for abusing their dominant position to create entry barriers and thereby distorting competition in the relevant market.<sup>27</sup> Given the relevance and significance of big data in the contemporary digital market, it would not be a far cry for the regulatory authorities to intervene and prevent the exclusionary practices by the enterprises having access to a significant volume of data.<sup>28</sup> For the current article, the authors would be focusing two specific aspects of abuse of dominance due to leveraging of big data namely: *excessive data collection amounting to 'excessive price'<sup>29</sup> and excessive data collecting resulting in 'unfair trade practice'<sup>30</sup>.*

The literature and jurisprudence relating to possible abuse of Big Data in India are rather constricted, hence, the authors would rely upon the available literature for the EU regime, owing to its similarity with that of Indian competition regime.

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25. Matrimony.com Ltd v. Google LLC & Ors, 2018 CompLR 101 (CCI).

26. Competition Act 2002 § 4.

27. All India Online Vendors' Association v. Flipkart India Pvt. Ltd. Competition Appeal (AT) No.16 of 2019; Matrimony.com Ltd v. Google LLC & Ors, 2018 CompLR 101 (CCI); XYZ v. Grasim Industries Ltd. (Case No. 62/2016); Shamsher Kataria v. M/S Honda Siel Cars Pvt. Ltd., 2014 CompLR 1 (CCI); Fx Enterprise Solutions v. Hyundai Motor India Ltd., Case No. 36&82/2014.

28. Maurice E. Stucke, Should we be concerned about Data-opolies?, 2 Georgetown L. Tech. Rev. 275, 284 (2018).

29. Competition Act 2002 § 4(2)(a)(ii).

30. Competition Act 2002 § 4(2)(a)(i).

### 1. Excessive Data Collection vis-à-vis 'Excessive Price'

Such an abuse considers the possible effects of the third-party tracking<sup>31</sup> on the users.<sup>32</sup> The underlying premise behind such an argument is an analogy drawn between the economic value of physical good and 'Big Data' is considered as the currency in the arena of the digital market.<sup>33</sup> EU competition law allows for such an analogy where the criteria for excessive prices as set out in the case laws – namely: the *excessive nature of the price as compared to the economic value of the product and the unfair nature of the price*<sup>34</sup> – are met by an excessive collection of data.<sup>35</sup> Although excessive prices are the 'simple form of exploitation' they are also surprisingly controversial, owing to the subjectivity of the term 'excessive'<sup>36</sup>.

The central pillar of excessive pricing is the existence of a monetary price. Economists may already be able to express the value of personal data in monetary terms, thus enabling us to 'calculate' whether the data collection has been excessive.<sup>37</sup> Excessive data collection can be treated as an abuse of excessive prices where sets of personal user data can be attributed a market value through a price.<sup>38</sup> At this juncture, however, the authors consider it appropriate to note that there is a rather important caveat to this analogy: the value of personal data depends very much on the specific subject that needs to be assessed on its monetary value, for example, for the data collector and the person whose data is at issue.<sup>39</sup> It may therefore be difficult to agree on the price of the data.

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31. Third - party tracking is a practice that allows a researcher to gather large amounts of personal usage data from a variety of first-party outlets in the online environment and across platforms such as smartphones , tablets and laptops, and servers, ultimately creating a detailed user profile.

32. Ariel Ezrachi & Viktoria HSE Robertson, Competition, Market Power and Third-Party Tracking, 42 WORLD Competition 5 (2019); Joel Purra & Niklas Carlsson, Third-Party Tracking on the Web: A Swedish Perspective. 28 IEEE 29, 31 (2016).

33. Oliver Budzinski, Competition Rules for Digital Age – The Economy of Personalised Data, Consumer Protection and 9th Amendment to the GWB, 43(2) Forum For Economic And Foreign Policy, 221, 228-230 (2017).

34. Apple/Shazam, Case No. COMP/M.8788 (2018); Facebook/WhatsApp, Case No. COMP/M.7217 (2014); United Brands v. Commission, Case No. 27/76, 252.

35. European Data Protection Supervisor, Supranote 16; Konstania Bania, The role of Consumer Data in Enforcement of EU Competition Law, 14 European Comp. L. J., 38, 42 (2018) [BANIA].

36. Ariel Ezrachi & David Gilo, The Darker side of the Moon: Assessment of Excessive Pricing and Proposal for a post-entry Price cut Benchmark, in Article 82 Ec: Reflection On Its Recent Evolution 169 (Ariel Ezrachi ed., 2009).

37. OECD, Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value, Oecd Digital Economy Papers No. 220 (2013); Giancaludio Malgieri & Bart Custers, Pricing Privacy – The Right to know the value of your Personal Data, 34 Computer Law And Security Review 289 (2018) [MALGIERI & CUSTERS].

38. Wolfgang Kerber, Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection, 11 J. Intellectual Property L. & Practice, 856 (2016) [KERBER].

39. Harri Kalimo & Klaudia Mejcher, The Concept of Fairness: Linking EU Competition and Data Protections Law in Digital Marketplace, 42 European L. Rev. 210 (2017); BANIA, Supra note 35.

While data is sometimes referred to as the currency of the data-driven economy, the structure of the data varies considerably from that of the real currency. This difference in characteristics, particularly about the lack of data scarcity and imitability – means that legal provisions based on the monetary remuneration criterion cannot simply be applied to data without a significant change in value.<sup>40</sup> By expressing the value of personal data in monetary terms, it is also possible to lose sight of the non - monetary values associated with the data, such as privacy.<sup>41</sup> It is therefore clear that there are considerable pitfalls in comparing excessive data collection to excessive prices.

## **2. Excessive Data Collection vis-à-vis Unfair and Discriminatory Conditions in the purchase or sale of Goods and Services**

Article 102(a) TFEU, not provides for ‘directly or indirectly imposing unfair purchase or sale prices’ but also of ‘other unfair trading conditions’ and thus opens the door to the development of further harm theories under the provision. Both of these types of abuses are identified under the same heading of Article 102(a) TFEU, indicating that they are closely related to each other: unfair prices are merely a subcategory of the broader notion of unfair trading conditions. For this very reason, many of the analytical subtleties discussed above are also relevant to the excessive collection of data as a stand-alone category of abuse. Hence, it can be referred to the as necessary adaptation of the provision to digital ecosystems.<sup>42</sup>

The central question relating to the definition of privacy policies as an abuse of rights due to unfair trading conditions is then centred on the question of whether such privacy policies are to be regarded as unfair within the meaning of Article 102(a) TFEU.<sup>43</sup> As a result, some thought needs to be given to what characterizes fair rather than unfair trading conditions about third - party monitoring. In several cases involving exploitative abuses, the Court of Justice and the European Commission have set out criteria for establishing what makes trading conditions unfair.<sup>44</sup>

In *SABAM* (1974), for instance, the Court found that a collecting society engages in such unfair trading conditions where it ‘imposes on its member's obligations which are not necessary for the

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40. Torsten Korber, *Conceptual Recording of Digital Platforms and Adequate Regulatory Strategies*, 21 J. Copyright And Media L. 93 (2017) [KORBER].

41. *Constitution of India 1950, Art.21; Justice K.S. Puttaswami v. Union of India*, (2017) 10 SCC 1; MALGIERI & CUSTERS *Supra* note 37, 294; KERBERS *Supra* note 38, 857.

42. Nicolo Zingales, *Between a Rock and Two Hard Places: WhatsApp at the Crossroad of Competition, Data Protection and Consumer Law*, 33 COMPUTER L. & SECURITY REV. 553, 557 (2017) [ZINGALES].

43. KORBER, *Supra* note 40.

44. *Oecd Summary Discussion, Supra* note 3.

attainment of[ the agreement's] object and which thus encroach unfairly upon a member's freedom to exercise his copyright.<sup>45</sup> The European Commission interpreted the SABAM test as requiring an assessment of whether [the statutes of a collecting society] exceed the limits that are necessary for effective protection (indispensability test) and whether they limit the freedom of the individual copyright holder to dispose of his work no more than is necessary (equity).<sup>46</sup>

Similarly, in DSD (2001), the Commission held that ‘unfair commercial terms occur where an arrangement in a dominant position fails to comply with the principle of proportionality’<sup>47</sup>. The Commission emphasized that this norm was not adhered to where the contracting partner of the dominant company, as in DSD, had only an option between embracing unfair commercial terms or setting up its own scheme.<sup>48</sup> This indicates that the bargaining power between the contracting parties, as well as the particular conditions imposed on the weaker party by the stronger party, must be evaluated.

In the case of excessive data collection, when assessing the excessive nature of data collected via third-party tracking, one may need to take into account the blatant asymmetry between trackers and users in terms of their respective bargaining power.<sup>49</sup> Relying on DSD, it can be said that a user's choice lies between setting up their own social network, emailing system, or online search—or agreeing to the dominant service provider's extensive third-party tracking. This is further aggravated by the lock-in that users experience in the face of a lot of online platforms.<sup>50</sup>

According to the available literature, ‘unfairness’ within the meaning of Article 102(a) TFEU was also regarded as encompassing ‘clauses that are unjustifiably unrelated to the purpose of the contract, unnecessary restrictions on the freedom of the parties, disproportionate, unilaterally imposed or seriously opaque’<sup>51</sup>. In the case of personal data, unfairness concerning the collection of data may result from third - party monitoring that goes beyond the reasonable expectations of users at the time they consent to this practice, also taking into account the context in which the data is collected.<sup>52</sup>

Therefore, consideration must be given to whether such business models constitute legitimate

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45. BRT v. SABAM, Case No. 25/74, Pg15.

46. GEMA Statutes, [1981] OJL94/12, Pg 36.

47. Duales System Deutschland (DSD)[2001] OJL166/1, Pg 112.

48. *Ibid.*

49. Frederik Zuiderveen Borgesius & Joost Poort, Online Price Discrimination and EU Data Privacy Law, 40 J Consum Policy 347 (2017).

50. Zingales Supra note 42.

51. Giuseppe Colangelo & Mariateresa Maggolino, Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case for the EU and the U.S., (TTLF Working Paper No 31/2018) § 4.2 (2018)

52. BANIASupra note 35.

means of doing business or whether they amount to exploitative practices when large amounts of personal user data are collected by a dominant platform provider.

### **3. Facebook v. Federal Cartel Office (Germany): A Trial Case for Abuse of Dominance to Excessive Data Collection**

#### **Background**

The first test case for excessive data collection by third - party tracking is underway in Germany: in its decision of 6 February 2019, the German Bundeskartellamt examined the terms of service of Facebook under competition law because they allow Facebook to collect large amounts of user data from outside its social network. The Bundeskartellamt considers that this infringes the principles of European data protection, in particular as users are not aware of the extent to which Facebook may collect personal data on them – possibly rendering users' consent ineffective.<sup>53</sup>

The bone of contention in the case was the data collection through the third - party sources, including digital services owned by Facebook (e.g. WhatsApp or Instagram) or third - party websites and applications running Facebook APIs (application programming interfaces), such as the Facebook login option, the Facebook like-button or Facebook analytical services. As soon as a third party runs Facebook APIs, Facebook collects data from its users –even if the user does not use any of those features, and whether or not the user has blocked web tracking. These data can then be amalgamated with the Facebook data of the particular user.

#### **DUSSELDORF'S JUDGEMENT**

On appeal to the higher forum in Düsseldorf,<sup>54</sup> the Court rejected the view of the Bundeskartellamt on the abuse of domination and the violation of the GDPR rules. The Court explained that the legal provisions aimed at protecting the weaker party to an unequal contractual relationship do not necessarily seek to address the imbalance that arises from the 'market power' of the stronger party, but rather a bilateral imbalance inherent in the nature of such relationships ( e.g. the employer in relation to the worker, the seller in relation to the consumer, and the data controller in relation to the consumer). The Court stressed that the concept of exploitation, as the term 'technical competition law', refers to the exploitation of consumers as a result of dominance. Therefore, exploitation cannot be proved without showing that it would not be possible in the absence of dominance.

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53. Facebook, Case No. B6-22/16 (Bundeskartellamt Decision).

54. Facebook, Case VI-Kart 1/9 (V) (Düsseldorf Decision).

Having clarified the need for a causal link between dominance and allegedly exploitative behavior, the Court continues to examine whether it can be argued that Facebook is able to establish a link between the subscription of the social network and the processing of additional data because its social network services are indispensable for consumers. The Court held that it is not reasonable to claim that Facebook provides essential services to consumers on the grounds that these services do not cover essential needs and that a significant proportion of the German population prefers not to make use of these services at all.

In the light of these data, the Court held that consumers had a rational choice of allowing Facebook to use their personal data in return for the provision of zero-price services financed by advertising. In the view of the Court, the absence of other alternatives may not justify the presumption that consumers have no choice but to allow Facebook to process additional data in order to benefit from its social network services.

Finally, the Court also stated that the Bundeskartellamt erred in assuming that consumers' acceptance of Facebook's terms and conditions without reading them is an indication of their dependence on Facebook and thus a reflection of Facebook's ability to exploit consumers by abusing its dominant position. On the contrary, this was simply due to consumers' indifference to the processing of additional data by Facebook and their belief that the benefits of subscribing to Facebook's social network outweighed any potential disadvantages that could arise from the processing of additional data.

#### **MERGER REVIEW IN DIGITAL MARKETS: STRENGTHENING ANTITRUST ENFORCEMENT**

The ubiquity and impact of big data are very much given and appear in the current digital markets.<sup>55</sup> Some officials feel that and believe that the antitrust principles for traditional mergers and data-driven mergers are the same. For mergers specifically, competition authorities work on a prediction basis. The focus hence for antitrust regulatory authorities should be to concern themselves with the impact and effect of these mergers in concentrated markets.<sup>56</sup>

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55. Ben Holles de Peyer, EU Merger Control and Big Data, 13(4) J. COMPL. & ECON. 767 (2017).

56. Maria C. Wasastjerna, The Role Of Big Data and Digital Privacy In Merger Review, 14(2-3) EUROPEAN COMP J. 417 (2018).

**i. 'Big Data' and the Plausibility of Abuse of Dominance: A Merger Control Perspective**

There is an intense economic debate evolving in the last decade or so whether the current regime of merger control effectively protects against the potential harm to competition and innovation that may result from acquisition by dominant companies of small, young, innovative companies with little turnover at the time of their acquisition, but highly competitive potential.<sup>57</sup> There has been a gradual increase in the number instances of the Digital platforms acquiring hundreds of companies and most without facing any scrutiny from antitrust regulators.<sup>58</sup>

It is necessary to differentiate the merger control regimes prevalent in the traditional markets and the prevalent regime in the digital market. Due to the long-drawn transfer process involved in the acquisition of physical assets, any delay in intervention by the part of competition regulatory authorities is not that harmful. However, in a market which is data-driven, along with strong tendencies towards monopolization any mistake in approval of a merger or missing an important merger which could have harmful effects for a healthy competition can condemn an industry to turn into a monopoly. Further, the wide-ranging impact, these data-driven acquisitions often having a political flavour attached to as witnessed in the Cambridge Analytica case, mistakes could be irreversible.<sup>59</sup>

Since regards the Indian authority under the Competition Act 2002, the main reason for the regulation of mergers by Indian Competition regulators is to remove the potential threat to competition in the market, which is why mergers are ex ante controlled. Consequently, the identification and reversal of anti-competitive results after the transaction is rarely sought. However, the Act falls short of effectively regulating mergers in the digital market, as it is not very often the case that such mergers come within the prescribed threshold of turnover or asset criteria.

Implications of data are manifold on competition and one of how it manifests itself is in horizontal mergers where data is input for delivery in certain service. Data can be an important factor to look into consequences of how a merger affect the competition in the market. The

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57. Mirko Tobias Schäfer & Karin Van es (eds.), *The Datafied Society: Studying Culture Through Data* (Amsterdam University Press, 2017).

58. Daniel Sokol & Roisin Comerford, *Antitrust and Regulating Big Data*, 23 *GEO. MASON L. REV.* 1129 (2016).

59. Alex Hern, *Cambridge Analytica: How Did It Turn Clicks into Votes?*, *The Guardian* (May 06, 2018), <https://www.theguardian.com/news/2018/may/06/cambridge-analytica-how-turn-clicks-into-votes-christopher-wylie> (last accessed Aug. 28, 2020).

authors are trying to explore the idea that an enterprise might buy up a rival or a potential competitor in the specific industry or market where both exist, just have control over its data even if the turnover of the enterprise is very low. Some researchers have argued, that multinational large companies can use data as a 'radar system' to 'track competitive threats shortly after they take off' and then 'acquire new entrants before they become significant competitive threats'<sup>60</sup>.

The authors feel that especially for Indian competition regulatory authorities to be more vigilant in approving mergers where there is low turnover and high data, as the sole purpose for that merger can be to get the valuable data of the upcoming enterprise and monopolise that data in a way that the acquiring enterprise becomes a dominant player in that market. One can say here that consumer data, has become "the new raw material of business: an economic input almost on a par with capital and labour.

#### **ii. Data Monetisation and its interplay in the Merger Control Regime**

The concept of monetization of the data in the form of targeted advertising sales for antitrust purposes is not suspected to be harmful, but rather "economically-rational, profit-maximizing behaviour," which has resulted in consumer benefits.<sup>61</sup> As the main objective of antitrust regulations is also for companies to have the ability to offer high-quality services to consumers for free or subsidized rates which are considered to be a procompetitive effect of Big Data monetization, not anticompetitive harm.<sup>62</sup> The issue however still exists, as being a very nascent regime, there are a lot of speculations about the methods of evaluating the monetisation process of the big data.

This has turned out to be more complicated as it has completely unsettled the existing regime concerning merger control. They're essentially two facets to this issue, firstly, the current definition of the term 'assets' and secondly, the procedural aspects of determining the ascribed value of a particular piece of information. The present merger control regime while valuing the threshold amount of merger transactions, interprets 'assets' as tangible or intangible assets of quantifiable nature such as fixed assets and quantifiable IP rights or licenses.

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60. Maurice E. Stucke & Allen P. Grunes, Debunking the Myths over Big Data and Antitrust, *CPI Antitrust Chron.*, May 2015, at 7.

61. Andres V. Lerner, *The Role of 'Big Data' in Online Platform Competition* (2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2482780](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482780) (last accessed Aug. 25, 2020).

62. Evans And Schmalensee, *Supra note 14*.

This approach, when applied to data based companies, becomes untenable as these digital companies, often operate on remote servers and their primary assets is the data that has been accumulated by them. Thus, when valuing the merger deal, the data being non-quantifiable (as per the present understanding) is often left out of the purview of evaluation, thereby, resulting a significantly reduced asset amount, which invariably put such mergers outside the purview of scrutiny by the antitrust regulators. The recent merger between WhatsApp and Facebook can be a great illustration of the same.

### **CONCLUSION**

In contemporary times it is beyond a reasonable doubt that, data is a highly relevant aspect to consider in any merger and acquisition reviews. This primarily due to the increasing influence of Big Data as a determinant of a competitive market. It may be suggested that merger reviews must now at least take into account the data dimension and quantify the data in each assessment being made, but that can be done on a case to case basis only as quantification of data for deal analysis is very subjective criteria and no country has yet come up with set rules to quantify data. As for the issue of the possibility of European antitrust law accommodating the digital economy within the ambit of its current legal regime, it is rather difficult to answer it in simple yes or no. For a similar reason, the same would hold for Indian Competition regime as well. Nonetheless, in line with India's increasingly dynamic and effect-based, less structuralist approach to competition evaluations which the authors believe is going through a revamp, however, the straitjacket applicability of predefined standards to digital markets remain unrealistic, impractical, and undesirable.

While there is room for improvement on several fronts, the issues aren't rooted in a systematic incompatibility between competition law and data in our opinion. Nor does data represent a new, never-before-seen phenomenon which does not the resources to handle regulation law. The existing state of competition law offers the Commission with an opportunity to write well-argued and accurate rulings for any reason it is faced with.

This should not be understood as a conclusion in the state of competence of those involved in making previous acquisition decisions but should be interpreted as follows: data as a resource in the assessment of competition has only recently been put into the spotlight as something important, and it is only fair that time of research is required before experienced in the handling

of data-based knowledge is available.

Our understanding is that we are still in the later stage of this 'digital infancy' of competition law and that the level of competitive data evaluations can only get higher and higher with the expanded debate and awareness regarding data. Therefore, the best way to approach such a situation, is the slow integration of the digital economy with that of the Competition regime, which should be based upon the adaptive and flexible application of Competition Law. We are strong of the opinion that, the alarmist stance of overhauling of the established mechanisms to incorporate Big Data within its ambit, will be inconsistent and counter-productive and risks the destabilization of the present regime as well.

## **BREAKING THE GLASS CEILING: NAVIGATING THE SPACE FOR GENDER DIVERSITY IN THE COMPOSITION OF THE INDIAN JUDICIARY**

**Dr. Madhuri Sukhija\***

*There is no better test of the efficiency of a democratic system of government than the efficacy of its judicial system.*

### **INTRODUCTION**

Has the Indian society reached a turning point in terms of supporting female leadership roles or for that matter, supporting gender diversity in its varied professions? The national statistics are somewhat disturbing. Women constitute 48.5% of India's population, but their participation in the workforce is just 27%.<sup>1</sup> Interestingly, the 2019 Lok Sabha Elections saw the highest number of women candidates securing seats in the lower house of parliament. However, in terms of percentage, this measured upto only 14% of seats occupied by women in the parliament<sup>2</sup>

This disappointing trend is reflected in the Indian judiciary as well. Even after so many decades of independence, there have been only eight women Supreme Court judges and not a single one has occupied the post of Chief Justice.<sup>3</sup> Presently, the strength of the judges in the Supreme Court is thirty four including the Chief Justice, which is the highest ever. Justice Sharad Arvind Bobde is the 47th Chief Justice of India. He was sworn in on 18th November, 2019<sup>4</sup>. India being a heterogeneous society, gender diversity is intrinsic to social inclusion. Besides, greater diversity of views may alter decision-making, and the content of the judgment, itself. What are the barriers that come in the way of improved gender representation and how does one bridge the gap? These are pertinent questions in the judicial domain. Rosemary Hunter, a Professor of Law and Socio-Legal Studies at Queen Mary University of London, is of the opinion that the inclusion of women judges provides for an appointment process that is merit-based, fair, and non

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1. Sarah Khan, "The Case of Missing Women in the Judiciary", *The Citizen* (March. 16, 2019). Available at <https://www.thecitizen.in/index.php/en/NewsDetail/index/7/16489/The-Case-of-Missing-Women-in-the-Indian-Judiciary->
2. Shruthi Radhakrishnan, "New Lok Sabha has highest number of MP's", *The Hindu* (May. 27, 2019).
3. *Supra note 1*
4. Ajmer Singh, "Legal fraternity speculates on a women CJI in future", *The Economic Times*, Last Updated: May 22, 2020, 11:22 AM IST. Available at <https://economictimes.indiatimes.com/news/politics-and-nation/legal-fraternity-speculates-on-a-woman-cji-in-future/articleshow/75876758.cms>

- discriminatory. It also offers an active mentoring for other women who wish to pursue careers in law and the judiciary<sup>5</sup>

### TRAVERSING THE PATH

Anna Chandy made history when she was appointed as the first female judge in the Kerala High Court, in 1959. In fact, she was the first woman to hold this position not only in India but among all the Commonwealth nations<sup>6</sup>. However, it was not until 1989 that the appointing authority elevated Fathima Beevi, as the first female judge, to the Supreme Court.<sup>7</sup> The United Nations basic principles on the Independence of Judiciary stated that there must be no discrimination in appointments on any grounds, including sex<sup>8</sup>

Nevertheless, gender imbalance in the judiciary is a universal phenomenon, be it the developed nations or the developing ones. This is evident from the data given below, which specifically relates to the higher level of Judiciary.

**Table 1. Global Data on Women's Representation in the higher Judiciary<sup>9</sup>**

Country	Number of Judges	% Female Judges
United States of America <sup>10</sup>	9	33%
United Kingdom <sup>11</sup>	12	25%
China <sup>12</sup>	15	7%
India <sup>13</sup>	34	9.09%
South Africa <sup>14</sup>	29	34%
Brazil <sup>15</sup>	11	18%

5. Rosemary Hunter, "More than Just a Different Face? Judicial Diversity and Decision-making" Current Legal Problems, Volume 68, Issue 1, 2015, Pages 119- 141, Available at: <https://academic.oup.com/clp/article/68/1/119/337616> (last visited on Nov. 20, 2019).
6. Speeches: Address by the president of India, Shri Ram Nath Kovind at the valedictory function of the diamond jubilee celebrations of high court of Kerala, Kochi : 28.10.2017
7. Also see: J Devika, (Edited), Her-Self: Early Writings on Gender by Malayalee Women 1898-1938 ( Kolkata: Stree, 2005)
8. *Ibid*, UN Basic Principles on the Independence of the Judiciary [Endorsed by General Assembly Resolutions 40/32 (29 November 1985) and Resolution 40/146] (13 December 1985) available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>
9. Keerty Nakray & Arshiya Chauhan, "Gender Mainstreaming In Indian Judiciary: Participatory Parity and Representation In Three Tier System" –volume I, GNLU law & society review, 2019
10. Supreme Court of the United States <https://www.supremecourt.gov/about/justices.aspx>
11. Biographies of Justices <https://www.supremecourt.uk/about/biographies-of-the-justices.html>
12. The Supreme People's Court of the People's Republic of China <http://english.court.gov.cn/justices.html>
13. Lalita Panicker, "The legal profession must ensure gender balance| Analysis", Hindustan Times (February, 26, 2020). Available at [https://m.hindustantimes.com/analysis/the-legal-profession-must-ensure-gender-balance-analysis/story-zXAKhye28e9ihWXV4GetRK\\_amp.html](https://m.hindustantimes.com/analysis/the-legal-profession-must-ensure-gender-balance-analysis/story-zXAKhye28e9ihWXV4GetRK_amp.html)
14. Constitutional Court of South Africa <https://www.concourt.org.za/index.php/judges/current-judges>
15. Federal Supreme Court Brasilia [http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte\\_en\\_us&idConteudo=120056](http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120056)

## STATUS OF WOMEN REPRESENTATION AT VARIOUS LEVELS OF JUDICIARY IN INDIA

The Indian judicial system is widespread encompassing the Supreme Court of India and the 25 High Courts,<sup>16</sup> the district and sessions courts and the courts below it. It is indeed unfortunate, that at every level, the representation of women is dismal. Of the total 16,600 judges in district and subordinate courts across the country, less than 4,500 are women, as per reports by the Vidhi Centre for Legal Policy, a legal think-tank.<sup>17</sup> Based on the State Judicial Services Rules, the lower judiciary roughly comprises of three tiers, namely: civil judge (Jr. Division), civil judge (Sr. division), and district judge in ascending hierarchy. At the lowest entry level, i.e. civil judge (Jr. Division), the proportion of women is fairly good in most of the states (lies between 40%-50%).<sup>18</sup> This is significantly higher than the number of women appointed directly as district judges (11.75 per cent). As we move upwards through these tiers, there seems to be a decrease in their proportion.

District-wise gender composition

**Table 2: Represents the gender composition of the lower Judiciary across all districts in India.**<sup>19</sup>

Gender of Judges	Total Number	Percentage
Male	11,397	71.4%
Female	4,409	27.6%

### At the level of the Apex Court:

As of March 23, 2018, only 10.89 per cent of high court judges were women<sup>20</sup>. In the Supreme Court today, the figure is 9.09 per cent. There are 2 sitting women judges in a Supreme Court out of 34 judges and just 73 women judges in high courts.<sup>21</sup> The higher the judicial climb, the starker is the disparity in the existing hierarchy.

16. <http://legallaffairs.gov.in/sites/default/files/chapter%207.pdf>. Also see, official websites of the High Courts, <http://indiancourts.nic.in> (Last Accessed Dec 23, 2018)

17. A. Ghosh, D. Sanyal, N. Khaitan, & S. Reddy, "Tilting the Scale: Gender Imbalance in the Lower Judiciary" Vidhi Centre for Legal Policy (2018), Available at: [https://vidhilegalpolicy.in/wpcontent/uploads/2019/05/180212\\_TiltingtheScale\\_Final.pdf](https://vidhilegalpolicy.in/wpcontent/uploads/2019/05/180212_TiltingtheScale_Final.pdf)

18. Arijeet Ghosh, "With the Lower Judiciary Still an Old Boys' Club, the Gender Imbalance Must Be Addressed", The Wire (February 9, 2018) Available at <https://thewire.in/gender/lower-judiciary-old-boys-club-gender-imbalance>

19. *Supra note 17*

20. *Ibid.*

21 *Supra note 13*

At the Supreme Court level, with Justices R. Banumathi's retirement on the 19th of July, 2020<sup>22</sup>, there are presently, two female presiding judges namely, Justices, Indu Malhotra and Indira Banerjee. Justice U. U Lalit has joined as the new member of The Supreme Court's Collegium after Justice R. Banumathi's retirement. The apex court collegium comprises the 5 senior most judges who select and recommend names for the appointment of judges to the Supreme Court.<sup>23</sup> Justice R. Banumathi was the second ever woman to be a part of the collegium after Justice Ruma Pal in the last 14 years. The Chief Justices position has never been occupied by a woman, although there has been one Dalit chief justice. When the Supreme Court diluted the prevention of atrocities act, provoking outrage from Dalits, many openly traced it to skewed representation in the judiciary<sup>24</sup>.

One is given to understand, that if there are women judges in the High Court and Apex Court, this would amount to an increased reporting of crimes against women. Women judges are likely to be more empathetic towards women litigants and witnesses and their presence on the bench would provide a better courtroom experience for the victims who are often subject to embarrassment and unease. In the same vein, the practitioners too would be saved from facing the wrath of a sexist approach and a gender bias.

#### **At the level of the High Court:**

When talking of gender representation in all the High Courts of India, the strength of women judges, is just a little over 10%. There are states which do not have a single woman judge in the high courts — these are Uttarakhand, Chhattisgarh and Himachal Pradesh among others. Of a whopping 1.7 million advocates enrolled with the bar councils, just about 15% are women<sup>25</sup>.

States such as Bihar have (11.52%) women Judges in the High Court, Jharkhand (13.98%), Gujarat (15.11%), Jammu and Kashmir (18.62%), and Uttar Pradesh (21.4%). However, some states fare better. The High Courts of Punjab & Haryana, Delhi and Kerala maintain a fairly decent proportion of women judges. Meghalaya (73.8%), Goa (65.9%) and Sikkim

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22. Ria Das, Justice R Banumathi Retires, Only Two Women Judges Now In The Supreme Court, SheThePeople, The Women's Channel (July.18,2020) Available at <https://www.shethepeople.tv/news/justice-r-banumathi-retires-supreme-court/>

23. <https://theleaflet.in/justice-u-u-lalit-to-be-a-member-of-the-supreme-court-collegium-from-july-20/>

24. Tarika Jain, Shreya Tripathy, "70 Years Of Indian Judiciary | Opinion: Composition Terribly Skewed, Higher Levels Bastion Of Upper Caste Males" OUTLOOK, (February.3, 2020) Available at <https://www.outlookindia.com/magazine/story/india-news-70-years-of-indian-judiciary-opinion-composition-terribly-skewed-higher-levels-bastion-of-upper-caste>

25. *Supra note 13*

(64.7%) are at the higher end of the spectrum<sup>26</sup>.

It is a matter of great pride that the Madras High Court has had an added distinction of having had an all women division bench, during the tenure of former Chief Justice Indira Banerjee<sup>27</sup>, (a Supreme Court Judge now). However, across the states in India, the pattern has not been uniform.

#### **IDENTIFYING THE BARRIERS:**

1. **Generally speaking, biases are a manifestation of social stereotypes and conditioning.** Gender discrimination, emanating from a patriarchal social structure acts as an impediment to women from accomplishing themselves in the legal profession. On a comparative note, women have to work much harder than men and ironically female judges' experiences ultimately often depend on the Chief Justice and the collegium.<sup>28</sup> While some Chief Justices have been supportive of their female colleagues, others have not.
2. **Harassment at the workplace.** In the judiciary too, there are ample instances, but they are unfortunately swept under the carpet for reasons that are obvious. When arguing cases, women lawyers are subject to verbal harassment by their counterparts, which make them feel uncomfortable and hamper their smooth functioning.
3. **A significant number of women make it to the law colleges but very few make it to the legal profession.** Sometimes, this is more a matter of conscious decision because of the string of prejudices, most women encounter, in this profession. The students enrolled in law stream are approximately 3.3 lakh out of which 2.2 lakh are males. A pertinent question that arises is where are the 1.1 lakh female law pursuers going then?<sup>29</sup>
4. **Social identities such as race, age, caste, class, religion and sexual orientation have grave ramifications.** They directly impact the representation of women in the Indian judiciary.
5. **Nurturing an underlying sexist attitude in the judicial profession.** This is commonplace and is an obstacle to bringing about improved gender representation in the Indian Judiciary.

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26. Hindustan Times, 'Why Indian judiciary needs more women', Updated: Aug 16, 2018 12:29 IST Aug 16, 2018. Available at <https://www.hindustantimes.com/editorials/why-indian-judiciary-needs-more-women/story-uU4kDWi5Nd09N6GpgBmYgJ.html>. Also see: Supra note 17

27. The Hindu, 'India's first all women full bench to hear crucial case today', updated: March.4,2020, 01:17IST.

28. Interview with Ret. Judge, Delhi High Court, female, Delhi (Jul. 9, 2018)

29. Staff Reporter, "Gender diversity: Talk held on women in legal profession" The Hindu (2018), available at: [www.thehindu.com/news/cities/Delhi/gender-diversity-talk-held-on-women-in-legal-profession/article25139430.ece](http://www.thehindu.com/news/cities/Delhi/gender-diversity-talk-held-on-women-in-legal-profession/article25139430.ece) (last visited on Dec. 10, 2019).

**A few instances:**

- One does not have to go too far. In April 2018, a request was made by judges to post only male staff. Criticism against this request was widespread on twitter. This was the result of the allegation of sexual harassment against a former Chief Justice of India. The request made by the Supreme Court judges was surprising, since 60% of the apex court's staffers are women.<sup>30</sup>
- In an unprecedented development, a Madhya Pradesh woman additional district judge had resigned in July 2014, protesting her "illegal" transfer from Gwalior to Sidhi. (424 km away) This happened soon after she accused a sitting high court judge of sexual harassment. Six years down the line, she is now set to get her job back, despite a five-year break in service. The Supreme Court bench of Chief Justice S A Bobde and Justices B R Gavai and Surya Kant asked the Madhya Pradesh High Court to consider taking her back.<sup>31</sup>
- The former Supreme Court judge, A.K Ganguly had to resign as Chairman of the West Bengal Human Rights Commission (WBHRC) on the 6th of January, 2014, following allegations of sexual harassment by a law intern in December, 2012.<sup>32</sup>

6. **Reproductive and motherhood responsibilities also contribute to women judges being sidelined.** Their roles in the decision making domain are also becoming monopolized by the male judges, who would rather identify the women judges with subordinate courts rather than being promoted to higher judiciary.

7. **Bias in the Recruitment process as well as in the domain of Promotion:**

- Appointments to the higher judiciary are somewhat conventional and a patriarchal structure does impact judicial appointments and promotion of women in the higher Judiciary. Processes are governed by a subjective criteria

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30. Aria Thaker, "Facing #MeToo allegation, Indian chief justice says judges are now wary of hiring female staffers" Quartz India (April.24,2019) Available at <https://qz.com/india/1602393/metoo-india-chief-justice-gogoi-says-judges-wary-of-women-staff/>.

31. Dhananjay Mahapatra, "SC steps in, woman judge may get back job 6 years after resigning," Times Of India (February. 13, 2020), 03:20 IST

32. "Justice A.Ganguly resigns as Chairman of WBHRC," The Economic Times, ET Bureau, Last Updated: January. 07, 2014, 03:51 AM IST. Available at: [https://economictimes.indiatimes.com/news/politics-and-nation/justice-a-k-ganguly-resigns-as-chairman-of-wbhrc/articleshow/28482541.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/politics-and-nation/justice-a-k-ganguly-resigns-as-chairman-of-wbhrc/articleshow/28482541.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

like interviews rather than objective examinations. Former Supreme Court Justice Gyan Sudha Misra had an interesting revelation to make. “This is deep rooted in the society, and more so, in the male psyche and the reason there are females in the higher judiciary, is more for the sake of symbol, rather than their equal participation.<sup>33</sup> It was only in 2018 that a female senior lawyer was directly appointed as a Supreme Court Judge. Indu Malhotra’s direct move from the bar to bench surprised many in the legal fraternity and prepared the ground for more women advocates to get directly nominated as judges of the Supreme Court<sup>34</sup>

- At the Apex court level, it is the collegium system, which decides the selection of judges. Ironically, it is the judges themselves, who appoint judges and they would be more at ease

with selecting people who are more akin to them. The collegium comprises the CJI and the next four senior-most judges and their decision is binding on the President. The procedure followed keeps the executive at bay in the selection of judges but it is not transparent as the proceedings of the collegium are not accessible. The knowledge about the composition of the particular panel as well as the criteria that determines the promotion of a judge from the High Court to the Supreme Court, elude the public eye.

- There are other factors which play a role in deciding the suitability for appointment to the higher judiciary and this is evident in Justice Chandrachud’s argument. He observes that bias exists because of the unfounded “income criterion,” where the income of an advocate is the yardstick for determining their success.<sup>35</sup> Many women fall short of that criterion because many are not senior counsels<sup>36</sup>, disadvantaging them against their male counterparts.”
- The seniority norm is an important criterion for determining appointments at the higher level. However, it does not work in favour of women as the societal

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33. Uday Shankar, Srichetha Chowdhury ‘Representative judiciary in India: an argument for gender diversity in the appointment of judges in the Supreme Court’. *ILI Law Review*, Volume II, Winter Issue, 2019.

34. S. R. Singh, “Who is Indu Malhotra?” *The Hindu* (2018), available at: [www.thehindu.com/news/national/who-is-indu-malhotra/article22480945.ece](http://www.thehindu.com/news/national/who-is-indu-malhotra/article22480945.ece) (last visited on Dec. 20, 2019).

35. Gautam Patel, “Shattering Glass Ceilings on the Bar and on the Bench,” *Bar & Bench* Dec 28, 2018, 5:28 PM IST. Available at <https://www.barandbench.com/columns/shattering-glass-ceilings-on-the-bar-and-the-bench-justice-gautam-patel>

36. Poulomi Banerjee, “When the Bar has a Male Tilt: Gender Imbalance in the Judiciary,” *Hindustan Times* (Oct. 23, 2016, 7:01 PM), Available at <https://www.hindustantimes.com/india->

responsibilities of marriage and motherhood bring about their entry into the legal profession, rather late. Due to this reason, women are less likely to be senior HC judges and are thus less likely to be elevated to the SC.

- Appointments made on merit are still a far cry. Sometimes personal factors take precedence, and close connections with those at the helm of affairs, determine the selection, which otherwise should have been decided on merit.
- The Vidhi Legal Policy Report stated that, “When it comes to elevation, women judges are subject to higher standards, as compared to their male counterpart”<sup>37</sup> The Parliamentary Standing Committee in its 87th Report on “Inordinate delay in filling up the vacancies in the Supreme Court and High Courts,” recognised that the data on women’s representation in the higher judiciary was far from encouraging, and suggested that efforts had to be made to bring about a more inclusive and diverse judiciary<sup>38</sup>

8. **At a higher level, sexual Minorities may not find a place on the bench anytime soon.** This is regardless of the fact that after years of struggle, sexual minorities now have constitutional rights<sup>39</sup> and India being a democratic country, significant efforts have to be made in this field. In July, 2018, the court in Guwahati got its first transgender judge, when Swati Bidhan Baruah was appointed as a judge to mediate cases in Lok Adalat. In West Bengal and Maharashtra lok Adalats too, there are instances, but then this is just the tip of the ice-berg.<sup>40</sup>

9. **There are cases that were conspicuous by the absence of women Judges.** This is regardless of the fact that these cases prompted societal thinking and had serious ramifications for women’s rights. Important instances are **The Triple Talaq Judgment, The Sabrimala Temple Entry Case** or the very recent judgment on 11th of August, 2020 on **“Daughter’s equal right to ancestral property”**.<sup>41</sup> They were indeed historic verdicts, but what is ironical is the

37. *Supra note 1 & Supra note 17.*

38. *Supra note 1.*

39. “Supreme Court decriminalizes Section 377 :All you need to now”, Times Of India,( September. 6, 2018) Available at <https://timesofindia.indiatimes.com/india/sc-verdict-on-section-377-all-you-need-to-know/articleshow/65695884.cms>

40. “Assam To Get Its First Transgender Judge Today”, All India, Press Trust of India, Updated: July 14, 2018 2:51 am IST Available at <https://www.ndtv.com/india-news/assam-to-get-its-first-transgender-judge-tomorrow-1882989>.

41. Dhananjay Mahapatra, ‘Supreme Court gives equal inheritance rights to daughters from 1956’, Times Of India (August.12,2020) Available at [http://timesofindia.indiatimes.com/articleshow/77493244.cms?utm\\_source=contentofinterest&utm\\_medium=ext&utm\\_campaign=cppst](http://timesofindia.indiatimes.com/articleshow/77493244.cms?utm_source=contentofinterest&utm_medium=ext&utm_campaign=cppst)

fact, that either they did not have women judges on the bench or had a negligible number. The latest judgment by the Supreme Court giving equal inheritance right to daughters from 1956, comprised of all three male judges on its bench.

#### **ADDRESSING THE CONCERNS:**

##### **1. Sensitizing towards gender diversity:**

Systemic patriarchy is embedded in our institutional structures and this impacts appointments and promotions. This is reason enough for changing the mindset at each level of the judiciary. Sexism permeates every kind of courtroom encounter and there is a need for gender-sensitivity training to balance the gender ratio, which of course is more skewed at the top. India being a young nation with two third of the population comprising the youth, sensitizing the young minds towards a gender diverse society would be a step in the right direction

##### **2. Encouraging women judges:**

This is possible by giving women judges greater number of cases to handle and particularly those that have social and political significance. The law schools too shoulder a responsibility as far as the young women lawyers are concerned. This would go a long way in boosting their morale and being hopeful about their future in the legal profession.

##### **3. Navigating the option of Reservation:**

Despite persistent efforts for a good many years, the ‘women’s reservation bill’ still hasn’t seen the light of the day. In the judicial domain too, especially at the higher level, reservation for women has been a subject of debate all along, with no uniform policy in sight. To ensure greater diversity in the judicial services participation, a parliamentary standing committee on Law and Justice had proposed reservation for women in the higher judiciary. The Standing Committee, in its report in 2015, recommended that “women should have equal representation in the higher judiciary, and to ensure that, reservation could be considered,” said Dr E.M.S. Natchiappan, who is former chairman of the Committee.<sup>42</sup>

It is not gender alone that has prompted reservation in the Indian Judiciary, caste too has been an important factor in this regard. This was endorsed by the National Commission for Scheduled Castes in 2011, which recommended reservation to address the problem of caste imbalance in the judiciary. What followed was, eighteen states provided a degree of reservation for one or

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42. S. Mishra, “The Sexist Bar” *The Week* (2016), available at: [www.theweek.in/theweek/cover/genderdiscrimination-in-judiciary.html](http://www.theweek.in/theweek/cover/genderdiscrimination-in-judiciary.html) (last visited on Dec. 10, 2019).

more disadvantaged group(s) at the level of lower judiciary, but not in the high courts and Supreme Court.<sup>43</sup> A number of states have provided quotas for women in the lower judiciary. States like Andhra Pradesh, Assam, Bihar, Chhattisgarh, Jharkhand, Karnataka, Odisha, Rajasthan, Tamil Nadu, Telangana and Uttarakhand provide for reservation in the lower judiciary, which ranges between 30%-35%<sup>44</sup> of the total seats.

**Table 3 Reservation for Women in the Lower Judiciary. Data given for five states<sup>45</sup>**

State	Percentage of Reservation	Percentage of Female Judges in the State	Year in which it was introduced	Reservation applicable to
Andhra Pradesh <sup>46</sup>	33.33%	37.54%	2007	District Judges (Direct Recruitment from Bar); Civil Judges (Junior Division)
Bihar <sup>47</sup>	35%	11.52%	2016	District Judges (Direct Recruitment from Bar); Civil Judges (Junior Division)
Jharkhand <sup>48</sup>	5% <sup>25</sup>	13.98%	2004	Civil Judges (Junior Division)
Rajasthan <sup>49</sup>	30%	26.53%	2010	District Judges (Direct Recruitment from Bar); Civil Judges (Junior Division)
Uttar Pradesh <sup>50</sup>	20% <sup>26</sup>	21.4%	2007	District Judges (Direct Recruitment from Bar)

Keeping in mind the statistics, the proportion of women judges in states with reservation, does not follow a uniform pattern. Telanganawith over 40.03 % representation of women judges, and Jharkhand with 13.98 percent, are two ends of the spectrum.<sup>51</sup>

#### 4. Transparency in the appointment of judges

Appointment of judges, especially at the higher level, is sometimes mired in controversy. Making the process just and transparent is a possible way out and for that official maintenance of statistical data is required.

43. *Supra* note 24.

44. *Supra* note 17.

45. *Ibid.*

46. *Ibid.*

47. *Ibid.*

48. Pradeep Thakur, "Women Account For Less Than 28% of Total Judges in the Country", The Times Of India, (October.30, 2017) available at <<https://timesofindia.indiatimes.com/india/women-account-for-less-than-28-of-total-judges-in-country/articleshow/61329003.cms>> (last accessed on December 14, 2017). K (last accessed on December 14, 2017)., This was also confirmed from the Jharkhand High Court Registry via telephone.

49. *Supra* note 17

50. *Ibid.* Also see, *Supra* note 48

51. PTI, "Leaders at NDA Meet Seek All India Judicial Service", 17th December, 2017. Available at: <https://www.bloomberquint.com/law-and-policy/2017/12/17/leadersat-nda-meet-seek-all-india-judicial-service> (last accessed on February 10, 2018).

There are certain measures proposed in the book-*Towards the Rule of Law: 25 Legal Reforms for India in 2019*<sup>52</sup> Vidhi Centre for Legal Policy.

Collation and publication of the required data makes the process of appointment of judges more transparent. The Department of Justice under the Ministry of law and Justice can take the initiative to serve as a coordinating agency to publish data pertaining to:

- a. Annual Judicial Diversity Statistics in collaboration with the judiciary.
- b. Advocates functioning in various high court bar associations as well as the pool of probable candidates from which the judges are to be appointed.
- c. Annual reports on judicial diversity, with demographic data on existing judges at all levels of the judiciary.

Besides, a proactive stance by the judges to voluntarily declare information vis-a-vis age, gender, caste, religion, and educational as well as professional, will be an added asset to the annual publication record.

#### **The optimistic side: Women at their best**

1. Instances of women Justice presiding over Courts are increasing considerably. The apex court had seen a women alone bench for the first time in 2013, when Justices Gyan Sudha Misra and Ranjana Prakash Desai sat together for hearing a case. The Supreme Court repeated history as an all-women bench comprising Justices R Banumathi and Indira Banerjee held court on September 5, 2018.<sup>53</sup>
2. With the swearing-in of Justice Banerjee in August, 2018, the Supreme Court for the first time in its history had three sitting women judges. She is the eighth woman judge in the apex court since Independence<sup>54</sup>.
3. Carrying the optimistic narrative further, there are women Judges who have acquired coveted positions in the past. After Justice Leila Seth became the first woman judge of the Delhi High Court on July 25, 1978 and the first woman chief justice of a High Court (Himachal Pradesh in 1991), many more women Justices have presided over courts. Recently, Justices Manjula Chellur, G

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52. file:///E:/VidhiBriefingBook20191%20(1).pdf

53. History repeats itself as SC set to witness all-women bench on September 5". Times Of India, PTI | Updated: Sep 1, 2018, 16:31 IST. Available at [https://m.timesofindia.com/india/history-repeats-as-sc-to-witness-all-women-bench-on-september-5/amp\\_articleshow/65635635.cms](https://m.timesofindia.com/india/history-repeats-as-sc-to-witness-all-women-bench-on-september-5/amp_articleshow/65635635.cms)

54. *Ibid.*

Rohini, Nishita Nirmala Mhatre and Indira Banerjee headed the High Courts of Bombay, Delhi, Calcutta and Madras respectively.<sup>55</sup>

4. Establishment of Mahila Courts in India:

The Mahila courts are essentially staffed by women and are headed by a woman judge of the rank of Additional Chief Metropolitan Magistrate cum Assistant Sessions Judge. These courts deal exclusively with cases relating to offences against women such as cases pertaining to grant of maintenance under section 125 of Cr. PC or cases of assault or criminal force and words or gestures intended to insult the modesty of a woman under sections 354 and 509 of I.P.C. The first Mahila Court was set up as an experiment in the state of Andhra Pradesh in 1987. Thereafter which, it was established in other states as well. Speaking of Delhi, amendments are required, as out of the 25 functional Mahila Courts, in Delhi, 12 Courts still have male prosecutors.

5. A plethora of judgments delivered by women judges have served the constitutional good in as much as they have strengthened the values of democracy. The verdicts delivered have left their imprint on society and have given a sense of justice and security to women.

**Historical Verdicts that turned the tide:**

- The landmark judgement, *Vishaka v State of Rajasthan* (1997)<sup>57</sup> was delivered by Justice Sujata Manohar, where for the first time in the history of India, the issue of sexual harassment at workplace was addressed from a legal point of view and clear cut guidelines were formulated on sexual harassment. Her presence on the bench not only gave it a representative character but also brought an element of gender sensitivity. This judgement brought the much needed relief for working women across India. Off-bench, a note of caution too

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55. Upendra Baxi, "Women in Judiciary: From Raw Deal to New Deal?" Available at: [www.indialegallive.com/viewpoint/women-in-judiciary-from-raw-deal-to-new-deal-57342](http://www.indialegallive.com/viewpoint/women-in-judiciary-from-raw-deal-to-new-deal-57342) (last visited on Aug. 20, 2019).

56. Abhishek Angad, "At Delhi's Mahila courts, women prosecutors still to replace men," *The Indian Express* (December 7, 2018).

57. K. M. Sheriff, "Need to rethink Vishakha to include incidents from past: Its author Justice Sujata Manohar" *The Indian Express* (October 22, 2018), Available at: [indianexpress.com/article/india/metoo-need-to-rethink-vishakha-to-include-incidents-from-past-its-author-justice-manohar-5408334/](http://indianexpress.com/article/india/metoo-need-to-rethink-vishakha-to-include-incidents-from-past-its-author-justice-manohar-5408334/) (last visited on Aug. 20, 2019) Also see (Guidelines and norms laid down by the Hon'ble Supreme Court in *Vishaka and Others Vs. State of Rajasthan and Others* (JT 1997 (7) SC 384).

was expressed by her that these guidelines need to be revised in view of recent developments in India.

- Similarly, Justice Ruma Pal, also extensively elaborated on the concept of “mental cruelty” in marriage through her judgements for *Jayachandra v Aneel Kaur* (2004).<sup>58</sup> Justice Ruma Pal has many a time expressed her opinion on issues of social and gender justice on and off the bench. The judgement was extremely important as it brought to light that mental cruelty could be as grave as physical cruelty inflicted upon by one married partner over the other. In physical cruelty, the evidence is obvious, but in the case of mental cruelty it may not be so. Physical violence is not absolutely essential to constitute cruelty and persistently subjecting the partner to immeasurable mental agony and torture, may well constitute cruelty.
- Justice Banumathi delivered maximum judgments during her stint of six years at the top court. She will forever be remembered for the landmark judgement in the **Nirbhaya Rape Case**, December 16, 2012.<sup>59</sup> She had asserted that if this case was not the rarest of rare to award death penalty, then which case can fall under it. A convict’s background, age and good behaviour in prison could not nullify the gravity of the crime committed. Her judgement set a good precedent and had a strong message to convey to society.

#### **THE WAY FORWARD: A FEW RECOMMENDATIONS**

It is a matter of great pride that India’s only lady President till date, Smt. Pratibha Patil, had argued strongly in favour of appointment of women judges to the Supreme Court. During her tenure, she had made a polite noting in the file for the Collegium headed by Chief Justice of India, K G Balakrishnan, suggesting that it was time, a woman judge was appointed to the Supreme Court, as the Supreme Court had seen just 3 women judges till 2006. Thereafter, not a single women judge was elevated to the Supreme Court.<sup>60</sup> It isn’t sheer coincidence, that no

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58. *Jayachandra v. Aneel Kaur*. Civil Appeal Nos.7763 of 2004 - 7764 of 2004. Decided On, 02 December 2004. Available At : <https://www.lawyerservices.in/A-Jayachandra-Versus-Aneel-Kaur-2004-12-02>.

59. Satya Prakash “Nirbhaya rape case: SC upholds death sentence to 4” *Tribune News Service* May 05, 2017 10:20 AM (IST). Available at. <https://www.tribuneindia.com/news/archive/nation/nirbhaya-rape-case-sc-upholds-death-sentence-to-4-402567>.

60. Dhananjay Mahapatra ,“President pushes for women Judge in The Supreme Court”, *Times Of India* (December.25,2009). Available at <https://timesofindia.indiatimes.com/india/President-pushes-for-woman-judge-in-Supreme-Court/articleshow/5375307.cms>.

woman judge has made it to the Chief Justice of the Supreme Court, The Chair of the National Law Commission and The Bar Council of India. Likewise, no woman has been appointed to the constitutional position of Attorney General, although Indira Jaising and Pinky Anand were appointed as additional solicitor general<sup>61</sup>

Better representation of women in the judiciary will accord democratic legitimacy to the most revered institution in the Indian political system. This will serve the twin purpose of providing equality of opportunity for women in the legal profession as well as repose faith in the justice system, by making the courts truly representative of the societies they serve.

- **Merit as the criteria of appointment to the higher Judiciary needs to be implemented by bringing about procedural change.** Like the armed forces, the judiciary too, should be merit-driven. Appointment of women judges on the basis of merit to the higher Judiciary needs to transform into reality.. Reforms are required in the selection process so that top legal appointments and judicial elevations can bring women on board. In the selection between a man and woman of equal merit for judgeship, men judges are given top priority and this has happened time and again, resulting in the miniscule number of women judges in the judiciary.
- **Reservation for women in the higher judiciary may be resorted to, although it is certainly not the best option.** A formal criterion (policy of affirmative action) for maintaining gender diversity in selecting judges can be explored. To streamline the process of appointment, reservation could serve the purpose of being the first small step to bringing more women on board. Once this happens, merit as the criteria of appointment should strictly be followed.
- **Removing the structural barriers in the selection process and initiating a transparent process of appointment and promotions.** This will work towards overcoming the abysmal gender disparity in the Indian judiciary. On appointment of female judges to the apex court, an informal “ladies quota” or “an informal quota system”<sup>62</sup> are often applied, but this is not convincing enough, since no one gets to know what are the criteria or parameters for the selection.

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61. *Supra note 55*

62. Abhinav Chandrachud, *The Informal Constitution: Unwritten criteria in selecting judges for the Supreme Court of India* (Oxford University Press, New Delhi, 2014).

- **In keeping with the spirit of democratic pluralism, the Indian Supreme Court can work out the required procedures to make way for sexual minorities on the bench.** This would be in keeping with the spirit of constitutional morality and set a healthy precedent by the highest court in the land.
- **There is a need for greater education and gender sensitization at all levels of judiciary.** The courts can walk that extra mile by being supportive and accommodating flexible work schedules. It would be worth mentioning, that the bench of any High Court is reflective of the HC's culture, which is in turn determined by the socio-cultural thinking and conditioning of the particular state. Thus, in a state where the pool for selecting female judges is smaller due to various socio-economic and cultural barriers, the likelihood for elevation to the apex Court is even less in the light of the seniority principle.<sup>63</sup> As a corollary, there is a need for greater education and sensitization in the lesser-developed states to enhance women's participation in the legal profession. .
- **Adopting a uniform policy can help to iron out dilemmas vis-a –vis the law exam.** Today, different states have their own set of requirements and policies, as far as the law exam is concerned. When applying for the law exam, the language requirement act as an impediment. Besides, domicile quotas and other state-specific quotas that exist, tend to impact the pool of participants. .
- **A periodic review of the judicial curriculum, incorporating diversity training for the judges.** An increased participation of women in the capacity of investigators, prosecutors and judges will undo the imbalance in the judicial making process. Moreover, gender diversity will lead to a healthy work culture and the more eclectic the group, the more diverse the knowledge. There is a convention that states, that the high courts should have at least one female judge<sup>64</sup> since this is not so yet, initiatives have to be undertaken towards this end.
- **Greater representation of women in the judiciary, especially at the higher level requires a national commitment.** This would help in creating opportunities early in their legal profession as well as removing the barriers that disproportionately affect their promotion.

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63. Interview with Ret. Judge, Bombay High Court, female, Bombay (Jun. 23, 2018)

64. *Supra note*17

**CONCLUDING REMARKS**

The constitution is not merely a social reform document but also a living document and the onus lies on the much revered judiciary, to interpret it in ways that can strengthen the socio-cultural fabric of Indian democracy. It can begin with its own composition which should be in keeping with the principle of federal diversity and merit as well. A little headway was made in 2013, the then Chief Justice P.Sathasivam formed the “Supreme Court Gender sensitization and Internal Complaints Committee” (GSICC), in which there were six female members.<sup>65</sup> However, sincere efforts are wanting in this regard. It is time India had a respectable number of women judges in the judiciary, rather than a token representation. Behind every successful woman lawyer or legal academic and a women judge, there would certainly be other women who would be inspired to pursue the legal profession in a fearless manner without the usual deterrents.

On a comparative note, Asian democracies like Malaysia and Philippines too, have women Chief Justices in the apex court. The appointment last year, (2019) of Tengku Maimun Tuan Mat<sup>66</sup> as the first female Chief Justice in Malaysia demonstrates that it is possible for a woman to be appointed to the highest judicial office in a Muslim majority Southeast Asian country. India is well into its seventy fourth year of democracy and for a modern rights- respecting democracy, an important challenge is, how long would it be, before India gets its first woman Chief Justice at the apex court? Equally important, why more eminently qualified women are not being appointed to the high courts and the Supreme Court? These are the concerns that warrant attention and provide sufficient ground for further academic endeavors and initiatives.

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65. Supreme Court sets up Committee to deal with sexual harassment complaints”, The Economic Times, (November.26,2013).

66. <https://www.lowyinstitute.org/the-interpretor/long-wait-indonesia-female-chief-justice-top-court>

## **TERRORISM FINANCING AMID PANDEMIC: A CRITICAL ESTIMATE OF SOCIO-LEGAL DYNAMICITY**

**Mayura Mahonar Sabne\***

### **INTRODUCTION**

The world is seeing death on mass scale. Fear has engulfed in the mind of each and every human being on the globe. The question of survival is staring with wide open eyes at each and every community in the nook and corner of the world. However, for terrorists and their organizations, the definition of fear and survival is different. They see above these normal parlances in their day to day interaction with the outside world that they perceive as their potential targets. They see life in death and money in all forms keeps their aspirations for death alive. These testing times of pandemic are presenting unseen challenges before humanity. Though the socio-legal challenges posed by terrorism and its financing are present since past several decades, the Covid-19 crisis is molding their face in unimaginable ways. The consequences are not immediately visible in contemporary times; however, the present ignorance of future repercussions is fatal and hence, the author has made an attempt to underscore the emerging trends in terrorism financing amid pandemic. The international and national scenarios are analyzed in detail to understand the nature and gravity of this foe to resilience of human race. The contours of the present research cover all the tentacles of societal existence like financial, social and legal. In summarization, an attempt has been made to articulate possible pathways which can be adopted in post pandemic era to deal and counter the visible and emerging socio-legal challenges posed by terrorism financing before the resilience of human race.

### **INTERNATIONAL SCENARIO**

The international news in context of terrorism and financing are dominated by Al-Qaeda and its affiliates and ISIS since last decade. ISIS has always been at the forefront of exploring the emerging situations to its advantage. It is the most known adoptive terrorist network and it is very much advanced in terms of technological usage<sup>1</sup>. During the times of pandemic, the news reports are exposing that ISIS and their allies are appealing to their followers worldwide that amid this global lockdown, the terrorist activities should never cease. Rather, this opportunity,

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1. Over 10000 Islamic State fighters active in Iraq, Syria:UN, The Hindu International(August 25,2020,06:37 IST)<https://www.thehindu.com/news/international/over-10000-islamic-state-fighters-active-in-iraq-syria-un/article32434377.ece><Accessed on 26/08/2020>.

natural one, must be exploited to the fullest to plan and execute the evil agenda of terrorist activities<sup>2</sup>.

The nationwide lockdowns imposed by the Governments of various nations led to significant increase in the number of online activities. When the citizens are locked down in their homes, there is surge in online transactions. This surge leads to enormous data creation and it is difficult to mine the requisite suspicious data. Due to these untraceable opportunities, massive multiple avenues are opened up for terrorists to transfer their illicit funds under the garb of heavy traffic of online fund transfers. The task of CTF agencies can face failures due to inability to trace these online transfer trails during this crisis period.

If we look at the current scenario from the global geopolitical developments, we can see that “financing of terrorism” has become one of the important factors in shaping the financial aid among various nations who are suffering from pandemic. For example, Iran, the alleged state sponsor of terrorism, is facing the toughest U.S. sanctions in history. Considering these sanctions, US intended to block the IMF fund from providing a \$5 billion emergency loan to Iran for assistance in combating the Covid 19 pandemic. The US administration contended that this financial aid will be diverted towards the terrorist proxies harbored by corrupt Iranian officials<sup>3</sup>. This will be like triggering the future terrorist attacks through legitimate aid. Considering the history of Iran, these fears are not unwarranted. However, the value of human life is equal in each and every corner of the world. Considering this, the United Nations which is charged with responsibility to balance the evil along with virtuous acts, has taken a stand that these sanctions should not hamper the humanitarian aid during these difficult times<sup>4</sup>.

These are few seen global currents in context of international scenario. These current developments are laying down a foundation of future actions of each and every human on this earth. Therefore as a common human being is trying to cope up with new normal with his or her best known resilient capacities, the terrorists are securing funds and equipping themselves to challenge these resilient capabilities to fulfill their evil agendas. Hence, these seen and unseen developments need to be pondered upon and thought about at this very moment so that the

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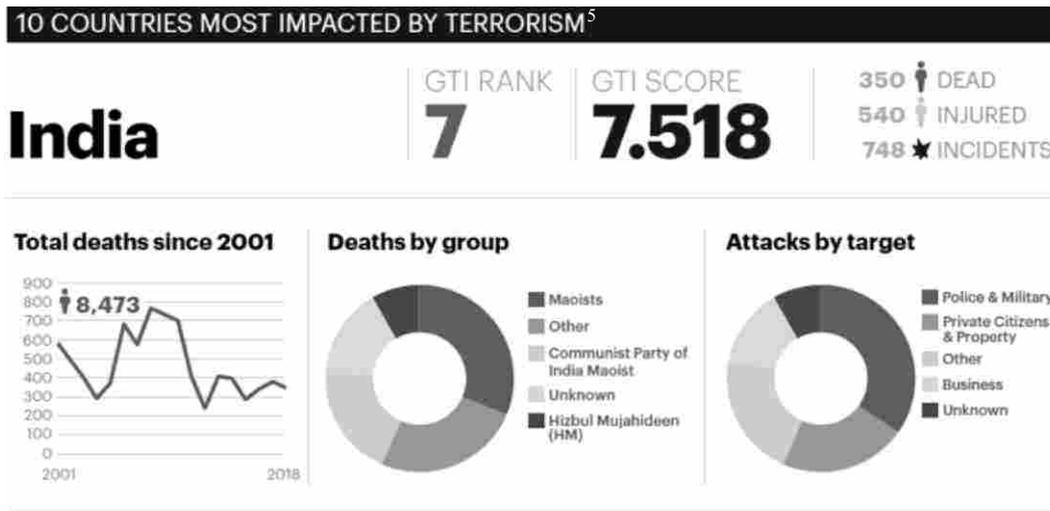
2. Andrew Hanna, *ISIS Offensive Exploits Pandemic*, Wilson Center Insight & Analysis (8 June 2020) <https://www.wilsoncenter.org/article/isis-offensive-exploits-pandemic><Accessed on 26/08/2020>.

3. Bill Van Auken, *US blocks IMF loan for Iran’s fight against Covid-19*, World Socialist Website, (11 April 2020) <https://www.wsws.org/en/articles/2020/04/11/iran-a11.html><Accessed on 26/08/2020>.

4. *Id.*

international peace and security will be able to support the resilient efforts of humans in near future.

## INDIAN CONTEXT



Along with global developments as discussed in the preceding paragraphs, the Indian state of affairs is worth to have in-depth insight. Just before the pandemic, the Global Terrorism Index was released which ranked India on 7<sup>th</sup> rank among the ten countries most impacted by terrorism. This reality which was brought to light forces us to dwell in detail about the inter connectivity between terrorism financing within India , internal and external security of India and resilient power of Indian society. The author has attempted to touch different trends in socio-legal analysis of Indian society and has tried to analyze the nature of socio-legal challenges in the context of internal and external threats to Indian national security. All this analysis is ultimately scrutinized from lens of the present and emerging resilient trends in post pandemic Indian society.

### 1. Internal Threats

The crime-terror nexus is in existence since decades and this symbiotic relationship has been developed through various sources and channels of financing which aid and assist both of them

5. Institute for Economics & Peace, 2019. The Global Terrorism Index 2019. [online] Sydney: The Institute of Economics & Peace, p.27. Available at: <<http://visionofhumanity.org/app/uploads/2019/11/GTI-2019web.pdf>><Accessed on 26 August 2020>.

for their own benefits. Counterfeiting of Indian Currency is one of the major channels through which the terrorists have secured constant source of funding<sup>6</sup>. With the passage of time, counterfeiting has assumed different faces and the goods are being counterfeited to secure funds for terror activities<sup>7</sup>. This already existing menace has assumed threatening proportion during the Pandemic as there is opening of multiple invisible opportunities which are facilitating collection of funds through counterfeiting<sup>8</sup>. Currently, this is causing economic losses; however, if neglected, it is likely to become one of the stronger financial support mechanisms in future for several terrorists intending to attack India.

Another point of concern in the similar context is the congregation of Tablighi Jamaat in Delhi's Nizamuddin area in India. It is alleged to have become one of the significant factors in the spread of corona virus in the nooks and corner of India<sup>9</sup>. Tablighi Jamaat is one of those organizations of Muslims which performs the function of Dawah i.e. invitation to the fold of Islam. In spite government directives of not holding religious gathering, the Jamaat leaders went ahead with the congregation and the member spread throughout India becoming the carriers of corona virus. Whether the members were aware about the potential risk they were posing to Indian masses, is the matter to be investigated. However, one thing is certain that the past linkages of Tablighi Jamaat members with Indian Mujaheddin cannot be ignored<sup>10</sup>. Further STRATFOR's Fred Burton and Scot Stewart inform that 14 Islamic radicals (12 Pakistanis, 1 Indian and 1 Bangladeshi) were arrested in Barcelona for planning to bomb targets in the city belonged to Tablighi Jamaat. TJ's name had figured earlier in connection with terrorism plots like October 2002 Portland seven, September 2002 Lackwanna Six cases in U.S. , August 2006 plot to bomb airliners en route from London to the U.S., July 7, 2005 London Underground bombings (suspects Shahzaad Tanveer and Muhammad Khan) and July 2007 ( suspect Kafeel Ahmad)

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6. PIB, Steps Taken to Combat Terror Financing & Circulation of Fake Indian Currency in Country, <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1579971> <Accessed on 26/08/2020>.

7. Sehaj Cheema and Kuldeep Garg, From a Peccadillo to Treason: How Counterfeiting Became a Terrorist Offence, Criminal Law Blog, National Law University, Jodhpur (March 24, 2020), <https://criminallawstudiesnluj.wordpress.com/2020/03/24/from-a-peccadillo-to-treason-how-counterfeiting-became-a-terrorist-offence/> <Accessed on 25/08/2020>.

8. PTI, Counterfeit Products Create Rs.1-lakh-Cr hole In Economy, Incidents up 24% in 2019: Reports, The Economic Times, News (Jul 30, 2020, 03:00 PM IST) <https://economictimes.indiatimes.com/news/economy/finance/counterfeit-products-create-rs-1-lakh-cr-hole-in-economy-incidents-up-24-in-2019-report/articleshow/77259432.cms> <Accessed on 25/08/2020>.

9. S Gurumurthy, Tablighi Jamaat-its other, evil side, The New Indian Express (03 April 2020, 07:50 PM) <https://www.newindianexpress.com/opinions/columns/s-gurumurthy/2020/apr/02/coronavirus-tablighi-jamaat---its-other-evil-side-2124563.html> <Accessed on 25/08/2020>.

10. Rakesh Maria, Let Me Say It Now, 335 (1st ed., 2020).

attempted bombings in London and Glasgow, Scotland<sup>11</sup>.

At face value, TJ is an apolitical, peaceful and egalitarian movement that works at grassroots level aiming to bring wayward Muslims to puritanical and orthodox practices of Islam. However, STRATFOR briefs confirm that there are strong pieces of evidence of indirect connections between TJ and global or wider nexus of Deobandi extremist organizations like the Taliban, anti-Shiite groups and Kashmiri militants in Afghanistan, Pakistan and India respectively. Through such links, the TJ cadres disgruntled with its apolitical stance get a chance to join jihadist organizations. Members of TJ's military offshoot, Jihad-bi-Al Saif, were accused of plotting to kill Pakistan's former PM Benazir Bhutto in 1995. When TJ cadres travel to Pakistan for training and religious congregations, they are lured by terrorist organizations like Al Qaeda, Harkat-ul-Mujahiddin, the Taliban and Lashkar-e-Taiba to join them. Superficially, TJ's message may be peaceful and benign, but ultimately it espouses the same conservative Islamic values that are adhered to by the above mentioned militant organizations. Hence, TJ acts as a de facto conduit for terrorist organizations for recruitment. Besides, TJ is also used by terrorist organizations as a cover for travel and recruitment<sup>12</sup>.

The misinterpretation of religious texts is one of the driving factors of radicalization in India and such religious gatherings act as the widest platform for ideological indoctrination of masses. Tabligi Jamat is a neo-fundamentalist organization, which follows the literal sense of Islamic tenets & inculcates such ideas into its followers. The general perception among the intellectuals and intelligence community in India is that the real threat lies in the challenge from Wahabbi radicalization financed and propped by Saudi money. Most of the relevant stakeholders tend to ignore the role played by the domestic Islamic extremist groups like the Deobandis and their affiliate Tableeghi Jamaat<sup>13</sup>.

In the light of this objective of the organization, it is imperative for the Counter-terrorism agencies to lift the veil of such religious congregations and investigate the linkages between ideological indoctrination and terrorist activities without harming the genuine fundamental rights of Muslims to preach and profess their religion. An in depth analysis is necessary in the near future from the perspective of safeguarding the national security. A blind eye to this

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11. Abhinav Pandya, *Radicalization in India*, 38 (1st ed., 2019).

12. *Id.* at 39.

13. *Id.* at 35.

innovative way of garnering funds and spreading terror will lead to heavy losses on national security fronts in near future.

Along with this one event, India also witnessed historic migrant exodus<sup>14</sup> from the industrial states to their least developed and poor inhabiting states. The migrants belonging to states like Uttar Pradesh, Bihar and Madhya Pradesh travelled back to their home states due to loss of employment in other industrial states. The fear of death and loss of employment has generated a sense of insecurity among them and hence, they are taking road back to their homes. However, it cannot be neglected that states like U.P., Bihar don't have enough employment opportunities nor they have basic amenities to be provided to these returnees. Hence, now these migrants are facing unprecedented unemployment coupled with hunger and dependant family members to look after. U.P. and Bihar are bordering states with very prominent illegal arms and drugs trade networks. These unemployed migrants may become potential recruits for cross border terrorists entities because the economic needs of these poor migrants can be easily satisfied by the rich terrorist organizations functioning beyond the borders. The lack of all inclusive governance initiatives and measures and absence of means to fulfill the basic needs of food, shelter and clothing will force these migrants to become tool in the hands of terrorists to achieve their needs of spreading terror through in-house recruits.

The internal fabric of India is multi-faceted with several hidden socio-legal issues which are still left outside the considerations and redressal of governance. The evils of crime-terror nexus resulting into funding and operationalization of terrorist entities on Indian soil has been continuing unabated since decades. The current pandemic has resulted into more unemployment<sup>15</sup> and once the conditional restrictions are lifted, this nexus will get breeding ground to harness the evil potential of criminal elements in society. These actions will be further complimented and supplemented with ideological indoctrination and radicalization which will aggravate the threat further. All these developments will automatically get broad framework to settle down which is prevalent in present socio-economic disparities affecting basic needs of

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14. A.K. Singh, Modi 2.0 & National Security: What's Been Done & What's Left To Do, The Quint (23 May 2020, 05:19 PM IST)<https://www.thequint.com/voices/opinion/modi-govt-second-term-national-security-defence-achievements-way-forward-challenges>< Accessed on 26/08/2020>.

15. Shiv Nalapt, Kasturi Sharma, How the Covid-19 outbreak has affected the joblessness rate in India-explained in 4 Charts, ET Now Digital (Aug 09,2020,18:34 IST)<https://www.timesnownews.com/business-economy/economy/article/how-the-covid-19-outbreak-has-affected-the-joblessness-rate-in-india-explained-in-4-charts/634284>< Accessed on 26/08/2020>.

migrants and poor population of India. And ultimately these currents and trends will pose a significant socio-legal challenge to the resilience capabilities of Indian masses.

## **2. External Currents**

Along with these previously discussed internal threats, the biggest external threat in the form of Pakistan is also raising its ugly head. The deep state mechanism in Pakistan has attempted to take advantage of the pandemic to free its assets by getting orders of release in long pending legal proceedings from the Pakistani judiciary. The person who is involved in these trials is the same Ahmad Omar Saeed Sheikh who was involved way back in 2001 in the crime of kidnapping wealthy persons in India to finance terror activities along with deadly terrorists such as Asif Raza Khan & Aftab Ansari. The trio shared intimate link with Al-Qeada & Jaish-E-Mohammad & were involved in using ransom money to fund 9/11 terror attacks in U.S. These entities acted as father figures & indoctrinated and radicalized the Indian youth after the infamous Godhra riots and fuelled the multiple blasts at several locations during the period of 2002 to 2006<sup>16</sup>. If such deadly monsters are released from judicial hands and unleashed in the open field once again then innocent Indian citizens will again have to sacrifice their lives with no mistakes of their own.

Another issue to be considered herein is that the financial crimes watchdog The Financial Action Task Force has given Pakistan a grace period of five months to submit its performance report on 13 outstanding benchmarks for foolproof arrangements against money laundering and terrorist financing. However, these impending appraisals don't seem to have any positive impact upon the terrorist mindset of Pakistani factions. Even during this pandemic period, Pakistan continues to promote terror<sup>17</sup>.

Another point of concern from Indian perspective is that currently, the adverse global opinion is being voiced against China at all international fronts as well as at domestic levels such as U.S. and India because it is being evident that China has harbored the Corona virus in Wuhan laboratory and has purposefully let the Covid 19 spread in connivance with WHO. These allegations are yet to be investigated. However, India cannot ignore that after American withdrawal from Afghanistan, U.S. stopped the military aid, money and moral backing to

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16. Maria, *Supra note 10*, at 342,343.

17. Dipanjan Roy Chaudhury, Pakistan continues to promote terror notwithstanding pandemic, *The Economic Times News* (July 07, 2020, 11:13 PM IST) <https://economictimes.indiatimes.com/news/defence/pakistan-continues-to-promote-terror-notwithstanding-pandemic/articleshow/76841645.cms> <Accessed on 26/08/2020>.

Pakistan and this void is filled up by China by providing infrastructural aid to Pakistan and at the same time, China is blocking every move to blacklist Pakistan in FATF list. China has always put forth its appreciation and support for Pakistan in every FATF Review meetings held till date<sup>18</sup>. In its third and final Plenary held virtually due to Covid-19 Pandemic in June 2020, the FATF decided to keep Pakistan in the “Grey List” as Islamabad failed to check the supply of money to terror groups like LeT and JeM. The plenary was held under the Chinese Presidency of Xiangmin Liu. If till October 2020, Pakistan does not take concrete actions against the perpetrators of terrorism financing, it will be put up in the “Black List” which will further deteriorate the precarious financial situation of the country<sup>19</sup>. Though U.S. & E.U. are putting weight behind Indian demand to blacklist Pakistan, Chinese support will prove to be a fatal blow to these goodwill intentions raised by India and her allies. Due to these delays in implementing strict counter-terrorism financing measures against Pakistan, the threat level is on increase. Though everything at border or within India seems silent and peaceful, the undercurrents will surely raise its ugly heads once the new normal becomes the norm of society.

At the United Nations Security Council, China is always supporting Pakistan even if it is known fact that Pakistan is harboring terrorists financially which has resulted in major terrorist attacks on Indian soil<sup>20</sup>. The end of Pandemic will reveal the true perpetrator of Covid 19 spread; none the less these international alignments and resultant outcome at FATF meet will surely have a long lasting impact upon the role of India in tackling the menace of cross-border terrorism and its financing.

Another point of concern is that the much-awaited Financial Action Task Force (FATF) mutual evaluation of India's anti-money laundering regime and legal measures formulated to check financial crimes, scheduled for this year, has been postponed till early next year in view of the current pandemic<sup>21</sup>. The review was to be conducted after 10 years of cycle. This review is important to assess the threat level and follow up of counter-terrorism financing processes. Last

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18. Brig Anil Gupta, Terrorism and Pak Army- Two beneficiaries of Corona Pandemic, India Defense Review (18 Apr, 2020) <http://www.indiandefencereview.com/news/terrorism-and-pak-army-two-beneficiaries-of-corona-pandemic/><Accessed on 26/08/2020>.

19. PTI, Pakistan puts more curbs on Hafiz Saeed, Masood Azhar and Dawood Ibrahim to avoid FATF blacklisting, Times of India World (Aug 22,2020 ,17:53 IST) <https://timesofindia.indiatimes.com/world/pakistan/pakistan-puts-more-curbs-on-hafiz-saeed-masood-azhar-and-dawood-ibrahim-to-avoid-fatf-blacklisting/articleshow/77691927.cms><Accessed on 26/08/2020>.

20. Sharmita Kar, India Says it Has Been a ‘Victim of Cross-border Terrorism’ After China Raises Kashmir at UNSC Debate, India.com News Debates( August 7,2020, 07:50 IST)<https://www.india.com/news/india/india-says-it-has-been-a-victim-cross-border-terrorism-after-china-raises-kashmir-at-unscc-debate-4105242/><Accessed on 26/08/2020>.

review was done in June 2010 and since then; there has been sea change in the terrorism financing patterns and trends across India. The move for digital India in the last decade has resulted in massive growth of online infrastructure in terms of countering-terrorism regime in India. An evaluation of this system will assist to explore the lacunas and rectify the system for more effective outcomes and efficient results. The unexpected delay will push the review outcome to the year of 2022 which will give further time to terrorist entities to exploit the loopholes. Terrorists are always a step ahead of counter-terrorism financing agencies and hence, the agencies need constant updates and review to counter the emerging contingencies.

The issue of Kashmir and terrorism inflicted in that region, though an internal one has assumed the international dimension since its birth. The analytical study of internal as well as external threats to the Indian national security is incomplete without the contemporary overview of this long pending agenda. Pakistan and its allies like Taliban has kept the fire burning and they keep the terrorist spirit alive through training of future terrorists. During these pandemic times when the whole world came to halt, these training initiatives are carried forward without much hindrance<sup>22</sup>. The withdrawal of U.S. troops from the territories of Afghanistan is going to result in threat fallout for India. Intelligence Agencies are already warning that these logistical activities are supporting these emerging developments and the planning of terrorist attacks is continuously on high tide. All these undercurrents shaped by contemporary pandemic crisis are strengthening threat factors which will unleash their developed potential in near future and give a blow to resilience of Indian society which is being built up through massive efforts.

### **3. Enforcement Approach**

The forced lockdowns and lack of access to physical financial and economic infrastructure have resulted into the rise of online financial transactions. These online avenues are not just pathways of transfer of money; the digital currency in the form of bitcoins provides an attractive avenue for storage and investment of digital money. There was observed increase in the investments and

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21. PTI, FATF review of India's anti-money laundering & terror financing regime pushed to 2021 due to Covid, The Economic Times Politics (Jul 26, 2020, 03:46 IST) <https://economictimes.indiatimes.com/news/politics-and-nation/fatf-review-of-indias-anti-money-laundering-terror-financing-regime-pushed-to-2021-due-to-covid/articleshow/77181119.cms?from=mdr><Accessed on 26/08/2020>.

22. Shishir Gupta, Afghan forces intercept Taliban Fighters , find Jaish terrorists training for Kashmir, Hindustan Times India News (Apr 16, 2020, 19:18 IST) <https://www.hindustantimes.com/india-news/afghan-border-clash-with-taliban-exposes-jaish-terror-camps-for-kashmir/story-GyRErS9kvUzbYcq544s6bO.html><Accessed on 26/08/2020>.

transfer of crypto currency during this period of pandemic<sup>23</sup>. Just before the outbreak of this deadly Covid 19 pandemic, the Supreme Court of India squashed the ban imposed by the RBI upon crypto currencies and paved a way for enormous transactions to be done through the medium of digital currencies<sup>24</sup>. The initiative was taken by RBI to regulate the misuse of crypto currencies for illegal online storage and transfer of terror funds. However, the setting aside of ban has come as a boon to the criminal & terrorists to exploit the uncharted cyber space for storing and transferring their illegal funds. The already backward Indian IT laws are made more regressive in the wake of this judicial decision and the Indian cyber space and online transactions are left unsecured and to the mercy of malicious terror agenda. Further, we need to pay heed to the glaring fact that the draft 'Banning of Crypto currency and Regulation of Official Digital Currency Bill, 2019' is still under consideration. Crypto currencies in India occupy the nether world of no man's land. While the regulatory framework that the RBI had promulgated had been struck down by SC, but simultaneously there has been no enabling regulation that has come in the offering. In such an unregulated environment, the possibility of unscrupulous players entering the market to dupe genuine investors cannot be denied<sup>25</sup>.

The data is the new asset of the modern technological world. This data driven digital society needs a novel protection in all transactions of human life. Financial aspects need security on priority basis because for both good and evil adventures, finances play the most significant role in successful completion of proposed agenda. The financial data is in dire need of protection in Indian ecosystem because India does not have any comprehensive legislation for data protection. Recently, the Personal Data Protection Bill, 2019 was introduced in Parliament. The Bill has been referred to a Joint Parliamentary Committee for detailed examination, and the report is expected by the Budget Session, 2020. The Bill seeks to provide for protection of personal data of individuals, create a framework for processing such personal data, and establishes a Data Protection Authority for the purpose<sup>26</sup>. The pending bill has a very long

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23. Abhinav Singh, Despite growing interest, crypto currencies face uncertain future in India , The Week(July 31,2020,19:49 IST) <https://www.theweek.in/news/biz-tech/2020/07/31/despite-growing-interest-cryptocurrencies-face-uncertain-future-in-india.html><Accessed on 26/08/2020>.

24. Turner Wright, Indian Government Actively Working Toward New Crypto Ban, Coin telegraph,(Aug 05,2020)<https://cointelegraph.com/news/indian-government-actively-working-towards-new-crypto-ban><Accessed on 26/08/2020>.

25. Singh, supra note 23.

26. Anurag Vaishnav, The Personal Data Protection Bill,2019: All you need to know, PRS Legislative Research <https://www.prsindia.org/theprsblog/personal-data-protection-bill-2019-all-you-need-know><Accessed on 26/08/2020>.

journey since 2017 and it is still under discussion. This unnecessary delay may prove fatal in terms of national security as the technological advances are exploited easily and in faster mode by the terrorist elements of the society.

### **CONCLUSION & RECOMMENDATIONS**

It is well accepted that it is an exciting period of change and challenge. Though the priority of saving lives from this deadly virus must take precedence over anything else, the continuous efforts of safeguarding national security & potential terror threats in the near future must not be neglected. Due to lack of commonly accepted definition of terrorism, a uniform and targeted counter approach is missing. Hence, it is high time now that the global community adopts a uniform definition of terrorism and the national legal systems implement the same in their domestic legal fabric.

Terrorism is highly contingent & reactive<sup>27</sup>. It knows neither territorial boundaries nor lockdowns. Online platforms are more easily accessible avenues for this dynamic evil element. These unavoidable realities demand that the resilient ecosystem of the human race as a whole will have to face the dynamic socio-legal challenge posed by terror funding amid pandemic. All the solutions need to be targeted and comprehensive so that the invisible and contingent threats to the resilience adopted in post pandemic era prove to be effective and result-oriented.

Current situation demands effective intelligence gathering and it's alignment with national police force. Though intelligence gathering is a fragile preventive measure, it will assist in future in punitive and corrective actions of State. The intelligence systems must avoid failure of imagination. The global cooperation will assist in nipping the threat of counterfeiting in bud. Further, the geopolitical moves of each and every nation must confirm to the standards of international peace and security adopted and implemented for the benefit of whole mankind.

India represents a unique blend of communal co-existence in very dynamic times and hence solution must also recognize and adapt to these dynamics of societal ethos. Though the constitution of India guarantees freedoms and civil liberties, they are subject to reasonable restrictions. If these liberties are posing threat to national security then they must be restrained and curtailed with accountability. The exodus of migrants has brought to light the fault lines in the present governance mechanism in all spheres of life ranging from fulfillment of basic human

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27. Martha Crenshaw, The Debate over "New" vs. "Old" Terrorism, The American Political Science Association Annual Presentation, Aug.30,2007, at 32.

needs till provisions of employment. All these fault lines are laying down foundation for future divisions which will give blow to the resilience of humans in post covid era. These currents need constructive solutions to be implemented with the help of good governance initiatives and inclusionary measures.

A consistent monitoring of cash flows from one point to another point will help in nipping the threat of terrorism in the bud & will pave way of saving precious innocent lives from deadly terror attacks in near future. The adoption and implementation of robust cyber security infrastructure will pave a successful way out to counter online financial crimes including the crime of terrorism financing. The world has taken its lead in the form of governing crypto transactions; however the compliance factor is causing an obstacle in effective implementation of global standards<sup>28</sup>. India is also mulling over implementing a new crypto ban<sup>29</sup>. These global and national initiatives must be speed up because the terrorist and their networks are highly adaptive to emerging technologies and counter-terrorism financing regime must always be ahead of them to tackle the menace effectively.

The ideologies are not violent in themselves; but they fire the forces of radicalization in a vigorous manner that helps in creating foot soldiers for the jihad, including lone wolf attackers<sup>30</sup>. These social tentacles need grooming in positive ways so that the emerging threat from foreign fighters, sleeper cells, lone wolf attackers and several terrorist networks will not be able to exploit the vulnerability presented through online propaganda and funding.

First and foremost, the general penal law of the land in the form of Indian Penal Code exhibits lacuna when it comes to tackle the menace of terrorism financing. The bits and pieces of legislations like the Unlawful Activities Prevention Act and the Prevention of Money Laundering Act are not at all inclusive in terms of countering the crime of terrorism financing. These lacunas are to be patched up with effective Counter-Terrorism Financing Regime. Unfortunately, India does not have a comprehensive national security doctrine or policy and there is no counter- terrorism financing policy inclusive of targeted legislation. Before framing a comprehensive policy, comprehensive net assessment of terrorist threat is must. The threat

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28. Victor Chatenay, The Financial Action Task Force Published a 12-month Review of Crypto Standards, Business Insider (Aug 03, 2020, 7:14 PM) <https://www.businessinsider.com/financial-action-task-force-published-review-of-crypto-standards-2020-8?IR=T> <Accessed on 26/08/2020>.

29. Turner Wright, Indian Government Actively Working Toward New Crypto Ban, Coin telegraph, (Aug 05, 2020) <https://cointelegraph.com/news/indian-government-actively-working-towards-new-crypto-ban>.

30. Pandya, supra note 11, at 45.

assessment must be done at two intervals- present and future. The gap between policy makers and academia must be bridged so that the new emerging challenges studied from the academic perspectives are considered and implemented in reality. The trends were and are unknown and this mystery can be solved and addressed only through the complementary and supplementary approach of multiple disciplines. There must be academic outreach program.

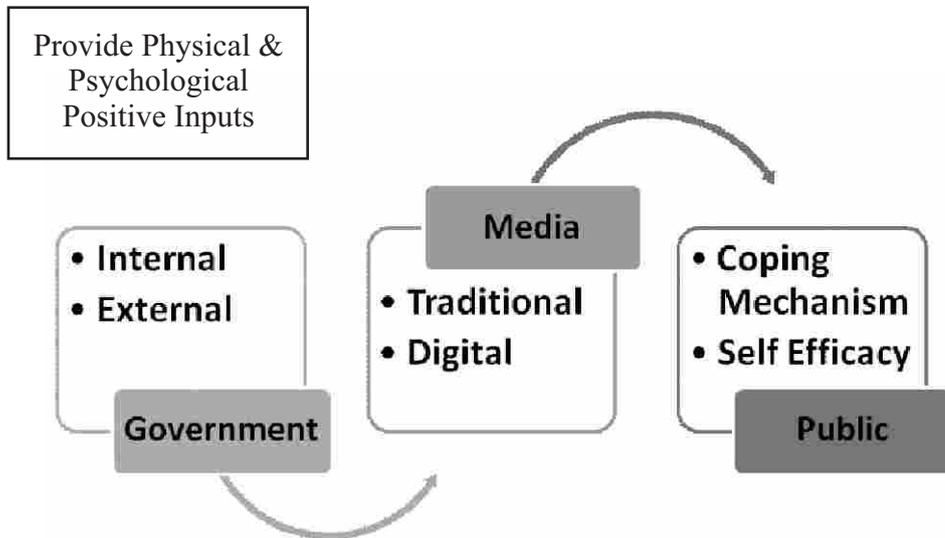
Law operates within society and community is the basic element which needs active participation for successful implementation of socio-legal measures. Community participation must also be sought to deal with anxiety and fear that is or will be generated by the present and future terrorist acts respectively. The current pandemic times are already testing the coping mechanisms of the society. The mental well being of the society as whole and of the vulnerable elements within it need robust support mechanism in terms of effective deradicalization strategies. Apart from this, the following ways can be adopted and implemented within the counter-terrorism financing regime to strengthen resilient ecosystem in post pandemic times-

#### WAYS OF RESILIENCE IN CTF <sup>31</sup>



31. Prof. Dr. Edwin Bakker and Prof. Dr. Beatrice de Graaf, Towards, a Theory of Fear Management in the Counterterrorism Domain: A Stocktaking Approach, (Jan 2014).

Further, the resilience ecosystem in post pandemic era can be built up on following pillars-



The world will emerge from this pandemic in new form with new features. India is not an exception to this new normal. However, it is high time that we must realize that criminal elements in the society will also adapt themselves to this new normal. They will have their own ways to challenge the resilience ecosystem at international and national level. Hence, we must keep ourselves updated about the contemporary invisible developments and enhance our capacities so that emergent contingency can be dealt with firm resolve and with ever equipped counter-terrorism regime.

## **AN OVERVIEW OF INTERNATIONAL CLIMATE CHANGE REGIME WITH REFERENCE TO INDIA'S POLICY TOWARDS CLIMATE CHANGE**

**Dr. Nandita S. Patil\***

### **INTRODUCTION**

A number of Environmental concerns are addressed at global level such as environment pollution, wildlife and biodiversity protection, sustainable development, hazardous activities, protection of ozone layer, climate change etc. These issues are addressed in a number of International instruments such as treaties, conventions, agreements and declarations which enable the countries to work together on these environmental issues affecting the world. United Nations Conference on the Human Environment (1972), World Commission on Environment and Development (1983), United Nations Framework Convention on Climate Change (UNFCCC), United Nations Conference on Environment and Development(1992) and World Summit on Sustainable Development(2002) have been particularly important in addressing certain environmental issues. The importance of these international instruments is due to the principle of Jus cogens which means “compelling law”. It is a special rule of customary (or general) international law under Article 53 of the Vienna Convention on the Law of Treaties as a peremptory norm from which derogation is not permitted. The principle of jus cogens has now been accepted as part of general international law.

Climate change is considered as one of the greatest threats and a serious risk to the human rights relating to life, health, food and an adequate standard of living of individuals and communities. Climate change implicates virtually every aspect of human life. UNFCCC, Kyoto Protocol and Paris Agreement are significant as they govern the global climate change regime. India's policy on low carbon emission pathway tries to balance the economic development and environment by adhering to the principles and provisions of the UNFCCC.

### **INTERNATIONAL REGIME ON CLIMATE CHANGE**

The international environmental legal regime on climate change is governed by UNFCCC, its Kyoto Protocol, 2015 Paris Agreement and the decisions taken by conference of parties (COP) to FCCC and Kyoto Protocol. If we look into the background a series of events led to the

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development of climate change regime at international level. The first World Climate Conference convened by World Meteorological Organization (WMO) held in 1979 issued a declaration that called on all nations to .....*forsee and prevent potential man-made changes in climate that might be adverse to the well-being of humanity*<sup>1</sup>, and in 1988, World Meteorological Organization and United Nations Environment Programme (UNEP) established the Intergovernmental Panel on Climate Change (IPCC) to assess the science related to climate change so as to enable policy makers at all levels of government to take sound decisions. To cope with the problem and impacts of climate change, in 1990 the first assessment report of IPCC and the second World Climate Conference call for a global treaty on climate change which resulted in the UN General Assembly negotiations on a framework convention on climate change. Thus, United Nations Framework Convention on Climate Change (UNFCCC) is adopted in 1992 and came into force on 21 March 1994.

As per the definition given in UNFCCC climate change is “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”To prevent the dangerous human interference with the climate, the UNFCCC required parties to it to take ‘precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects’<sup>2</sup>. However, it did not contain any internationally binding emission reduction targets,<sup>3</sup> hence, the Kyoto Protocol was adopted in 1997. It is considered as the first major step for reducing global emission by legally binding developed countries to emission reduction targets. It sets legally binding emission reduction requirements for industrialized countries. At present there are 195 Parties to the Convention and 192 Parties to the Kyoto Protocol.

The first commitment period of the Kyoto Protocol’s started in 2008 and ended in 2012. The States listed in Annex I to the UNFCCC have to reduce or limit their GHG emissions by or to a certain amount compared to the base year levels as specified in Annex B to the Kyoto Protocol<sup>4</sup>. Annex I countries are mainly developed ,industrialized countries historically responsible for most GHG emissions. Non Annex countries constitute the remainder which include ‘developing countries’ including China, India, Singapore, Argentina, Mali and Tuvalu as well as least

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1. See [https://public.wmo.int/en/bulletin/history\\_climate\\_activities](https://public.wmo.int/en/bulletin/history_climate_activities) (last visited Jul. 26, 2020)

2. Abate Randall S., *Climate Change Impacts on Ocean and Coastal Law* 610 (kindle edition, 2015)

3. Edwin Woerdman, Martha Roggenkamp, Marjin Holwerda, *Essential EU Climate Law* 15 (2015)

4. *Id.* at 16.

developed countries receiving special assistance.<sup>5</sup> In 2012 Doha amendment to the Kyoto Protocol included new commitments in second commitment period which began on 1 January 2013 with the overall target of an 18% reduction compared to 1990 levels<sup>6</sup> and will end in 2020. The protocol allows the countries committed to reduce or limit emissions to meet their targets primarily through national measures with the help of additional mechanisms that is Joint Implementation, Clean Development Mechanism and International Emission Trading.<sup>7</sup> Joint Implementation mechanism allows these countries to earn emission reduction units (ERUs) from projects in another Annex I country that reduce emission or removes GHGs.<sup>8</sup> Clean Development Mechanism(CDM) allows these countries to implement an emission reduction project in developing countries,<sup>9</sup> creating emissions entitlements on the basis of putative emissions forgone rather than actual reductions.<sup>10</sup> The Clean Development Mechanism, provides that if developed countries, invest in 'clean' development practices in poorer countries, they can count this as equivalent to reducing emissions and are thus permitted to increase their own quota of emissions rights as initially allocated under the Kyoto protocol.<sup>11</sup> International Emission Trading mechanism allow countries to implement their mitigation commitments through emission reductions in another country.<sup>12</sup> More importantly, technology is required to enhancing existing abilities and lowering the costs of reducing or preventing the GHG emissions, hence the UNFCCC and the Kyoto Protocol require Parties to promote and cooperate with each other in the development, diffusion, and transfer of technologies that control, reduce or prevent GHG emissions.<sup>13</sup> International climate change law also focusses on International oversight to promote implementation, compliance and effectiveness.<sup>14</sup>

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5. Siobhan McInerney-Lankford, Mac Darrow, Lavanya Rajamani, Human Rights and Climate Change, A Review of International Legal Dimensions, World Bank Study 3 (e-book) available at <https://www.researchgate.net/profile/lavanyaRajamani2/publication/316994246>
  6. Edwin Woerdman, Martha Roggenkamp, Marjin Holwerda, supra note 3, at 17
  7. [https://unfccc.int/Kyoto\\_protocol/items/2830.php](https://unfccc.int/Kyoto_protocol/items/2830.php) (last visited Dec. 26, 2016)
  8. Daniel Bodansky, Jutta Brune`e, LawanyaRajamani, International Climate Change Law180 (Kindle Edition, 2017)
  9. Kyoto Protocol, art. 12
  10. Tim Hayward, Human Rights Versus Emmission Rights: Climate Justice and the Equitable Distribution of Ecological Space,21 Ethics & International Affairs. 431 (2007)
  11. *Ibid.*
  12. Randall S.,supra note 2, at 13.
  13. Climate Change, Technology Transfer and Intellectual Property Rights, 1, Trade and Climate Change Seminar June 18–20, 2008 Copenhagen, Denmark, 2008, International Centre for Trade and Sustainable Development. Published by the International Institute for Sustainable Development
  14. Daniel Bodansky, Jutta Brune`e, LawanyaRajamani, International Climate Change Law13% (Kindle Edition, 2017)

With enhanced support to assist developing countries, the Paris Agreement<sup>15</sup> brought all nations into a common cause for combating climate change.<sup>16</sup> It establishes a legal obligation for the Parties to the agreement to prepare, communicate and to put forward their best efforts through “nationally determined contributions” (NDCs) and to report on a regular basis about their emissions and implementation efforts.<sup>17</sup> NDCs addresses mitigation, adaptation, finance for mitigation and adaptation, technology, capacity building and transparency.<sup>18</sup> 191 States have already submitted their NDCs to the UNFCCC secretariat<sup>19</sup>

### **INTENDED NATIONALLY DETERMINED CONTRIBUTIONS (INDCS)/NDCS**

At 19thCOP held in Warsaw Poland (December 2013) parties to UNFCCC framed a concept called Intended Nationally Determined Contributions (INDCs) as contributions ‘towards achieving the objectives of the Convention as set out in its Article 2’, that is-

“to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”

The 20th COP in Lima (2014) further clarify that INDC not to be mitigation centric only but can also include other components as per the priorities of the country.<sup>20</sup> INDC became a corner stone of the eventual agreement, the decision invited all parties to initiate or intensify domestic preparations for their INDCs<sup>21</sup> well in advance of COP 21 that is by the first quarter of 2015 so as to facilitate the clarity, transparency and understanding of the INDCs.<sup>22</sup> The word “intended” was used because countries were communicating proposed climate actions ahead of the finalisation of the Paris Agreement. As countries formally join the Paris Agreement the word

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15. Entered into force on 4 November 2016

16. <http://www.un.org/climatechange/towards-a-climate-agreement/> (last visited Dec. 27, 2016)

17. See The Paris Agreement, art. 4.2

18. *Supra note* 14, at 29.

19. *Id.* at 25.

20. <http://moef.gov.in/wp-content/uploads/2018/04/revised-PPT-Press-Conference-INDC-v5.pdf> (last visited Jul. 28, 2020)

21. Daniel Klien, Maria Pia Carazo, Meinhard Doelle et al., *The Paris Agreement on Climate Change, Analysis and Commentary* 65, (kindle edition, 2017)

22. <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement/nationally-determined-contributions-ndcs#eq-4> (last visited Jul. 31, 2020)

“intended” is dropped from INDC and the INDCs will constitute the first NDCs of the party concerned unless the party decides otherwise.<sup>23</sup>

NDCs outline and communicate post 2020 climate actions by the countries party to the Paris Agreement. It embodies efforts by the country to reduce national emissions and adapt to the impacts of climate change,<sup>24</sup> to be submitted every five years to the UNFCCC secretariat. After the submission of the first NDCs the next (new NDCs or updated NDCs) are to be submitted by 2020 and every five years thereafter, regardless of their respective implementation time frames<sup>25</sup> so that the successive NDCs will represent a progression compared to the previous NDC and reflect its highest possible ambition.

Mitigation, Adaptation, Financial resources are important elements in INDC/NDC. Climate Change Mitigation involves efforts towards reducing or preventing emission of greenhouse gases. Mitigation can mean using new technologies, renewable energies, making older equipment more energy efficient, or changing management practices or consumer behaviour<sup>26</sup>. Much of the international climate change law focuses on mitigation which encompasses both the measures to limit GHG emissions and measures to preserve or enhance sinks policies to reduce emissions include energy efficiency standards, subsidies for renewable energy, a carbon tax, an emission trading system and technology research and development. Sink policies generally relate to land use, land use change, forestry and include measures to reduce emissions from deforestation and forest degradation and to encourage afforestation.<sup>27</sup>

Adaptation is a kind of corrective response to potential or actual climate change affected human rights.<sup>28</sup> Adaptation refers to adjustment in ecological, social, or economic systems and also to changes in practices, processes and structures to moderate potential damages or to benefit from opportunities associated with climate change.<sup>29</sup> Adaptation involves anticipating the adverse effects of climate change and taking appropriate action to prevent and minimize the damage they

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23. Klien, *Supra note* 21.

24. <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement/nationally-determined-contributions-ndcs> (last visited Jul. 31, 2020)

25. <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement/nationally-determined-contributions-ndcs#eq-2> (last visited Jul. 31, 2020)

26. <https://www.unenvironment.org/explore-topics/climate-change/what-we-do/mitigation>, (last visited Jul. 29, 2020)

27. *Supra note* 14.

28. Climate Change and Human Rights: A Rough Guide 3, [www.ichrp.org/files/summaries/35/136\\_summary.pdf](http://www.ichrp.org/files/summaries/35/136_summary.pdf),

29. [unfccc.int/focus/adaptation/items/6999.php](https://unfccc.int/focus/adaptation/items/6999.php) (last visited Dec. 26, 2016)

can cause. Adaptation includes Observation, Assessment, Planning, Implementation, Monitoring and Evaluation. Mitigation, requires collective action, in contrast adaptation can usually be undertaken by individual states.<sup>30</sup>

There are several sources of financing to assist adaptation of climate change. Climate finance includes financing at local, national and transnational level to support climate change actions that is mitigation and adaptation.<sup>31</sup> Based on the principle of ‘common but differentiated responsibility’, UNFCCC requires the developed country parties to assist developing country parties in implementing its objectives.<sup>32</sup> The same obligation is reiterated in the Paris Agreement. The Marrakesh Accord of 2001 deals with the rules for implementation of the Kyoto Protocol provides for setting up new funding and planning instruments for adaptation and for establishing a framework on technology transfer.<sup>33</sup> An Adaptation Fund was established in 2001 to finance concrete adaptation projects and programmes in developing countries that are Parties to the Kyoto Protocol. The source of finance for Adaptation Fund is from the share of proceeds from clean development mechanism (CDM) project activities and other sources.<sup>34</sup> Funding has been made available under the Global Environmental Facility, Green Climate Fund, the Least Developed Countries Fund and the Special Climate Change Fund. These funds are for the process of accessing support for the formulation and implementation of adaptation plans at national level.<sup>35</sup> Article 9.2 of UNFCCC also provides that developing countries may voluntarily contribute to climate financing.

#### **INDIA’S POLICY FRAMEWORK ON ENVIRONMENT AND CLIMATE CHANGE**

India’s environment policy is a response to national and international commitments. India’s domestic response to environmental concerns has been through the Constitution of India, legislative enactments and judicial precedents. Article 48-A of the Indian Constitution directs the state to protect and improve the environment and to safeguard the forests and wildlife of the country”. Article 51 A(g) of the Constitution of India lays down the fundamental duty of every citizen to “protect and improve the natural environment including forests, lakes, rivers and

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30. *Supra note 14.*

31. <https://unfccc.int> (last visited August 25, 2020)

32. *Ibid*

33. *Supra note 29.*

34. <https://unfccc.int/process-and-meetings/the-kyoto-protocol/what-is-the-kyoto-protocol/kyoto-protocol-targets-for-the-first-commitment-period> (last visited Jul. 29, 2020)

35. See Para 6, Decision/C.P.25, National Adaptations Plans, [https://unfccc.int/resource/cop25/cop\\_25\\_auv\\_3b\\_NAPs](https://unfccc.int/resource/cop25/cop_25_auv_3b_NAPs).

wildlife and to have compassion for living creatures". Judiciary has played a significant role in developing environmental jurisprudence through the wide interpretation of Article 21 of the Indian Constitution which relates to right to life and personal liberty in a number of cases. Also, the Supreme Court of India has recognised international environmental principles such as polluter's pay principle<sup>36</sup>, public trust doctrine<sup>37</sup>, precautionary principle<sup>38</sup>, Inter-Generational Equity principle<sup>39</sup>, principle of sustainable development<sup>40</sup> and formulated the principle of absolute liability<sup>41</sup> in different cases relating to environment matters. A number of statutes are enacted by the government to protect environment such as Air (Prevention and Control of Pollution) Act, 1981, Water (Prevention and Control of Pollution) Act, 1974, The Wildlife (Protection) Act, 1972, The Forest (Conservation) Act, 1980, Environment (Protection) Act, 1986, The National Environment Appellate Authority Act, 1997, Public Liability Insurance Act, 1991, National Environment Tribunal Act, 1995 etc.

The National Environment Policy (NEP) 2006 laid down the broad policy framework on environment and climate change. It promotes sustainable development along with respect for ecological constraints and the imperatives of social justice. The Environmental policy is supplemented by actions of the State Governments through State Action Plan on Climate Change (SAPCC), Non-governmental Organizations (NGOs), initiatives of the private sector and other stakeholders.<sup>42</sup>

The above efforts are also supplemented by other national strategies and policies such as the Energy Conservation Act (for efficient use and energy conservation), the National Policy for Farmers (focuses on sustainable development of agriculture), the National Electricity Policy (NEP) (focuses on universalizing access to electricity and promoting renewable sources of energy) as does the Integrated Energy Policy (IEP), market mechanisms including Perform Achieve and Trade (PAT), Renewable Energy Certificates (REC), a regulatory regime of Renewable Purchase Obligation (RPO)<sup>43</sup> and Environment Impact Assessment (EIA)

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36. See *Vellore Citizens Welfare Forum v. UOI*, AIR 1996 SC 2718

37. See *M.C. Mehta v. Kamal Nath*, (1996) 1 SCC 38

38. See *Vellore Citizens Welfare Forum v. UOI*, AIR 1996 SC 2718

39. See *State of Himachal Pradesh v. Ganesh Wood Products*, AIR 1996 SC 149

40. See *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 5 SCC 281, *M.C. Mehta v. Union of India*, AIR 1997 SC 734

41. See *M.C. Mehta v. UOI*, AIR 1987 SC 1086

42. <https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/India/1/INDIA%20INDC%20TO%20UNFCCC.pdf> 7, (last visited Feb. 1, 2017) [hereinafter *unfccc.int/sites/submissions/INDC*]

43. *Ibid*

Notification for approval of industrial and infrastructural projects ( currently EIA draft 2020 is under consideration).EIA could be a great help in checking the GHG emission by denying approval to the proposed projects which do not use environment friendly technology.

The climate change vulnerability Index lists India among other countries that are most vulnerable to climate change.<sup>44</sup> The Stern Review on the likely impacts of climate change on development in developing countries, records that the cost of climate change on development in India could be as high as 9-13% loss in Gross Domestic Product (GDP) by 2100 as compared to what could have been achieved in a world without climate change.<sup>45</sup> One of the studies pointed out that in India urban water shortage in a large number of cities with seasonal water shortage particularly the Western Ghats of India, will have 81 million people with insufficient water by 2050.<sup>46</sup> According to this study population growth will have a large effect on urban water shortage. Climate change will cause an additional increase in water shortage<sup>47</sup>. To deal with these issues effective mitigation strategies are needed.

India's action plan to mitigate the impact of the climate change began with the launch of National Action Plan on Climate Change (NAPCC) in 2008. It provides a number of measures outlining priorities for mitigation and adaptation to combat climate change. It is implemented through eight national missions on solar energy, sustainable habitat, enhanced energy efficiency, water, sustaining Himalayan ecosystem, Green India, sustainable agriculture, strategic knowledge for climate change to support the above seven missions by generating and providing strategic knowledge. The obligation and responsibilities of UNFCCC and Kyoto Protocol on India led to formation of INDC which provides for an ambitious plan to reduce the GHG emissions.

#### INDC/NDC

India submitted its INDC on 1st October 2015 to UNFCCC. India's INDC is declared for the period 2021 to 2030 with an aim to reduce overall emission intensity and improve energy efficiency but at the same time to protect the vulnerable sectors of economy and segments of Indian society. Post 2020 period INDC goals outlined the plan to reduce carbon intensity, raise

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44. Ingrid Ahlgren, Seiji Yamada, Allen Wong, Rising Oceans, Climate Change, Food Aid and Human Rights in the Marshall Islands, 16 HEALTH AND HUMAN RIGHTS JOURNAL 69 Climate Justice and Right to Health (June 2014). <https://www.jstor.org/stable/10.2307/healthhumanright16.1.69>

45. *Supra* note 5, at 1.

46. Robert Mc Donald et al. Urban Growth, Climate Change and Fresh Water Availability, 2, available at <https://www.pnas.org/contents/pnas/early/2011/03/21/10>,

47. *Ibid.*

the share of non-fossil fuel power to 40 per cent by 2030, and to produce 175 GW of renewable power by 2022. To combat the growing problem of Climate Change, a voluntary goal of reducing the emissions intensity of its GDP by 33 to 35% over by 2030 is declared the government.<sup>48</sup>

The INDC/NDC provides for the mitigation and adaptation strategies and the financial policies for climate change as a contribution towards climate justice.

### **MITIGATION STRATEGIES**

India's ongoing mitigation strategies includes Green Generation for Clean & Energy with the renewable energy target 175 GW by 2022, National Solar Mission to establish India as a global leader in solar energy with a target of 20,000 MW installed capacity in three stages by 2022, National Smart Grid Mission, Smart Cities Mission to develop new generation cities through improvement and redevelopment of city including green field development and application of smart solutions to the city wide infrastructure and services, Green Energy Corridor projects and 'Swachh Bharat Mission' (Clean India Mission). It also includes:

- Solar powered toll plazas across the country.
- Nationwide Campaign for Energy Conservation
- National Heritage City Development and Augmentation Yojana to bring together urban planning, economic growth and heritage conservation in an inclusive manner.
- Atal Mission for Rejuvenation and Urban Transformation targeting 500 cities for urban renewal.
- Zero Effect, Zero Defect to enhance energy & resource efficiency, pollution control, use of renewable energy, waste management etc.
- Green Highways (Plantation & Maintenance) Policy with the aim to develop 140,000 km long line of trees on both sides of the highways.
- Faster Adoption and Manufacturing of Hybrid & Electric Vehicles (FAME India)
- Policies to increase production of energy efficient 3 phase locomotives and from 2016-17 onwards to switchover to 100% of these locomotives and to use 5% bio-diesel in traction fuel in diesel locomotives.
- National Air Quality Index with One Number, One Colour and One Description for giving status of air pollution in a particular city.

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48. Id. at 34.

**ADAPTATION STRATEGIES**

India has also implemented a series of schemes which strengthen adaptive capacities of the vulnerable communities. Adaptation strategies of the Indian government includes Soil Health Card Scheme to assess the status of soil health and to report the farmers the details of the soil of their farm so as to provide ways to improve the soil health, Paramparagat Krishi Vikas Yojana for organic farming, Pradhan Mantri Krishi Sinchayee Yojana for efficient irrigation practices, National Mission for Clean Ganga, National Bureau of Water Use Efficiency for efficient use of water 'Give It Up' Campaign to motivate domestic LPG (cooking gas) users who can afford to pay market price for LPG to voluntarily give up subsidy on cooking gas and Neeranchal for watershed development.

**CLIMATE FINANCE POLICIES**

Government's financial policies to promote actions to address climate concerns includes coal cess, cuts in subsidies, increase in taxes on petrol and diesel, tax free infrastructure bonds for funding renewable energy projects. For mobilizing financing for mitigation and adaptation National Clean Environment Fund and National Adaptation Fund for Climate Change are set up. The Coal Cess forms the corpus for the National Clean Environment Fund. In August 2015 the Government set up National Adaptation Fund for Climate Change (NAFCC) with an amount of 350 crore to meet the cost of adaptation to climate change the State and Union Territories of India which are particularly vulnerable to the adverse effects of climate change. The projects under NAFCC prioritizes the needs that builds climate resilience in the areas identified under the SAPCC (State Action Plan on Climate Change) and the relevant Missions under NAPCC (National Action Plan on Climate Change).<sup>49</sup>

National Bank for Agriculture and Rural Development (NABARD) is National Implementing Entity (NIE) for Adaptation Fund (AF) under Kyoto Protocol and is also designated as NIE for implementation of adaptation projects under NAFCC by the Government. NABARD facilitates identification of project ideas/concepts from State Action Plan for Climate Change (SAPCC), project formulation, appraisal, sanction, disbursement of fund, monitoring & evaluation and capacity building of stakeholders including State Governments.<sup>50</sup> So far 30 projects have been

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49. <https://www.nabard.org/content.aspx?id=585>(last visited Jul. 29, 2020)

50. *Ibid.*

sanctioned under the fund. NABARD is piloting Climate Change Adaptation (CCA) project in Ahmednagar district (25 villages) of Maharashtra with a fund support of US\$ 3.5 million, to develop the knowledge, strategies, and approaches that enable vulnerable communities to cope with Climate Change and adapt to the impending impacts. It is also piloting projects on climate proofing of watersheds in Tamil Nadu and Rajasthan.<sup>51</sup>

India's on-going mitigation and adaptation strategies and actions relating to climate justice mostly relates to agriculture and forest sectors. Both the mitigation and adaptation strategies are commendable; however, time bound implementation of these action plan will only help in reducing the GHG emission to a considerable extent.

### **CONCLUSION**

Climate change is a global problem which has consequences on all spheres of human existence. The need for reducing emissions was felt by the international community resulting in the adoption of UNFCCC and in that direction the adoption of Kyoto Protocol which legally binds the nations party to it to reduce the targeted emission in a phased manner. The Paris Agreement requires Parties to formulate national mitigation and adaptation strategies in their NDCs. Ultimately solving the climate change problem will depend on regulating or developing technologies<sup>52</sup> to enhance existing capabilities so as to reduce or prevent GHG emissions and how the governments fulfill their commitments towards mitigating the impact of climate change set out in its NDCs in a time bound manner.

India's policy towards climate justice addresses the concern about climate change but without ignoring the improvement in the lives of its citizens. However, the obligation and responsibilities of UNFCCC and Kyoto Protocol on India poses new challenges which stress the need to fulfil the ambitious plan set out in NDC to reduce the GHG emissions within specified time. It is important to ensure that India's mitigation and adaptation strategies and actions relating to climate change should integrate the human rights concern, stakeholder's participation in decision making process, creation of indigenous technology and more importantly the effective implementation of the National Action Plan for Climate Change.

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51. <https://www.nabard.org/content.aspx?id=586>, (last visited Jul. 29, 2020)

52. Daniel Bodansky, Introduction: Climate Change and Human Rights: Unpacking the Issues, 524, Symposium, International Human Rights and Climate Change. 38G A INT'L & COMPL. LAW 511 (2010) available at <https://digitalcommons.usa.edu/cgi>

**SUGGESTIONS**

1. International cooperation is needed for transfer of technology and in case of climate change most of the responsibility lies with the developed countries to help the developing countries in mitigating the impact of climate change.
2. Sustainable policies should be adopted to ensure right to good environment and for that participation of all the stakeholders must be promoted.
3. Carbon capture and storage should be adopted. Adoption of such sustainable policies will mitigate the effect of climate change.
4. The issue of human rights violation is one of the major challenges for achieving sustainable development and hence climate change adaptation policy has to ensure the protection of human rights of the stakeholders.
5. For effective implementation of India's National Action Plan for Climate Change there is a need to focus on Research and Development for creating indigenous technology.
6. To appreciate public needs and to promote human rights of the people Indian government should amend laws by taking into account international environmental principles such as Polluters pay principle and the right of public participation in environment decision making.
7. Greenfield projects, shift to renewable energy and biofuel, promotion of clean air and clean water, Environment Impact Assessment will help in controlling climate change effect, the ambitious targets set out in NDCs by the government has to be achieved in a time bound manner
8. Environment Impact Assessment to be included in India's NDC as one of the strategies to curb GHG emission.

## APPLICATION AND RELEVANCE OF FORENSIC TOXICOLOGY IN INDIA

Pancham Preet Kaur\*

### INTRODUCTION

*“All substances are poisons; there is none which is not a poison. The right dose differentiates a poison.”<sup>1</sup>*

Paracelus

Forensics are the scientific methods used to solve a crime. Forensic investigation is the gathering and analysis of all crime related physical evidence in order to come to a conclusion about a suspect. Investigators will look at the blood, fluid or fingerprints residue, hard drives, computers or other technology to establish how a crime took place. This is a general definition though there are a number of different types of forensics.<sup>2</sup> In the investigation procedure the important role has to be played by forensic toxicologist to find out the cause of death especially when it is suspected that it was not due to any natural cause. Toxicologist performs an autopsy which involves observing both the inside and outside of the victim. On the outside there may be signs of blows, bruises, bullet entry points and on the inside, the pathologist will look at things like the organs and stomach contents. By observing these things, a toxicologist can determine whether the death was a suicide, a murder or due to natural causes.<sup>3</sup> When the investigation is done by a toxicologist, he studies the symptoms, mechanism, methodology for detection and treatment of poisoning of a living body. There is the effect of toxic agents on the human body. There is frequent use of toxicology and other branches such as analytical chemistry, pharmacology and clinical chemistry in solving the mystery of crime.<sup>4</sup>

### MEANING OF FORENSIC TOXICOLOGY

Forensic toxicology is the use of toxicology and other disciplines such as analytical chemistry, pharmacology and clinical chemistry to aid medical or legal investigation of death, poisoning and drug use. The primary concern for forensic toxicology is not the legal outcome of the

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1. Available at: <https://toxtutor.nlm.nih.gov/01-001.html> (Visited on September 30, 2019).

2. Chris Kostakis, Peter Harpas, et.al., Forensic toxicology in: Liquid Chromatography, 301-358 (Elsevier, 2nd edn., 2017).

3. Martin H, Toxicology and Drug Testing, An Issue of Clinics in Laboratory Medicine, (Elsevier, 1st edn., 2016).

4. Available at: <https://www.news-medical.net/life-sciences/What-is-Forensic-Toxicology.aspx>, (Visited on July 14, 2020).

toxicological investigation or the technology utilized but rather the obtainment and interpretation of results. A toxicological analysis can be done for various kinds of samples. A forensic toxicologist must consider the context of an investigation in particular physical symptoms recorded and any evidence collected at a crime scene that may narrow the search, such as pill bottles, powders, trace residue and any available chemicals. The study of poisons is dealt with by this very branch of science and any substance which can kill a living organism can be termed as poison.<sup>5</sup> Harmful effects of such substances are studied on the human body with the help of this science along with the impact on environment and other like beings.<sup>6</sup> Since the disciplines like chemical chemistry and pharmacology are having ramifications of medico-legal nature, such cases are also placed before the court of law for necessary adjudication and it can be said that forensic toxicology has wide coverage and extended scope differing from case to case.<sup>7</sup> According to HR Management in Forensic Science Laboratory 2018, "Forensic toxicology is the only laboratory discipline in which scientific results are used to explain a person's behavior before, during or after the commission of a crime." It is also said that forensic toxicology is a part of the science which is concerned with the quantities and effects of various drugs and poisons on human body. In forensic toxicology the main interest is the extent to which drugs and poisons may have contributed to the impairment or death. Most of the cases received by forensic toxicology involve drinking alcohol and driving. Every state and the central government has enacted several laws which prohibit drinking and driving and have set levels above which a person is impaired. Forensic toxicologists are called upon to determine the level of alcohol present in the body and sometimes also to determine the level at a previous time and its effects on the person. In cases involving drugs and poisons, forensic toxicologists usually get involved when death has occurred. The toxicologist works with the medical examiner or coroner to help determine the cause and manner of death. Data is used by toxicologist to determine general health and role of drug or poison in the death of person concerned.

Forensic toxicology includes the analytical study of biological sample to find the existence of toxins including drugs. It is the function of report of toxicology to disclose information about the type of substance existing in the body of an individual and to find out the level of the substances.

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5. Ernest Hodgson, *A Textbook Of Modern Toxicology* 3, (John Wiley & Sons, Inc., New Jersey, 3rd edn., 2004).

6. Frederick W. Fochtman and Ed. Shafeek S. Sanbar, *Forensic Toxicology, in Legal Medicine* 617 (7th edn., 2007).

7. Deepak Ratan and Mohd. Hasan Zaidi, *An Introduction to Forensic Science in Justice Delivery System* 578, (Alia Law Agency, Allahabad, 2008).

These results can be used to make inferences while determining a substance's potential effect on an individual's death, illness or mental or physical impairment.<sup>8</sup> There is continuous ongoing research in the field of forensic toxicology and new drugs are being developed to create a constant need to design novel approach for their detection with a view to develop innovation in this field. New instrumentation is being used and new methods of detection of poison in the human body are constantly devised.<sup>9</sup>

There is a close relationship between Forensic toxicology and Forensic pharmacology in the matter of drug usage for medico legal purpose in which these two disciplines are found overlapping each other.<sup>10</sup>

The Forensic toxicologist deals mainly with providing information to the legal system on the effects of drugs and poisons. There are often senior toxicologists who have gained a lot of experience in other areas of toxicology and analytical chemistry. It was in the year 1813 when the first extensive research was released on forensic toxicology by Mathieu Orfila. He was a well known chemist from Spain and was called as the father of toxicology. He also found that there can be use of forensic toxicology in the issues pertaining to environment, industry, pharmaceuticals and clinics.<sup>11</sup>

#### **APPLICATION OF FORENSIC TOXICOLOGY IN LAW**

Forensic medicine fills in as the reason for the association between scientific toxicology and the lawful framework. Reports from after death toxicological examinations that demonstrate the possibility of poisoning can be utilized as proof in an official courtroom.<sup>12</sup> Therefore, criminological toxicology is a significant part of the legitimate framework particularly in the examinations of murders and deaths caused by poisoning. Toxicological examination is necessary for death examinations and criminological toxicologists seek to solve cases where there are deaths after an abrupt and unforeseen change in the state of a subject after the administration of a chemical or toxic substance.<sup>13</sup> Forensic toxicologists ought to comprehend

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8. Forensic Toxicology Research and Development, available at <https://nij.ojp.gov.in>(Visited on July 15,2020).

9. The Forensic Toxicology Council, Briefing: What is Forensic Toxicology, available at: <http://www.abft.org.in> (Visited on July 15, 2020).

10. O. H. Drummer, *Expert Evidence* (Thomson Reuters, United Kingdom, 4th edn., 2008).

11. Manish Yadav and Anindha Tiwari, "Forensic Toxicology and its Relevance with Criminal Justice Delivery System in India", *Forensic Research and Criminology International Journal*, 2017.

12. E. Vuorriand I.Ojanpera, *Legal Aspects of Toxicology*, in *Handbook of Forensic Medicine*, B. Madea, Ed. Hoboken, New Jersey: John Wiley and Sons, 2014, pp 827-839.

13. G. David. "Forensic Toxicology." *Clinical Laboratory Science*, vol. 25 (2), pp. 120-124, 2012

the impact of different substances and toxic substances on body organs and liquids. Most toxicologists are drawn from the fields of medicine, pharmacy, biochemistry, chemistry, and science in light of the fact that these fields include the investigation of synthetic substances as well as the human body. Toxicologists ought to hold the specimens till the end of a case in court. Forensic toxicologists should likewise gather the correct samples since drugs and poisons have distinctive affect on body organs and body liquids.<sup>14</sup>

### **Samples used in toxicology studies**

#### **Urine**

A urine test is speedy and simple for a live subject, and is basic among drug testing for athletes. Urine test not always reflect the harmful substances except if the subject was impacted by it at the hour of the sample collection. Urine is an important example for both before and after death drug testing since it is a moderately simple matrix. The sum required for inspecting is 50 ml. or all out amount. It is considered as the best example for drug and screening.<sup>15</sup>

#### **Blood**

Blood gives remarkable focal points over different lattices as far as the wide variety of analytical methodologies are accessible. A blood test of roughly 10 ml is typically adequate to screen and affirm most regular poisonous substances. A blood test gives the toxicologist a profile of the substance that the subject was impacted at the hour of collection; consequently, it is the example of decision for estimating blood liquor content in driving cases. In instances of harming where vaporous or unpredictable substances are included, examples of cerebrum, lungs and blood must be gathered quickly utilizing air-tight compartments, and if possible, tarred, cooled glass containers. Maintaining a solidified part of blood may help guarantee better investigation in later re-examinations.<sup>16</sup>

#### **Hair**

Hair has been used in toxicology settings to give a background of drug exposure and has therefore found applications in workplace. Approximately 100-200 mg of hair ought to be gathered from the vertex back on the rear of the head by trimming near the scalp as could reasonably be expected, guaranteeing that it is plainly checked which end is nearest to the scalp

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14. Available at: <http://gssrr.org/index.php/JournalOfBasicAndApplied/article/view/9570/4229> (Visited on August 20, 2020).

15. Deepak Ratan & Mohd. Hasan Zaidi, Toxicology Division, in *Forensic Science In India And The World*, P. 578, (2008).

16. *Ibid*

and fittingly protecting the hair into a pack with an elastic band, bend tie, or string. The hair test may then be set into aluminium foil, an envelope, or plastic assortment tube and put away at room temperature until analysis.<sup>17</sup> Therefore reasoning that, hair is considered as one of the most valuable examples for STA, when there has been a critical delay between suspected exposure to a drug or toxic substance and reporting to law enforcement.

### **Oral fluid**

The utilization of oral liquid is picking up significance in measurable toxicology for demonstrating late drug use, for example in clinical settings or examination of driving under impact of substances.<sup>18</sup> The utilization of oral liquid is picking up significance in measurable toxicology for demonstrating recent drug use, for example in clinical settings or examination of driving under impact of substances. It is made out of numerous things and convergences of drugs normally corresponding to those found in blood. Sometimes referred to as ultra filtrate of blood, it is thought that drugs pass into oral fluid predominantly through a process known as passive diffusion.

### **Vitreous humor**

Vitreous humor is especially helpful for post mortem examination of glucose, urea nitrogen, uric acid, creatinine, sodium and chloride. These are significant examinations for the assessment of diabetes, level of hydration, electrolyte awkwardness, post mortem interval and the condition of renal capacity before death.<sup>19</sup>

### **Gastric contents**

Gastric substance is a possibly significant example for examination in after death and clinical cases. Oral ingestion remains the most well known methods for introduction to medications and toxins. In this manner, gastric substance are fundamental for screening tests. The entirety of the accessible example ought to be gathered without the expansion of an additive. Undigested pills and tablets ought to be isolated and put into plastic pillboxes for examination. In the wake of opening the stomach depression, the stomach ought to be tied off and afterwards evacuated, along these lines purging the substance into a holder and archiving the aggregate sum. Dubious

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17. *Supra note 47.*

18. Crouch DJ, Oral fluid collection: The neglected variable in oral fluid testing, *Forensic Sci Int*, 165-173 (2005).

19. Coe JI, Postmortem chemistry of blood, cerebrospinal fluid, and vitreous humor. *Leg Med Annu* 1976: 55-92 (1977); Coe JI, Postmortem chemistry update. Emphasis on forensic application. *Am J Forensic Med Pathol* 14: 91-117(1993).

things, for example, tablet leftovers and home grown issue and so on ought to be disconnected, dried (for example on cellulose tissue) and put away separately.<sup>20</sup> Gastric substances are non-homogeneous and ought to be homogenized before inspecting.

### **Tissues**

Tissue samples gathered in post mortem examinations usually provide supplemental data to the toxicologist to help understanding the outcomes. In STA, examination of the right tissue specimen may be indispensable to the recognizable proof or affirmation of an obscure causative operator. At the point when tissues are examined they ought to be gathered rapidly and put promptly into sealed compartments. The most commonly gathered post mortem tissues are liver, kidney, brain, lung and spleen.<sup>21</sup>

### **INTERNATIONAL DEVELOPMENTS ON FORENSIC TOXICOLOGY**

#### **(A) The American Academy of Forensic Science, 1948**

This important American Academy was opened in 1948 which is working as a professional organization, running disciplined study and giving lead to all other bodies in the fields of science and technology. There are numerous objectives of this academy as to develop collaboration in forensic sciences, promote search, improve integrity, competency, education and develop professionalism. Its rules since 1948 are to serve for getting distinct membership and it can proudly say for having more than 7000 members segregated into 11 sections and a very wide forensic enterprise. It is a matter of great proud for the academy having multiple academicians in the field of engineering, physics, chemistry and criminology education, anthropology, documentation, digital evidence, law, toxicology and others.<sup>22</sup>

#### **(B) The International Association of Forensic Toxicologists, 1963.**

It is another expert body handling the subject of forensic toxicology based in London since 21st April, 1963. There have been several presidents of this body including Dr. E.C.G. Clark of U.K. who was the first President. He was succeeded by Dr Alan. S. Curry also from UK. Trisure Holden of UK and Dr. Fred Reiders of USA were first newsletter editors. The main motive of this international body is to promote cooperation and coordination among the member countries and give boost in research of forensic toxicology.<sup>23</sup>

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20. *Supra note 47*

21. Available at: <http://gssrr.org/index.php/JournalOfBasicAndApplied/article/view/9570/4229> (Visited on August 19, 2020).

22. Available at: <https://www.aafs.org.in> (Visited on July 17, 2020).

23. *Supra note 12.*

It was between 2nd and 6th September 2019, 57th annual meeting of this body was conducted at Birmingham in UK which discussed a solid agenda related to modern toxicology<sup>24</sup>.

The regional meeting of the above body was held in China Shanghai from 22nd to 25th May 2019, where opportunity was awaited by many countries to share their experience and give suggestions for the future of forensic analytical toxicology.<sup>25</sup>

### **(C) The United Nations Office on Drugs and Crime (UNODC), 1997**

The Apex level body was constituted in 1997 to help United Nations to address a coordinated and comprehensive response to the complex issue of illegal trafficking and abuse of drugs, crime prevention and criminal justice, international terrorism and political corruption.<sup>26</sup>

This body handles the portfolios of national drug testing and forensic laboratory and also aligns the performance internationally by improving the quality of forensic science services in the world. It also gives technical support, guidance, training, relevant tools and equipments to start new laboratories to check illegal drug protection.<sup>27</sup>

## **LEGAL MECHANISM FOR FORENSIC TOXICOLOGY IN INDIA**

### **(A) The Constitution of India**

There is a provision under Article 20 of The Constitution to protect the rights of the accused but Article 20 (3) is the most controversial one. It has been held that the admissibility of forensic evidence depends upon the manner of collection of the evidence. In India there is a tough procedure for admission of evidence before the court of law.<sup>28</sup>

It has been held by the judiciary that any self-incriminatory evidence taken without the consent of the accused is violation of the fundamental right. Under the law, no person charged with an offence shall be compelled to be a witness against himself which means that no person is bound by law to accuse himself. It is a special feature of common law criminal jurisprudence in India that an accused is presumed innocent until proven guilty. So, prosecution is duty bound to prove the guilt of the accused and as such the accused cannot be forced to make a statement against himself without his free will.<sup>29</sup>

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24. Available at: <http://www.tiaft.org/tiaft-meetings.html>, (Visited on July 17,2020).

25. *Ibid.*

26. Available at: <https://en.wikipedia.org> (Visited on July 17,2020).

27. Available at: <https://www.unodc.org> (Visited on July 17,2020).

28. J.N. Pandey, *The Constitution of India* (Universal Law Publications, 2014).

29. Prof. Narender Kumar, *The Constitutional Law of India*, 298 (Allahabad Law Agency, 2016).

**(B) The Indian Evidence Act, 1872**

The law makers could not estimate or guess the fast development of science and technology and its impact on the administration of justice when The Indian Evidence Act 1872<sup>30</sup> or The Indian Penal Code, 1860 or The Code of Criminal Procedure, 1973<sup>31</sup> were passed by the legislature. At a later stage, expert report on forensic toxicology started emerging and becoming important. Under The Indian Evidence Act, opinions of the experts in the matters of science, foreign law, art, handwriting or finger impression become admissible because of the skill of the expert<sup>32</sup> and the precision of the science.<sup>33</sup>

Opinion of the expert has a great importance under Sec. 45 of the Indian Evidence Act and number of convictions have been made on the basis of expert opinion.<sup>34</sup>

No court can ignore the post mortem report of a qualified doctor for the purpose of evidence when it is given by the forensic science laboratory. Moreover, as per the decision of the Apex Court it was held that the court cannot replace its own opinion with that of the doctor unless there is something intrinsically flawed in the medical report.<sup>35</sup>

**(C) The Indian Penal Code, 1860**

Matters dealing with crime such as robbery, theft, assault and suicide are covered under The Indian Penal Code, 1860<sup>36</sup> as offences. An agent called “Datura” is used by the group of thugs who poisoned wayfarers. In India till date, numerous examples of poisoning and robbing of travellers are clear which make the administration of poison a criminal offence whenever it is administered with intent to kill, cause serious injury or even just carelessly used. Examples of reckless use of poison can range from the purpose of causing rape, annoyance to the victim to throwing it on the person with the intention to injure him.<sup>37</sup>

The sections dealing with poison related provisions under IPC are as follows:

- i) Sec. 272 I.P.C- Punishment for adulterating food or drink intended for sale;
- ii) Sec. 273 I.P.C- Punishment for selling noxious food or drink;
- iii) Sec. 274 I.P.C- Punishment for adulteration of drugs in any form with any

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30. Act No. 9 of 1872.

31. Act No. 2 of 1974.

32. State v. S.J. Choudhary, AIR 1990 SC 10509.

33. Pratap Misra v. State of Orissa, AIR 1977 SC 1307.

34. Reddy, The Essentials of Forensic Medicine and Toxicology, 387 (23rd edn., 2004).

35. Available at: <http://www.ijiset.com> (Visited on August 12, 2020).

36. Act No. 45 of 1860.

37. Murari A and Sharma GK, “A comparative study of poisoning cases”, New Delhi, 2002.

- change in its effect knowing that it Will be sold;
- iv) Sec. 275 I.P.C- Punishment for knowingly selling adulterated drugs with less efficacy or altered action;
  - v) Sec. 276 I.P.C- Punishment for selling a drug as a different drug or Preparation;
  - vi) Sec. 277 I.P.C- Punishment for fouling water of public spring or reservoir;
  - vii) Sec. 278 I.P.C- Punishment for voluntarily making atmosphere noxious to health;
  - viii) Sec. 284 I.P.C- Punishment for negligent conduct with respect to poisonous substance;
  - ix) Sec. 328 I.P.C- Punishment' for causing hurt by means of poison or any stupefying, intoxicating or unwholesome drug.

**(D) The Criminal Procedure Code, 1973**

The Criminal Procedure Code ,1973 covers certain government scientific experts under Section 293.<sup>38</sup> The court can summon and examine any such expert under Clause 2 of Section 293 for his report. The principles underlying the technique (DNA typing for example) cannot be challenged and he can be asked questions regarding the collection and authentication of the sample.<sup>39</sup>

Any report made under the hand of anyone of the following can be made admissible under Sec 293 by the court:

- a. any Chemical Examiner or Assistant Chemical Examiner to government;
- b. the Chief Inspector of Explosives;
- c. the Director of Fingerprint Bureau;
- d. the Director or Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;
- e. the Director of Haffkeine Institute, Bombay &;
- f. the Serologist to the Government.<sup>40</sup>

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38. *Supra note 43.*

39. V.V.Pillay, Textbook of Forensic Medicine and Toxicology, 89(14th edn., Paras Publishing, Hyderabad, 2004).

40. The Code of Criminal Procedure, 1973, section 293.

**(E) The Malimath Committee, 2003**

In this regard, the report given by Dr. Justice V.S Malimath<sup>41</sup> is very important which recommended various reforms in the criminal justice system of India. One important suggestion was that forensic science should be used comprehensively in the matters pertaining to commission of crime and DNA experts should be invited in the list of experts as given under Sec 293(4)<sup>42</sup> of The Code of Criminal Procedure, 1973.

**(F) The National Draft Policy on Criminal Justice Reforms, 2007**

The National Draft Policy on Criminal Justice Reforms<sup>43</sup> has given many important suggestions for the amendments to be made in The Indian Evidence Act.<sup>44</sup> It indicated that the level of application of forensic science in the criminal investigation was very low at 5-6% of the registered crime relating to FSLs and Finger Print Bureau taken together. It recommended that the coverage should be increased and all possible cases should be brought within the ambit of forensic toxicology.<sup>45</sup>

Authorities should have realized that forensic expert has a holistic approach as to the cause and manner of death hence deserves more attention while, forensic scientists deal mainly with trace evidences in piece-meal without any co-ordination as to the commission of the offence. People compare the medico-legal and forensic investigation system with the developed countries but they should realize that the similar facilities are not available. There is urgent need to create medico-legal and forensic investigation system under one roof so that complete and fruitful investigation is done timely, which is the need of Criminal Justice Delivery System of India. But unfortunately by looking at the provisions of the Bill its implementation seemed to be difficult in near future.

**(G) The Forensic Regulatory & Development Authority of India Bill, 2011**

The purpose of the Bill was to set up a Forensic Science Development and Regulatory Authority in India so that provisions may be made for proper regulation, standardisation, accreditation of forensic science services and give certification of forensic science practitioners and other related issues.<sup>46</sup>

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41. Committee on Reforms of Criminal Justice System., Government of India, Ministry of Home Affairs, India, 2003.

42. *Supra note* 43.

43. Report of the Committee on Draft National Policy on Criminal Justice, Ministry of Home Affairs,

44. Government of India, July, 2007.

45. Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, Report, Volume 1, March 2003.

46. Available at: <http://vips.edu/wp-content/uploads/2017/07/Forensic-Science.pdf> (Visited on July 26, 2020).

### JUDICIAL ENDEAVOURS

It has been observed that the cases of poisoning are tremendously increasing in India. At times people are given poison either directly or indirectly and at other times people consume poison intentionally to commit suicide. It is estimated that more than 50,000 people die of poisoning in a year. People also use pesticides, sedative medication, chemicals like acid, copper sulphate, alcohol, etc. On regular basis there are number of cases relating to poisoning which shows that Indian society is becoming imbalanced.

In *Goutam Kunduv. State of West Bengal*<sup>47</sup>, the Supreme Court itself laid down guidelines governing the power of courts to order blood tests. The court held that:

- i. It is not in the power of courts to order blood test.
- ii. The prayers for blood test cannot be accepted even where applications are made for initiating inquiry.
- iii. A prima facie case is required where the husband proves his non access to do away with the presumption under section 112 of The Indian Evidence Act .
- iv. The consequences of ordering the blood test have to be meticulously examined to know if it has effect of stigmatizing the child and the mother as an illegitimate and unchaste respectively.
- v. Giving blood test for analysis cannot be forced on anyone.

It was pointed by the Supreme Court of India that samples of blood must be taken on scientific basis for testing DNA.

In the case of *Ram Swaroopv. State of Rajasthan*<sup>48</sup>, Justice Arijit commented that a doctor should give his opinion specifically on a matter pertaining to injuries or post mortem based on scientific testing and should not leave the matter both ways.

Delay in laboratory testing can lead to adverse version of the result in cases of biological, serological and viscera testing. Similarly is the case with the deaths of the persons who have consumed drugs or alcohol, the toxicology report should be made as early as possible<sup>49</sup>.

In the case of *Anant Chintaman Laguv. State of Bombay*<sup>50</sup>, the court stated in a case of

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47. Available at:<http://iafmonline.in/data/circular-notifications/FDRA-Bill-2011.pdf>(Visited on July 28,2020).  
AIR 1993 SC 2295.

48. AIR 1991 SC 1747.

49. *EnamulHaquev. State of West Bengal*, CRM 17348 of 2010 & AST 1114 of 2010.

50. AIR 1960 SC 500.

poisoning, the prosecution has to establish that:

- i. the cause of death was poison;
- ii. the accused was in possession of poison;
- iii. the accused had favorable chance to dispense it to the deceased.

If the above stated facts stand proved accompanied by motive, the court may draw the inference that it was administered by the accused to the deceased leading to his death.

In an important case titled as *The State of Bombay v. Kathi Kalu Oghad & Others*<sup>51</sup> pertaining to the evidence for forensic testing, it was held by the court that giving thumb impression, specimen signature, blood, hair, semen etc. by the accused as a witness under Art.20 is normal and he cannot object DNA examination for the purpose of investigation and trial.

In *Poloniswamy v. state*<sup>52</sup> the court passed the order that when the murder is caused by poisoning and the medical evidence is unable to determine poison, even then conviction can be recorded if the guilt can be established by other evidence.

The Supreme Court gave firm opinion in the case of *Dharam Deo Yadav v. State of U.P.*<sup>53</sup> that resorting to forensic science for detection of crime is normal. The Court is of the view that Criminal Justice System is not very clear in India and there are many complications involved such as intimidation and fear. Therefore, it is necessary to refer to forensic science in the crime detection. It is also felt that forensic evidence is unblemished, free from vagueness or any kind of deficiency. Judiciary should also update to comprehend the use of scientific material. The society should be proactive in accepting scientific methods of investigation.

### **CONCLUSION**

As we realize that with the approach of 21st century, the extent of application of forensic toxicology has been high on demand. Despite the fact that the limitations of forensic toxicology persevere in certain spheres, still its role in conveying the equity and solving criminal cases has been exceptionally valued and depended upon. The court and society everywhere rely upon the discoveries of forensic examination and reports. The development of scientific examinations in field of toxicology is seen in light of the fact that as the general public advances and turns out to

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51. AIR 1961 SC 1808, 1962 SCR (3) 10.

52. AIR 1968 Bom. 127.

53. (2014) 5 SCC 509.

be more unpredictable, the crime introduces itself in various structures. This correspondingly requires the modern scientific techniques for investigation. This need of the general public is taken care by the field of legal toxicology.

This is a wide field that incorporates numerous disciplines. In particular, every one of these fields intersect at the convergence of drugs and poisons and their consequences on the human body. Drugs and alcohol cause a great number of deaths all through the world. In this regard it is important to comprehend the impact of drugs on the body, particularly the impact of these substances on body liquids and organs. Forensic toxicologists ought to adhere to the guidelines to guarantee the reliability of their examinations. With the ascent in the quantity of individuals that use drugs and liquor, the number of deaths is also likely to increase. In this way, forensic toxicologists have a more significant role to play in determining the deaths caused by drugs, alcohol and poisons.

## ROLE OF ENGLISH LANGUAGE IN THE INDIAN LEGAL SYSTEM AND LEGAL EDUCATION

Dr. Puja Jaiswal\* & Amit Jaiswal\*\*

### INTRODUCTION

*Law and order are the medicine of the body politic and when the body politic gets sick, medicine must be administered.*

- B. R. Ambedkar.<sup>1</sup>

The concept of law and order through the lenses of legal luminary like Dr. B. R. Ambedkar, is noteworthy in itself. Law has always been an integral part of the society. Law is the one that keeps the society running. The law is important as it lays down the norms of conduct for the people. It provides guidelines for regulating the behaviour of its peoples. It also maintains equity in the three branches of the governance-Legislature, Executive and Judiciary. Law acts as an agent of social change and without it there would be chaos in the society. That is why every State has its own domestic laws and imparting of legal education is its important agenda.

The judicial system in India has a proud heritage. At present it is well developed, integrated and uniform throughout the country. Lawyers as well as the Judges all over India have the benefit of easy access to the views of other High Courts on similar legislations and other matters of law and constitution. Presently, the Judges from one High Court are transferred to other High Courts throughout India seamlessly. This has given a unified structure to the Indian judicial system and laws are uniformly applied throughout the Country. The hallmark of any robust legal system is that the law should be certain, precise and predictable and we have nearly achieved that in India. English is the principal legal language and retains its standard form all across the country. At present our judicial system is well developed, integrated and uniform throughout the Country. To a very great extent we owe it to the English language which has served as a link language for India where we have about two dozen official State languages.

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1. He was the Chairman of the Constitution Drafting Committee and also the First Minister of Law and Justice of independent India.

Republic of India has 28 States<sup>2</sup>, 25 High Courts<sup>3</sup> and 22 official Languages<sup>4</sup> recognized by Eighth Schedule<sup>5</sup> of the Constitution of India. Still there are more languages vying for space in the Eighth Schedule and list is bound to swell.

As per Article 348 (1)<sup>6</sup> of the Constitution of India, English is the official language of the Supreme Court as well of every High Court. However, as per Clause (2) of Article 348 the Governor of a State with the previous consent of President of India can authorize use of official language of the State in proceedings before its High Court. Language has always been an emotive issue in India and spectre of introduction of respective official languages of the States in 25 different High Courts looms large which will have very serious repercussions for the Indian Judicial system. A hitherto unified and well structured legal system within the country might well disintegrate in the game of lingual one-upmanship by the States. Role of English language in the Indian legal system and legal education is immense and that the legal profession as it exists in India today is the natural outcome of the usage of the unified language i.e. English.

#### **ENGLISH LANGUAGE: LANGUAGE OF PUBLIC BUSINESS:**

Before the English, the Persian was the language of administration for the most part of India.<sup>7</sup>

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2. Andhra Pradesh, Arunachal Pradesh, Assam, Bihar, Chhattisgarh, Goa, Gujarat, Haryana, Himachal Pradesh, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Mizoram, Nagaland, Odisha, Punjab, Rajasthan, Sikkim, Tamil Nadu, Tripura, Telangana, Uttar Pradesh, Uttarakhand, and West Bengal (The Jammu and Kashmir Reorganisation Act, 2019 (34 of 2019), vide section 2 re-constituted the erstwhile state of Jammu and Kashmir as two union territories, 'Jammu and Kashmir' and 'Ladakh', with effect from 31 October 2019.).<sup>1</sup>
  3. Allahabad High Court, Andhra Pradesh High Court, Bombay High Court, Calcutta High Court, Chhattisgarh High Court, Delhi High Court, Gauhati High Court, Gujarat High Court, Himachal Pradesh High Court, Jammu and Kashmir High Court (which also serve as High Court for Ladakh), Jharkhand High Court, Karnataka High Court, Kerala High Court, Madhya Pradesh High Court, Madras High Court, Manipur High Court, Meghalaya High Court, Orissa High Court, Patna High Court, Punjab and Haryana High Court, Rajasthan High Court, Sikkim High Court, Telangana High Court, Tripura High Court, Uttarakhand High Court.
  4. Assamese, Bengali, Gujarati, Hindi, Kannada, Kashmiri, Malayalam, Marathi, Odia, Punjabi, Sanskrit, Tamil, Telugu, Urdu, Sindhi (added by 21st Amendment Act, 1967), Konkani, Manipuri, Nepali (added by 71st Amendment Act, 1992), Bodo, Dogri, Maithili, Santhal (added by 92nd Amendment 2003).
  5. The list had originally 14 languages only but subsequently through amendments 8 new languages were added - Sindhi was added in 1967 by 21st Constitutional Amendment Act; Konkani, Manipuri and Nepali were added in 1992 by 71st Constitutional Amendment Act; and Bodo, Dogri, Maithili and Santali were added in 2004 by 92nd Constitutional Amendment Act.
  6. India Const. Part XVII Official Language,  
Chapter III.—Language Of The Supreme Court, High Courts, Etc.  
(1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides  
(a) all proceedings in the Supreme Court and in every High Court,  
(b) the authoritative texts  
(i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State,

English replaced Persian language as administrative language of India in the year 1835. English was gradually introduced as medium of instruction in primary, secondary and higher classes from the year 1840. The first generation universities were introduced on London Model in the three Presidency towns<sup>8</sup> in 1857-58.<sup>9</sup> The broadsheet newspaper- The Times of India started publication in the year 1838<sup>10</sup> The Statesman was established in 1875, The Tribune was established in the 1881 and The Hindu in the year 1878. It is needless to say that the English language had percolated amongst the population and these newspapers commanded readership. Slowly some other major dailies were established viz. The Hindustan Times in the year 1924 and Indian Express in 1932. All these newspapers are still in circulation with vast readership across India. English in India is taught in every school as a subject, every Arts college in India offers Bachelor and Master degree in English, every university has English department which attracts thousands of students every year. Resultantly lakhs of students pass out every year from Colleges and Universities throughout India holding B.A. (English Hons.)/ M.A. (English) degrees, M.Phil. and Ph.D. By now there is already a rich literature in English language by Indian writers. English has given us some of the most prolific and world famous writers both in fiction and non-fiction. Large parts of Southern states of India were introduced to English language much earlier than they were to Hindi Language, of course as a result of expansion of British rein and control of South Indian States. It will not be an overstatement to assert that English language has taken deep roots in India. English is one of language of Union of India; it is the language for Supreme Court of India. English is the principal legal language and is second most widely spoken and understood language in India.

Much water has flowed down the Ganges since independence. There is no escape from the reality that English language is the language of public business throughout the country and has come to stay.

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(ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor of a State, and

(iii) of all orders, rules, regulations and bye laws issued under this Constitution or under any law made by Parliament or the Legislature of a State, shall be in the English language

7. Dr. Mirza Mohd Ejaz Abbas, The Role of Persian Language before Independence in India, , Paper ID: D16111, 1(2), International Journal Of Pure And Applied Researches (ISSN: 2455-474); 232-235. (15th May 2016).

8. Bombay, Calcutta and Madras

9. Aparna Basu, The Origin And Operations Of Indian Education System, 1757-1947, 8 , Essays In The History Of India Education, Concept. 1982.

10. Initially, TOI started under the name of Bombay Times & Journal of Commerce and changed its name to Times of India in the year 1861.

### KEY DEVELOPMENTS OF FORMAL LEGAL EDUCATION IN INDIA

The model of legal education that we follow in India owes its origin to the Britishers. It was in the year 1855 that law courses and classes were started in Elphinstone College, Bombay, Hindu College, Calcutta, and at Madras. The University Act, came in 1857 that recognized and established the teaching of law as one of the required functions of the universities. Thus, from the year 1857 imparting of formal legal education was introduced in the country. After this the government took an initiative and started colleges of law at Bombay and Madras. At that time law classes were attached with Arts colleges. Subsequently, a few years after law classes started at Allahabad. Then in 1909, University College of Law was established at Calcutta. University College of Law, Calcutta, attempted to introduce changes both as regards the courses of study and methods of teaching following, to a certain extent, on the lines adopted by the great American Universities like Yale and Harvard.<sup>11</sup> Thus, a beginning of the formal legal education was made in the sub-continent. However, if one aspired to something higher, he could go to England and join the Inns court. For almost a century from 1857 to 1957 a stereotyped system of teaching compulsory subjects under a straight lecture method and the two year course continued.<sup>12</sup> The need for upgrading and reforming the legal education system was being felt and therefore numerous committees were set up periodically for improving the legal education in the country. The importance of legal education cannot be over-emphasized in a democratic society as legal education not only gives worthy jurist and efficient lawyers but also educates the citizens to be law abiding with human values and righteous approach. To reform the legal education, time to time several Commissions/Committee that were set up, one thing that is common is that all recognized English as the language for imparting legal education. A few of the important Commissions/Committee are as under that recommended suggestions for reforming the legal education system:

The Report of Indian Law Institute on Legal Education, 1934
The Report of University Commission, 1948-49
The Report of Bombay Legal Education Committee, 1949
The Report of All India Bar Committee, Government of India, 1951
The Fourteenth Report of Law Commission of India, 1958.
Report of Bar Council of India, 1982.
Report of the Curriculum Development Centre in Law, 1990.

11. S. Dayal Revised By DR. K. N. Cbandrasekharan Pillar, Indian Legal System; Legal Profession And Legal Education, p.166.

12. Dr Justice A.S. Anand; H.I. Sarin Memorial Lecture : Legal Education In India - Past, Present And Future; <https://www.ebc-india.com/lawyer/articles/9803a1.htm>

After independence, legal education acquired importance and therefore, it was introduced as a course of study in number of States, The kind and number of law colleges/institutes that were operating in the year 1955-56 are as follows:

Statistics of Law Colleges Etc. (1955-56)<sup>13</sup>

University	No. of law Departments	No. of law Colleges*	No. of Students in Law Departments		No. of Students+ in Law Colleges		No. of passes in Law Examination		Minimum Qualifications for admission to Law Department/Colleges	During of the Course
			B.L./ LL.B.	M.L./ LL.M.	B.L./ LL.B.	M.L./ LL.M.	B.L./ LL.B.	M.L./ LL.M.		
1	2	3	4	5	6	7	8	9	10	11
Agra	..	..	..	..	2784	534	944	..	Degree	2 years
Aligarh	1	..	381	..	..	..	104*	..	Degree	2 years
Allahabad	1	..	607	10	..	..	185	..	Degree	2 years
Andhra	..	1	..	..	517	2	171	..	Degree/ Inter	2 years/ 3 years
Banaras	..	1	..	..	386	2	187	..	Degree	2 years
Bihar	..	2	..	..	361	..	127++	..	Degree	2 year
Bombay	..	...	..	..	2467	120	587	4	Intermediate/Degree	3 years/ 2 years
Calcutta	..	2	..	..	2249	..	327	..	Degree	3 years
Delhi	1	..	689	9	..	..	222	6	Degree	2 years
Gauhati	..	1	..	..	283	..	23	..	Degree	3 years
Gujarat	..	3	..	..	1028	38	292	..	Intermediate/ Degree	3 years/ 2 years
Karnataka	..	2	..	..	275	19	122	1	Intermediate/ Degree	3 years/ 2 years
Lucknow	1	..	915	25	..	..	345	5	Degree	2 years
Madras	1	1	..	22	1.25	13	556	3	Degree	2 years
Mysore	..	2	..	..	446	..	105	..	Degree	2 years
Nagpur	..	3(A)	..	..	786(A)	12	171	..	Degree	2 years
Osmania	..	1	..	..	1024	23	97	7	Degree	2 year
Punjab	..	1	..	..	267	..	163(A)	..	Degree	3 years
Patna	..	1	..	..	714	..	260	..	Degree	2 years
Poona	..	2	..	..	264	28	76	4	Inter/Degree	3 years/ 2 years
Rajputana	..	5	..	..	894	..	268	..	Degree	2 years
Sagar	1	1	35	25	287	65	98	..	Degree	2 years
Travancore	..	2	..	..	538	..	111	..	Degree	2 years
Utkal	1	..	239	..	..	..	..	49	Degree	2 years
Gorakhpur	..	2	..	..	166	..	33	..	Degree	2 years
Total	7	36	2866	191	17293	856	5623	79		

13. Annexure To Chapter 25- Legal Education, Law Commission Of India Report No. 14, Reform of Judicial Administration (The XIVth Report was forwarded to the Union Minister of Law and Justice, Ministry of Law and Justice, GOI by Sh. M.C. Setalvad, Chairman, Law Commission of India, on September 26, 1958).

The First Law Commission of Independent India was established in the year 1955 and Mr. M.C. Setalvad was its Chairman. Mr. Setalvad on Sept, 26th, 1958, submitted 14th Report of the Law Commission, having 1282 pages, 57 chapters divided into two volumes. The report gave a detailed and an authoritative review of the legal system and range of suggestions to improve the legal education and legal system in the country. The report highlighted the need to reform the system of legal education and suggested several reforms for its improvement. A few of these recommendations are as under:

A few important recommendations of the XIVth [14th] Report the Law Commission- Setalvad Commission regarding legal education
Only graduates should be allowed to take the degree course in law
Law teaching should be imparted only in full-time institutions.
The law colleges should be manned by full time faculty
The theory and principles of law should be taught in the law schools and the procedural law and the law of practical character should be taught by the Bar Council.
The university course should be for two years and the Bar Council training should be for one year.
It is necessary that financial assistance should be provided by the Government to enable law colleges to attain and maintain proper standards and for carrying out legal research.
For the benefit of persons in employment who wish to acquire a knowledge of law, diploma course may be conducted but diploma holders should not be eligible to enter the legal profession.
The Bar Councils should arrange lectures for the benefit of apprentices undergoing this professional course.
The apprentice course should be of one year's duration.
Attendance by the apprentice of a certain minimum number of lectures should be compulsory.
All India Bar Council should be empowered to ascertain whether law colleges maintain the requisite minimum standards and should be empowered to refuse recognition for law colleges.

Looking at dire need for the improvement in the legal education in the country, the recommendations of the 14th Law Commission were accepted by All India Law Conference, 1959 and also by the All India Law Teachers Association. Then in the year 1961 the Advocates Act was passed. The Bar Council of India was established by Parliament under the Advocates Act, 1961 and was thus empowered to lay down standards of Indian legal education. It was conferred with the responsibility of maintaining standards in legal education. To make legal education accessible, Bar Council of India introduced uniform three years LL.B. Course with annual examinations and prescribed compulsory and optional subjects. By the early 1980s, most Indian universities were offering the three year LL.B. programme. It was at this point in time that

the Bar Council of India took steps to set up the “National Law School” in India. This was primarily proposed to develop a national character in its composition, to enable meaningful and effective teaching and in framing a comprehensive curriculum. And, thus the National Law School of India University (NLSIU) was established in Bengaluru by an Act of the Karnataka Legislature in January 1986. Gradually, five-year integrated B.A., LL.B. programme was introduced where students would be admitted after class XII. Now, the said five years integrated law programme is also available with subjects like science and business & management studies. It is perhaps one of the best experiments in the field of legal education, the start of the uniform five year law course to equip students with necessary skills to be competent jurists or legal practitioners or academicians.

### **IMPORTANCE OF ENGLISH LANGUAGE IN LEGAL EDUCATION IN THE COUNTRY**

Legal Education is the corner stone of development, growth and plays prominent role among those seeking social progress. English is the principal legal language and retains its standard form all across the country. It continues to be the language for imparting legal education. All major texts, digest & commentaries, judicial precedents, and other legal resources such as journals, reporters etc. are all primarily available in English only. The Bar Council Rules itself provides for English as language for the course. Rules of Legal Education<sup>14</sup> of Bar Council of India provides for it. Throughout the country legal education is conducted in English.

Finest law colleges/Universities in India impart education in English medium. We have 23 National Law Universities<sup>15</sup> all over India which are most sought after institutes by the students from all over the country and are known as IITs of legal education. They are ranked amongst the

14. Bar Council Of India, Part –IV Rules of Legal Education, 2008  
Schedule II

Academic standards and Courses to be studied:

1. Medium of instruction: English shall be the medium of instruction in both the integrated five year and three year courses. However if any University and its any CLE allows in full or in part instruction in any language other than English or allows the students to answer the test papers in the periodical and final semester tests in any regional language other than English, the students have to take English as a compulsory paper.

15. National Law School of India University, Bangalore, National Law University, Delhi, National Academy of Legal Study & Research (NALSAR) University of Law, Hyderabad, The West Bengal National University of Juridical Sciences, Kolkata, National Law Institute University, Bhopal, National Law University, Jodhpur, Hidayatullah National Law University, Raipur, Gujarat National Law University, Gandhinagar, Dr. Ram Manohar Lohiya National Law University, Lucknow, Rajiv Gandhi National University of Law, Patiala, Chanakya National Law University Patna, National University of Advanced Legal Studies, Kochi, National Law University Odisha, Cuttack, National University of Study & Research in Law, Ranchi, National Law University & Judicial Academy, Assam, Damodaram Sanjivayya National Law University (DSNLU) Visakhapatnam, The Tamil Nadu National Law School, Tiruchirapalli, Maharashtra National Law University,

best institutes in the world in imparting legal knowledge and training. The students from all over India compete to get admission in the top law universities/institutions and NLUs and they get the best placements in national and multinational companies. Some join active practice and some subordinate judiciary. These students work hard to get admission and then put to rigorous training for five years to make them one of the best legally trained minds in the country. Since the medium of all the renowned law colleges/universities and NLUs is English, therefore, their students feel more comfortable in expressing their views in English, be it drafting or oral expression. These clamors for introducing the official state languages in judiciary of different States makes one think whether these law institutes and the students belong to India?? Answer is obviously yes. Then why are they made to look like alien or unwanted? Were they at fault that they worked hard to get admission in prestigious colleges instead of procuring degrees by dubious means or from a substandard or moribund institutes being run from a residential area or a floor of a showroom in many States which actually imparts no education but virtually sell degrees. It is needless to say that judiciary will surely draw less talent if entire court work is mandated to be conducted only in official State languages. While having working knowledge of the official State language is called for but making it mandatory for the judicial officers to write the judgment and orders in the State languages only is surely a retrograde step. Instead of tapping the bright new talent this move by various States will dissuade them to join the judicial service. Forcing them to write the judgments and orders in the official State language only will scuttle process of their thinking, flow of ideas and it will reflect on the quality of judgments. Judgment writing is a refined art, a complicated and delicate balancing act and not a chaupal conversation. If there is so much inclination towards the official State languages then why do the States not take steps to direct their universities and NLUs to impart education in the official state languages only and not in English. Why all the States are working on the inverted logic by first training students in English and then forcing them to put their knowledge and skills into action in vernacular languages for which they are not equipped.

The political parties are surely playing their parochial games unmindful of the fact that how their steps will adversely affect the future of lakhs of bright young minds. This move by different States will surely prejudice the judicial administration system of the country and the general

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Mumbai, Maharashtra National Law University, Nagpur, Maharashtra National Law University, Aurangabad, Himachal Pradesh National Law University, Shimla, Dharmashastra National Law University, Jabalpur, Dr B R Ambedkar National Law University Sonapat, Haryana

public will actually get inferior quality of judgments and improper or unsatisfactory resolution of disputes. This will only erode the faith of the general public in the judiciary.

### LANGUAGE CONUNDRUM

We have a list of 22 Languages in the VIIIth Schedule<sup>16</sup> of Constitution and there are still many other languages having status of official language in the different States but do not find mention in VIIIth Schedule like Kokborok in Tripura and Mizo in Mizoram. And still many more languages are vying for space in the Eighth Schedule as demands are being raised by different pressure groups. There are some 38 languages<sup>17</sup> for which demands are being raised for their inclusion in Eighth Schedule.

As per Article 343<sup>18</sup> of Constitution of India Hindi was to be the official language of the Union however for a period of 15 years English language was to continue to be used for official purposes for which it was being used immediately before the commencement of the Constitution. As language has always been a highly emotive and sensitive issue in India so after the passage of 15 years from the independence, almost all the non-Hindi speaking States did not agree to adoption of Hindi as official language and saw the same as imposition of Hindi Language upon them. To preserve the unity of the country and avoid any kind of conflict Official Languages Act, 1963<sup>19</sup> was enacted which allowed the usage of English as official language of

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16. Assamese, Bengali, Gujarati, Hindi, Kannada, Kashmiri, Malayalam, Marathi, Odia, Punjabi, Sanskrit, Tamil, Telugu, Urdu, Sindhi (added by 21st Amendment Act, 1967), Konkani, Manipuri, Nepali (added by 71st Amendment Act, 1992), Bodo, Dogri, Maithili, Santhal (added by 92nd Amendment 2003).

17. Angika, Banjara, Bazika, Bhojpuri, Bhoti, Bhotia, Bundelkhandi, Chhattisgarhi, Dhatki, English, Garhwali (Pahari), Gondi, Gujjar/Gujjari, Ho, Kachchhi, Kamtapuri, Karbi, Khasi, Kodava (Coorg), Kok Barak, Kumaoni (Pahari), Kurak, Kurmali, Lepcha, Limbu, Mizo (Lushai) Magahi, Mundari, Nagpuri, Nicobarese, Pahari (Himachali), Pali, Rajasthani, Sambalpuri/Kosali, Shourseni (Prakrit), Siraiki, Tenyidi, Tulu; available at [http://mha.nic.in/hindi/sites/upload\\_files/mhahindi/files/pdf/Eighth\\_Schedule.pdf](http://mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/Eighth_Schedule.pdf)

18. India Const. art. 343-Official Language Of The Union:

(1) The official language of the Union shall be Hindi in Devanagari script The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numerals

(2) Notwithstanding anything in clause ( 1 ), for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement: Provided that the president may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union

(3) Notwithstanding anything in this article, Parliament may by law provide for the use, after the said period of fifteen years, of

(a) the English language, or

(b) the Devanagari form of numerals, for such purposes as may be specified in the law.

19. Official Languages Act, 1963, Sec 3- Continuation of English Language for official purposes of the Union and for use in Parliament.; and Sec 7, Official Languages Act, 1963: Optional use of Hindi or other Official language in judgements etc. of High Courts.

Union alongside Hindi. Thus despite Constitutional mandate a situation of impasse got created and concerns of non-Hindi speaking State had to be addressed and usage of English had to be continued. This important lesson from recent history, which tells us a lot about the complexities of language issue, seems to be lost on us.

Now let us take a scenario where all the 28 State authorizes the use of its official language in proceedings before their respective High Courts in terms of Article 348(2) of the Constitution of India. The consequences of that prospect are so colossal that the Indian judicial system will be shaken to its roots. There is no other country in the world where about two dozen languages have status of official language. As stated earlier that states of U.P., Bihar, Rajasthan and M.P. have already authorized the use of Hindi in proceedings before their respective High Courts and the State of Tamil Nadu is also working in the direction to authorize the use of Tamil before its High Court. This move will have sweeping effects on the justice administration system in our Country and needs broader discussion which the different State governments have totally avoided.

**Some of the very serious and obvious problems are being discussed herein:-**

**i) Creation of an abyss and pulling back from the situation of advantage:-**

As has been discussed above that the law in India has developed from common law of England and almost every enactment, concept, theory and legal jurisprudence applied and used in Courts of present day India traces its origin to English/Common Law or judgments rendered by the Privy Council. It is needless to say that any student or practitioner of law who is not versed in English language will miss the entire substratum on which law stands today. His knowledge of Indian Judicial system will be shallow. With official language of the States becoming their mode of pleading, drafting and addressing before their respective High Courts a legal practitioner, not fairly acquainted with English, might find it difficult to understand or at least fully understand and comprehend even the judgments of the Supreme Court. He will also find it difficult to read & comprehend and compare similar legislations of other States, read and cite judgments of other High Courts for the benefit of his own case, his client and for the general benefit and development of the law. This scenario will hardly do any good to the institution. The legal jurisprudence, art of writing judgments, interpretation of statutes and legislation and comparative study thereof have attained highest standards in English Language. This has been achieved over the period of 200 years. It will be very tall order to attain those standards that too

in two dozen different State official languages and by what time will we be able to attain that is anybody's guess. This will surely take decades, if not another 200 years. Is this effort worth the time and energy of judicial system? The huge economic costs involved in translations of legal texts, judgments, major commentaries, Acts etc. in two dozen different languages will run into billions of rupees when this money can be used for some social welfare measures and, may be, for appointment of High Courts judges. At present there are about 400 vacancies in various High Courts in India i.e. near about 40% of total sanctioned strength of High court judges all over India which has clogged the High Court's with mountain of backlog and decades old appeal/petitions are pending for actual listing and hearing.

After Independence the law has developed and has kept pace with the march of justice administration system world over. The English language has provided us a gateway through which we easily connect with vibrant democratic nations and their legal systems especially the commonwealth countries and U.S.A. Frequently the various Courts in India usefully cite the judgments rendered by the Courts of other progressive democratic countries. Landmark judgments rendered by Supreme Court of India and even by the various High Courts are also referred to in the Courts all over the world. The entire accomplishments, honing of skills and fruits of labor of over last about two centuries and march of Indian legal system with the world in fields of Arbitration Laws, Trademark and Patent Laws, Human Right conventions and other commercial fields and international laws will be lost and this introduction of official languages of the 28 different States, particularly, in High Courts will ultimately prove retrogressive.

**ii) Put new road blocks on the functioning of High Courts and transfer of High Court judges on all India basis:-**

The introduction of official State languages to the proceedings before High Courts will directly interfere with the Transfer Policy of High Court Judges. If 25 different High Courts work in 25 different languages, or may be more, and proceedings are carried out in those languages then how the High Court judges, who are transferred on all India basis to different High Courts, will be able to hear and adjudicate the matter on being transferred outside the parent High Court. This will play total havoc with the system.

One issue which has been affecting the High Courts throughout the Country is the issue of practicing kith and kins of the High Court Judges in the same very High Court. The issue was raised and discussed even as early as in the First Judges case in 1981 (S.P. Gupta vs. President of

India<sup>20</sup>) and the Hon'ble Supreme Court observed as thus:-

*“We have to take into account the advice given by the CJI in one of the seminars that where close relations of a Judge or the Chief Justice practise in the same court and are likely to gain undue advantage, the concerned judge should himself, in obedience to the keen sense of justice which every Judge possesses opt to be transferred to some other High Court.”*

However the issue remains very much alive till date and so are the concerns. All India transfers of High Court Judges also help in national assimilation and integration. The above issues have their own difficulties and challenges, thrown in language angle and you will find everything falling apart. A judge transferred from High Court of Kerala or Andhra or Gujrat or Orissa or West Bengal to Punjab & Haryana High Court will find it impossible to deal with the proceedings in Hindi and vice versa. Furthermore, it is a settled policy and practice that the Chief Justice of a High Court has to be a judge from outside of that very High Court. Thus, transfers are very important measure for checks and balances in the system. But the way States are going populist way it will wreck havoc with Indian judicial system. A hitherto unified and well structured legal system within the Country might well disintegrate in this lingual tug of war between different States.

#### **USE OF HINDI OR VERNACULAR LANGUAGE IN COURTS: WHAT OBJECTIVE WILL BE ACHIEVED?**

The objective sought to be achieved by the amendment to introduce use of Hindi (for e.g. The Haryana Official Language (Amendment) Act, 2020) or vernacular language in courts is to enable citizens to understand the entire justice process in their own language and to enable them to easily put their views before the Courts. The objectives of making the official State language compulsory before the subordinate courts by other States are also similar. A closer look by any career Advocate would reveal the inherent fallacies which we have tried to point out in following paragraphs:-

- a. The language of communication/arguments between advocates and the judges before subordinate courts is already local language and litigants also freely interact with the judicial officers in local dialect only.
- b. Even at present the statements of witness are largely being recorded in Hindi or local language by the subordinate Courts. In case evidence is recorded in

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20. AIR 1982 SC 149

English the questions to the witnesses are invariably put in vernacular and he answers the same in his language, which is translated instantaneously in English in open court in the presence of counsels for the parties. The judicial officers make practical choices depending upon the nature of case and of testimony. Thus in a same case some of the witnesses may depose in vernacular but the testimony of doctor or other experts may be recorded in English. The process is transparent and has been working very well for over a century.

- c. Mandating judicial officers throughout the State to write their judgments/orders only in Hindi, will only choke the system. Even the quality of judgments might be compromised. Besides, the cost of creating the infrastructure will be huge. Any career advocate will vouch that even the most educated of the litigants hardly go through the entire judgment but only the concluding paragraphs. The solution is rather simple; if somebody wants to get the copy of judgment in Hindi then on an application a translation of the judgment should be made available to him. For criminal matters such provision is already there in Section 363 of Cr.P.C.
- d. The amendment will prove too costly for a litigant because in case he files appeal in High Court or Supreme Court, entire court record will be translated in English at his cost.
- e. The objective of use of vernacular is to make litigant understand entire justice process is specious. An advocate is a professional who has read voluminous commentaries and judgments to imbibe the judicial process, legal principles and the nuances of law. Similar goes for the Judge as well. Can a litigant really ever understand entire process of justice?

All the objectives sought to be achieved by such amendments seems to be based on the misplaced notion that the legal practice is a layman's job and is as simple as ABC.

By this logic a patient also even has a right to know and understand entire medical process. The doctors in government hospitals, in various PGIs and AIIMS should be directed to do all the work in Hindi or in the language which the patient understands. The bed head ticket, observation chart and discharge summary of a patient should be in the language which a patient understands so that he may understand entire medical process.

Courts are the place where citizens/residents go for resolution of their disputes and the primary function of the Court to resolve disputes judiciously, equitably and efficiently. Courts are not a forum for promotion of culture and languages and should not be involved in this lingual one-upmanship by the States.

### **CONCLUSION**

The introduction of local State Languages in High Courts will only do more harm than good to the institution and administration of justice. Introducing two dozen different official languages in 25 different High Courts within a country will be an exercise in futility which will put the entire judicial system to lot of strain, disruption and turmoil with mammoth economic costs with minimal effect on actual administration of Justice.

Dual Language system has been working well for the Courts with a lot of practicalities attached to it. Further, in the present era of economic liberalization, information technology, global businesses, legal profession in India has to cater to the needs of a new brand of legal consumer/client namely the foreign MNCs/ companies. In the changed scenario, the additional roles these law professionals are playing- as policy planners, business advisors, experts in articulation, negotiators; importance of language is manifold because language is an important bridge. Due to expanding role of law professionals our language of communication should be that which is widely spoken, and understood across the globe. English language qualifies for it and therefore, the medium of instruction of our legal education system is rightly English.

The move by the different States to introduce their official language in their respective High Courts without having a discussion with other States at any level or making any effort to achieve even a semblance of consensus for the alternative link language in place of English will only create legal pigeonholes in the Country with judiciary of one State will have no means to interact with the judiciary of the other States. The channels of communication between judiciaries of different States will be broken. If the different State governments are trying to avoid any discussion on this issue then it is a fit case where Supreme Court of India, the High Courts and definitely the Bar Council of India and Bar Councils of different States must intervene on its own so that the integrity of the legal system is protected. The unified structure of our judicial system and legal education system should be protected at all costs and it should not crumble at the altar of parochial regional politics and lingual chauvinism.

## FORENSIC ANALYSIS IN HOMOSEXUAL RAPE CASES: NEED OF GENDER-NEUTRAL RAPE LAWS IN INDIA

Dr. Pyali Chatterjee\*

### INTRODUCTION

*“All human beings are potential rape victims. Spouses are raped. Male and female children are raped. Babies are raped. Physically handicapped persons are raped. Anaesthetized patients are raped. Mothers, fathers, brothers and sisters are raped. Adolescents rape one another as well as older persons and children. Male and female prisoners rape each other. During wars, soldiers have been known to rape entire communities. Males rape females and males. Many rapists are gender and age blind. Females rape other females and males. No person is immune from the human potential to rape or be raped”<sup>1</sup>.*

Recently “a 19-year-old girl has been accused of raping a 25-year-old woman with a sex toy. The survivor had alleged that the accused had forcefully committed anal sex upon her. Delhi police have arrested four people for allegedly raping and blackmailing the victim, including the accused woman on charges under Section 377 of the Indian Penal Code, making it the first such development in the country ever after the Supreme Court decriminalized same-sex relations in September last year. According to Delhi Police data, till March 2018 as many as 28 cases have been registered under section 377 (unnatural offences) of the Indian Penal Code. From 2015 to March 2018, more than 543 cases of sodomy were registered at various police stations<sup>2</sup>”. So it’s not an uncommon crime rather it has become common now. The only difference is that some victim come forward to report and some not due to taboo.

Even a homosexual relationship is not a modern concept, one can find its roots in ancient Hindu mythology also like Kama Sutra which was written by Sage Vatsyayana<sup>3</sup> is considered to be as one of the classic books, where an entire chapter is written on homosexual and according to him homosexual sex is a kind of art and one should enjoy it. In his book, he not only describes the oral

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1. Noreen Abdullah Khan, *Male Rape: The emergence of a Social and legal Issue* 1 (Palgrave Macmillan, New York, 2008)
2. Woman rapes woman: 19-year-old arrested under Section 377 for same-sex assault, *India Today* <https://www.indiatoday.in/india/story/woman-rapes-woman-first-case-of-same-sex-assault-after-section-377-verdict-1448534-2019-02-05>
3. Manoj Mitta, *Ancient India didn't think homosexuality was against nature*, *Times of India*, <http://timesofindia.indiatimes.com/india/Ancient-India-didnt-think-homosexuality-was-against-nature/articleshow/4708206.cms>

sex between men but he also categorized men who desire other men as “third nature”<sup>4</sup>.

Rape law in India is specifically related to gender which says that women will be the victim and man will be the rapist. In India, if a woman commits rape on male then she will be charged under section 352 of IPC which punishment will be 3 months and/or Rs. 500 fine<sup>5</sup>. According to section 375 IPC victims are women and the perpetrators are men. Even the definition of rape starts with “A man is said to commit rape if ...”. Here the law fails to consider that men can be a victim too and women can be a perpetrator<sup>6</sup>. Even many foreign states like Canada<sup>7</sup> has enacted gender neutral rape law which will apply to both male and female perpetrators and victims.

Nowhere in any book, it is written that it’s only the men who can commit crime and women will be the victim always. It’s the perception of the society which makes such kind of discrimination and thus making it a taboo where a male victim is not allowed or stopped to report any sexual crimes upon him committed by a male or by a female.

#### **RELATIONSHIP OF SODOMY WITH HOMOSEXUAL ACT**

For understanding homosexual rape first one has to know about the Sodomy. Anal intercourse between two males or between a male and female is known as Sodomy. Sodomy was practiced in a town called Sodom. Sodomy is also known as buggery. It is called gerontophilia when the passive agent is an adult, and paederasty, when the passive agent is a child, who is known as catamite. A pedophile is an adult who repeatedly engages in sexual activities with children. It can be heterosexual or homosexual. When practiced between two men, they may alternately act as active and passive agents. Any degree of penetration or any attempt at penetration just into the anal margin is punishable. Proof of emission is not necessary. When the act is performed with the consent of the passive agent both are liable for punishment, but only the active agent is punished when the offence is committed without consent<sup>8</sup>”.

Sodomy prevails all over the world; in India there is a particular community of Hijras<sup>9</sup> who

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4. *Id.*

5. Anil Agarwal, Forensic Medicine and Toxicology For MBBS366(Avichal Publishing Company, Sirmour(HP): 2019)

6. Partners for Law in Development (PLD), “Comments by Laxmi Murthy to Criminal Law Amendment Bill 2000”, (Jul. 22, 2020, 4:00PM)  
<http://pldindia.org/wp-content/uploads/2013/04/Comments-by-Laxmi-Murthy-to-Criminal-Law-Amendment-Bill-2000.pdf>

7. Anil Agarwal, Forensic and Medico-legal Aspects of Sexual Crimes and Unusual Sexual Practices212(CRC Press, New York, 2009)

8. Dr. K.S. Narayan Reddy and Dr. O.P. Murty, The Essential of Forensic Medicine and Toxicology427 (Jaypee Brothers Medical Publishers (P) Ltd, New Delhi, 2014)

9. Rai Bahadur Jaising P. Modi, A Textbook of Medical Jurisprudence And Toxicology 348 ( Butter Worth & Co. (India) Ltd,Bombay, 6thedn, 1940)

prostitute themselves as passive agents. They commonly dress as women and have their genital organs cut off usually in boyhood. In a few cases that come up before the Court for trial, the active agent is usually a grown-up male, and the passive agent, a boy and occasionally a girl or a woman<sup>10</sup>. Thus, sodomy is basically related to homosexual sex but can be found in heterosexual sex also.

Earlier Sodomy was a punishable offence under section 377 of IPC. But after the Navtej Singh Johar v. Union of India case<sup>11</sup> homosexual sex is no longer a punishable offence as this section violates Article 14 Indian Constitution which speaks about Right to equality, Article 21 of which speaks about Right to life with Dignity as well as Right to privacy, Article 19(Right to expression). Also any kind of discrimination made by the States will be violation of Article 2(2) and Article 26 of The United Nations International Covenant of Civil and Political Rights (ICCPR) and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Though homosexual sex was made legal but law failed to consider the homosexual rape as crime under section 375 of IPC because of gender specific law.

The issue of gender neutrality in rape law was first raised in 1996 by Jaspal Singh, J of the Delhi High Court in Sudesh Jhaku v. KC Jhaku, 1998 Cri LJ 2428. Therein, the Court was required to determine whether the pre-2013 definition of rape could be interpreted to include non-penetrative sexual acts. However, the court went beyond its mandate to opine on the issue of gender neutrality as well. While holding that the prayed-for relief could not be granted by a judicial authority, but only by means of legislative amendment, Singh, J went on to articulate his preference for the offence of rape to be redefined in gender-neutral terms. The judge noted that the offence of rape was the sole avenue under the Indian criminal law for dealing with heinous acts of sexual assault before quoting the following passage from an article in the California Law Review: “Men who are sexually assaulted should have the same protection as female victims, and women who sexually assault men or other women should be as liable for conviction as conventional rapists. Considering rape as a sexual assault rather than as a special crime against women might do much to place rape law in a healthier perspective and to reduce the mythical elements that have tended to make rape laws a means of reinforcing the status of women as

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10. *Id.*

11. “Constitutionality of Section 377 IPC” ,(Jul. 21, 2020, 7:30 PM)<https://www.scobserver.in/court-case/section-377-case>

12. Sudesh Jhaku v. KC Jhaku, 1998 Cri LJ 2428

sexual possessions”<sup>12</sup>.

In 2000 and in 2012, the Union Cabinet through the Criminal Law (Amendment) Bill, 2012, had proposed to make rape a gender-neutral offence by replacing the term ‘rape’ with that of ‘sexual assault’. It was only after the Delhi Gang Rape Case of 2012, Justice Verma Committee submitted its report and after that only The Criminal Law (Amendment) Act, 2013 was passed, where the rape definition was widened to include acts other than forcible peno-vaginal penetration or sexual intercourse but did not make any changes to include men or transgender as victims under the law. Though any kind of sexual offence with a minor whether consented or not will be punishable offence under The Protection of Children from Sexual Offences Act, 2012.

Again Section 18(d) of The Transgender Persons (Protection of Rights) Act, 2019 states that “harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine<sup>13</sup>”.

Now this is again violation of the right of the Transgender. For an offence like rape how can there be two different punishments. Under Section 375 of IPC maximum punishment of life imprisonment is prescribed when a woman is raped by a man. This is a clear violation of the right of the Transgender relating to sexual offence. There is no difference in the trauma when victim is male, female or a transgender. Everyone has privacy right and hindrance of it will automatically hurt the emotion of the person. Even Article 1 of UDHR says “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. Here all human beings includes both male, female and the LGBT Communities. Thus penal law can’t make discrimination between male, female and the LGBT Communities in commissioning of crime. Law should provide justice to the victim of sexual crime who can be any one without making it gender specific crime.

The problem relating to current rape law is that it considers only heterosexual rape committed by men on women. Law is silent about the right of the LGBT community in it. Akshat Agarwal, lawyer and research fellow at Vidhi Centre for Legal Policy during one of his interview said that “All our laws are drafted in a manner that only recognize ‘male’ and ‘female’. So where do trans

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13. The Transgender Persons (Protection of Rights) Act, 2019

14. Fatima Khan, “Year after homosexuality was decriminalised, equality a distant dream for LGBTQ community“,

people fit into this? Sexual harassment and rape laws currently only operate in the 'male-female' binary. Only male can be the perpetrator and female can be the victim<sup>14</sup>". Even in a case when a transgender is raped by a man, in such situation whether the men will be charged u/s 375 of IPC. The most common form of homosexual rape can be found from the prisons. Homosexual rape behind the bar was highlighted after the suicide of the accused Mr. Ram Singh of the Delhi gang rape case of December 2012 at Tihar Jail<sup>15</sup>.

Another issues related to Homosexual rape is that most of us actually don't know how to figure out homosexual rape through forensic medical science. We all know about the process of test when a victim is women and the accused is male. But many of us actually don't know about the test which is conducted for the determination of homosexual rape.

#### **PENAL PROVISIONS WHICH NEED TO BE HIGHLIGHT**

1. Section 8 of IPC described Gender as "The pronoun "he" and its derivatives are used of any person, whether male or female<sup>16</sup>." Here the pronoun he is used for both men and female unless otherwise expressly mentioned in the specific sense. Even in *Girdhar Gopal v. State*, AIR 1958 MB 147(148), the Madhya Pradesh High Court held that the pronoun used in section 354 of IPC (Assault or criminal force to woman with intent to outrage her modesty) applies to either a man or a woman. As per this case a man and a woman can be held for guilty of the offence as per the provisions of section 354 of IPC. At least as per these provisions both man and woman can be an accused for offence under Sec.354 of IPC. Though here also law failed to considered that both men, women, transgender can be a victim.

Now for rape also the term "he" can be used for both male and female under section 375 of IPC. But section 375 of IPC specifically makes the crimes as gender specific in terms of accused and for victim i.e. male will be accused and woman will be the victim only. It's fails to consider that male, female and transgender can be a victim and accused too. Now to remove such ambiguity

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The Print, (Jul. 21, 2020, 7:30 PM)<https://theprint.in/india/year-after-homosexuality-was-decriminalised-equality-a-distant-dream-for-lgbtq-community/286312/>

15. Imran Ahmed Siddiqui, "Sodomy behind jail suicides", The Telegraph, (Jul. 21, 2020, 7:30 PM) [http://www.telegraphindia.com/1150604/jsp/nation/story\\_23829.jsp#.VuffIkComSp](http://www.telegraphindia.com/1150604/jsp/nation/story_23829.jsp#.VuffIkComSp)

16. K.D.Gaur, Textbook on Indian penal code66(Universal Law Publishing, Haryana, 2016)

The Criminal Law (Amendment) Bill of 2019 has proposed an amendment on section 375 of IPC for making it gender neutral rape law which states that-

*“375. Any person is said to commit rape if that person.*

- (a) penetrates their genital, to any extent, into the genital, mouth, urethra or anus of any other person or makes that person to do so with them or any other person; or*
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the genital, the urethra or anus of any other person or makes that person to do so with them or any other person; or*
- (c) manipulates any part of the body of any other person so as to cause penetration into the genital, urethra, anus or any part of body of such person or makes that person to do so with them or any other person; or*
- (d) applies their mouth to the genital, anus, urethra of any other person or makes that person to do so with them or any other person, under the circumstances falling under any of the following seven description:*

*First.—Against the other person's will.*

*Secondly.—Without the other person's consent.*

*Thirdly.—With the other person's consent, when that person's consent has been obtained by putting them or any person in whom they are interested, in fear of death or of hurt.*

*Fourthly.—With the other person's consent, when a man knows that he is not that person's husband and that the person's consent is given because they believe that he is another man to whom they are or believe themselves to be lawfully married.*

*Fifthly.—With the other person's consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the or the administration by the person personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which they give consent.*

*Sixthly.—With or without the other person's consent, when they are under eighteen years of age.*

*Seventhly.—When other person is unable to communicate consent.*

*Explanation 1.—For the purposes of this section, the word genital denotes penis and vagina and; vagina shall also include labia majora.*

*Explanation 2.—Consent means an unequivocal voluntary agreement when any other person by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.*

*Explanation 3.—For the purposes of this section, the definition of gender as under section 8 of the Penal Code shall be applicable wherein the pronoun 'he' and its derivatives are used for any person, whether man, woman or transgender:*

*Provided that a person who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.*

*Exception 1.—A medical procedure intervention shall not constitute rape.*

*Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape<sup>17</sup> ”.*

If we go through the definition of person in Section 11 of IPC then we will find that “The word “person” includes any Company or Association or body of persons, whether incorporated or not<sup>18</sup>”. Section 11 considers natural person as man and woman only<sup>19</sup>. So there is a need of amendment in section 11 also. So that transgender should be included in the scope of natural person.

2. Even the definition of men and women given in section 10 of IPC doesn't include transgender in it. All though Supreme Court in National Legal Service Authority v. Union of India, in 2014 assigned them as “third gender” . But then also penal law failed to incorporate them in rape laws.

Although in The Criminal Law (Amendment) Bill of 2019 it has been proposed that in section 10 of IPC, “The word “man” denotes a male human being of any

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<http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/crimnal-E-12719.pdf>

18. *Supra* note 16 at 68

19. *Id.*

20. *Id* at 66

age; the word “woman” denotes a female human being of any age;<sup>20</sup> and the word “others” denotes a human being including but not limited to transgender of any age.<sup>21</sup>”

3. An important point to be discussed here is that earlier sodomy was punishable offense because the court didn't consider the sexual relationship between the LGBT communities. But now when Court has accepted their sexual relationship than in such scenario if any person without the voluntary consent of the other person commits anal/oral intercourse with any of the person belonging to these communities than whether they should be punished according to section 377 of IPC or under 375 of IPC?
4. Another point of discussion is whether a woman can be charged with abetment of rape? Since current rape law doesn't consider that woman can be a perpetrator too like that of man, in such a situation a woman can easily escape from the criminal charges of abetment of rape even if she has done the crime. Though relating to this issue one can see the case of Priya Patel v. State of M.P. & Anr<sup>22</sup> and State v. Monika & Rita Singh<sup>23</sup>.

## **FORENSIC STUDY OF HOMOSEXUAL RAPE CASES**

### **A. LOCARD'S EXCHANGE PRINCIPLE**

Locard's exchange principle<sup>24</sup> states that when any two objects come into contact, there is always a transfer of material from each object on the other. This principle is often used as sure proof of crime. The principle was first enunciated by Edmond Locard (1877-1966), often referred as the Sherlock Holmes of France.

This principle clearly states that in every offence there must be some evidence to proof it. It's the task of the forensic expert to find evidence from the crime scene. Thus for homosexual rape, forensic evidence can be collected to proof it.

Now for collecting forensic evidence first important task is to identify the *Partners of sodomy or homosexual rape-*

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21. *Supra note 17*

22. *AIR 2006 SC 2639*

23. SC No. 75/13. Unique Case ID No.02405R0152062012.

24. *Supra note 5* at 438

25. *Supra note 8* at 429

Active agent is one who penetrates; passive, the one who is penetrated. Both active and passive agents may interchange, even if one of the partners is a female. She uses a dildo to penetrate when acting as an active partner. After the identification of partners their proper examination is possible.

- **FORENSIC EXAMINATION OF PASSIVE AGENT**

The medical examination of passive agent of Sodomy is similar to as in the case of alleged victim of rape. Consent must be obtained and general history is to be taken like date, time, place of alleged act, degree of penetration, whether bathed or washed anal area after the act, ejaculation during the act, any bleeding etc. The clothing should be examined as in the case of the victim of rape. The crutch area of the underwear and trousers should be examined for the presence of blood, seminal or faecal stains. General injuries together with scratches, especially on the back and buttocks should be looked for. Swabs must be taken from the anal verge and the skin of the perineum. A small, unlubricated proctoscope should be passed, and swabs should be taken from the lower rectum and anal canal, through the lumen of the instrument.

Even proper Anal Examination must be is done to gather information related to penetration. Anal orifice, Anal laxity, Lateral buttock traction test, Laceration of Anal canal, Laceration of sphincter ani etc must be done for the diagnosis of the act. Even anal examination helped to find out that whether the Passive agent was habitual or not.

The presence of semen in the anus is the only proof of sodomy. Opinion as to the cause of the dilation should be guarded and it should only be stated that it is consistent with entry of a penis. Lubricant matter, seminal fluid or venereal infections found at the anus or recovered by swabs from the rectum is a strong evidence of the crime<sup>25</sup>.

Also for further diagnosis<sup>26</sup> -(1) Blood (2) Urine (3) Head hair (4) Pubic hair (5) Loose hair and fibers found anywhere on the body (6) Swabs from any soiled areas of skin (7) Swabs from the anal, perianal and lower rectum, if necessary

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26. *Id.*

27. *Id.*

with the aid of a proctoscope (8) Rectal washing with sterile saline. (9) Nail scrapings should be collected for forensic analysis.

• **FORENSIC EXAMINATION OF ACTIVE AGENT**

The medical examination of active agent of Sodomy is similar to as in the case of alleged victim of rape. The following are the evidence collected from active agent<sup>27</sup>-

- i. The only evidence commonly found is the peculiar smell of anal glands transferred to the penis, and traces of faecal matter and lubricant on the organ.
- ii. Abrasions on the prepuce, glans penis, tearing of fraenum or swelling or redness of penis.
- iii. Faecal soiling, blood and foreign hairs are likely to be found in the area of coronal sulcus.
- iv. The urethral swab may show faecal material and organisms similar to those found on the anal verge swabs from the passive agent, which corroborate penetration.
- v. Blood and seminal stains.
- vi. Presence of venereal disease. Smears should be taken from the external meatus after applying pressure on the undersurface of the penis along the urethra for gonococci.
- vii. Marks of violence on the body.
- viii. The clothes may show seminal stain. or a mixture of semen and faeces.
- ix. In habitual sodomites, penis may be elongated and constricted at some distance from the glans with twisted urethra. Swabs should be taken from shaft of penis, coronal sulcus and glans. Transmission of AIDS may occur after only a few sexual acts in homosexuals, eunuchs and prostitutes.

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28. *Id.*

**B. FORENSIC TEST****• BUCCAL COITUS<sup>28</sup> (coitus through mouth)**

Spermatozoa can be found in the mouth up to nine hours provided: if (1) the victim has not cleaned the teeth nor taken a hot drink after the incident, and (2) careful swabbing has been done by rubbing around inside mouth, under tongue and gum margins. The victim's mouth is rinsed with distilled water, which can be expectorated into a sterile container, centrifuged and examined.

The male prostitutes will submit to homosexual acts either as oral or anal inserters or receivers and even perform intercourse in the armpits (playing the bagpipes).

**• TRIBADISM**

Female homosexuality is known as tribadism or lesbianism. According to Greek mythology, women of Isle of Lesbos practiced this perversion. Active partner uses a dildo either strapped around waste, or manipulated by hand.

Sexual gratification of a woman is obtained by another woman by simple lip kissing, generalized body contact, deep kissing, manual manipulation of breasts and genitalia, genital apposition, friction of external genital organs, sucking of breasts or external genitalia, etc. In some cases enlarged clitoris is used as organ of passion or some artificial penis or phallus may be used. The external genitals may show scratch marks, abrasions or teeth marks.

**• SEMINAL FLUID<sup>29</sup>**

Seminal stains have to be detected in cases of rape or attempted rape, sexual murder of the female, sodomy and bestiality. The stains are usually found on the clothing, but may be found on the person of either the victim or the accused. They may also be found on bed clothes, on floor or on the grass where the offence was committed.

**C. RAPE TRAUMA SYNDROME (RTS)**

It was first described by Ann Wolbert Burgess during 1974<sup>30</sup>. Rape Trauma Syndrome is a set of acute long term symptoms resulting from rape or attempted rape. The syndrome is of two-phase reaction-

- *An acute disorganization<sup>31</sup>* phase lasting about 2 to 3 weeks after the

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29. *Id* at 434

30. *Supra note 7* at 213-214

31. *Id*

rape, during which time there is a great deal of disorganization in the woman's lifestyle as a result of rape,

- and the *reorganization phase*<sup>32</sup> lasting for years, during which the victim reorganizes her life. In the acute phase, the victim is apt to appear calm and subdued mainly due to fear, anger, or anxiety. Many women in the acute phase also experience physical symptoms, such as tension headaches, fatigue, and disturbed sleep patterns. In the reorganization phase, the victim develops motor activity changes, nightmares, and phobias related to the circumstances of the rape.

RTS is not used as a piece of evidence to prove rape but it demonstrates why the victim took the time (often days) to report the rape to the authorities. A judge or a lay juror, in the absence of RTS evidence, may likely consider this delay as evidence of a false allegation of rape.

Here the researcher would like to point out that rape is considered to be one of the most heinous crimes. Physical injury might be recovered with the span of time but the mental trauma remains for entire life. So, one can't distinguish a trauma of heterosexual rape victim with a homosexual rape victim, because for both the victim, trauma remains the same

#### **CONCLUSION AND SUGGESTIONS**

Through forensic evidence it is possible to prove homosexual rape crimes and even death related to it through physical examination. Even from my interview with Dr. Mathur, it is cleared that the degree of injuries related to mental and physical is equal in both heterosexual rape and homosexual rape. Even there is no separate forensic test for homosexual rape. Also from the interview and from the above discussion, it is also cleared that through forensic analysis of the active and passive agent the cases of homosexual rape can be proved with accuracy. Non-inclusion of homosexual rape in Indian Penal Law is acting as a barrier for the victim to come forward for filling cases against the perpetrators. Though in a number of cases, report and studies it has been proofed that homosexual rape is prevalent in current society e.g. Prisoners Rape. Even there are many cases where the LGBT communities have also faced this heinous

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32. *Id.*

crime but failed to report it due to the failure of law for giving them the protection and also because of the Taboo.

Rape law in India needs an amendment. Though the recent amendment includes all kinds of illegal penetration by penis or with any object in the vagina, anus, urethra, tightly closed thighs, axilla, or any part of the woman body. Here the law fails to consider that rape can happen with anyone. Victims can be man, woman, transgender. Accused can also be a man, woman or transgender. There is an urgent need for gender-neutral rape law for the protection of every person's right as suggested in The Criminal Law (Amendment) Bill of 2019. Apart from this, there is a need for clarification in section 11 regarding the definition of a person that whether it covers transgender under a natural person or not. Also, section 10 must be amended to include third gender in it.

Lastly penal law must be gender neutral; it should not be gender specific.

## NATURAL DISASTER AND ITS IMPACT ON WEAKER SECTIONS OF SOCIETY

Dr. Rattan Singh\*

### INTRODUCTION

A disaster is a sudden calamitous event bringing great damage and destruction to a nation and its people. It is unexpected natural or man-made catastrophe causing physical damage and loss of life. Disaster is described as a catastrophic situation in which the normal pattern of life or ecosystem has been disrupted and extra-ordinary emergency interventions are required to save and preserve lives and or the environment<sup>1</sup>. It does not only disrupt the functioning of community, society, normal conditions of human existence, human life and property but a nation and its agencies too. It gives rise to casualties and damage properties, infrastructure, environment, essential services or means of livelihood on such a scale which is beyond the normal capacity of the affected community to cope with. It destroys the economic, social and cultural life of people and deeply effect the weaker section of the society.

Disasters may be natural or man-made. Natural disasters include weather phenomena such as tropical storms, extreme heat or extreme cold, winds, floods, earthquakes, landslides volcanic eruptions, tsunamis, hurricanes, wildfires, heat waves, droughts and epidemic or pandemic. A natural disaster is defined by the UN as: “*the consequences of events triggered by natural hazards that overwhelm local response capacity and seriously affect the social and economic development of a region*”<sup>2</sup>. Man-made disasters include transport and industrial accidents, escape of hazardous materials like gases, collapse of buildings, dams, flyovers etc.

Natural disaster in a natural act of such magnitude as to create a catastrophic situation, by which the pattern of life and living standards suddenly disrupted, changed and people are plunged into helplessness. Natural disaster leads to problems of food, clothing, shelter, medicines, nursing care and transport by means of air, road, rail, water and other necessities of life. They have an immediate impact on human lives and often result in the destruction of the physical, biological and social environment of the affected people, thereby having a longer-term impact on their health, well-being and survival<sup>3</sup>.

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1. A Report on Disaster Management in India, Ministry of Home Affairs, Government of India (2011) 18.

2. Satish Modh, Introduction to Disaster Management 33 (Macmillan Publishers Pvt. Ltd., 2009).

3. M. Assar, Guide to Sanitation in Natural Disasters, 27 (World Health Organisation, 1971).

We have sufficient evidence which shows that poverty and economic backwardness is an important factor in understanding the ill-effects of natural disasters. It is always the weaker section of the society and marginalized who are worstly affected by natural disasters. People living below the poverty line or belong to marginalised class do not have their own house to live. By compulsive circumstances they are bound to live in less safe environment, without shelter, unhealthy and unhygienic living conditions.

Congested slums, unhygienic shelter and unplanned construction of colonies are very much vulnerable to disasters like epidemic and pandemic. The poor segments of society do not face problem of food for their survivorship but fight with the multifarious attacks of socio-political and economic conditions of life. They encounter with problems created by natural disaster like unequal access to assistance; discrimination in aid provision; enforced relocation; sexual and gender-based violence; unsafe or involuntary resettlement and issues of property restitution. Because of insecurity of food, health, shelter and income, they are forced to leave their homes or places of residence. Many are internally displaced as a result of fear of future damages.

Due to its socio-economic conditions, society has given birth to a weaker section within its folds. Such segment includes women, scheduled caste, scheduled tribes, children, poor, landless farmers etc. They have faced socio-economic and political discrimination in hands of dominating sections. Their fight for rights and access to justice is as old as the discrimination against weaker group<sup>4</sup>. The oppression of the weaker section of society is well known fact to all of us. They are subject to discrimination and suppression at the hands of the advanced and upper class of society. Every day and night their sufferings grow throughout their lives. They had been made subject to discrimination in one way or the other at all stages of their life<sup>5</sup>.

Their livelihood is hand to mouth. Whatever they earn from their daily labour, they eat in the evening. They do not possess regular source of income. It all depends upon the environmental, socio-cultural, religious, political and weather conditions of their work place that whether they will get the work for the day or not. Whatever the nature of disaster it may be like tropical storms, extreme heat or extreme cold, winds, floods, earthquakes, landslides volcanic eruptions, tsunamis, hurricanes, wildfires, heat waves, droughts and epidemic or pandemic like COVID 19, it is the weaker section of society and especially migrant labour who is effected the most due

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4. Mahendra Lal Patel, *Awareness in Weaker Section: Perspective Development and Prospects* 52 (M.D. Publications Pvt. Ltd., 1997).

5. *Ibid.*

to the reasons like:

- a) That they live below the poverty line,
- b) That their survival is hand to mouth,
- c) That they do not have regular source of income,
- d) That many of the weaker sections of the society do not have their own houses,
- e) That they live in unhygienic conditions and cannot afford their medicines,
- f) That they are educationally, socially and economically backward,
- g) That they do not have social security,
- h) That they do not get food with minimum calories required to the body to be immune from diseases,
- i) That government take them as vote banks and do not care for their well being,
- j) That working for the upliftment and dignity of all weaker and deprived sections of society is least priority of government,
- k) That much of the crimes are committed against them,
- l) That they are the most exploitive segment of the society,
- m) That they are most vulnerable from the hands of religious groups,
- n) That in some societies children of weaker section are prone to drug addiction,
- o) That they are too sensitive to be exploited by politicians,
- p) That lack of positive and supportive relationships of society prevents them from participating in local life, which in turn leads to their isolation from the mainstream.
- q) That they are not united to fight for their rights,
- r) That the birth rate among the members of weaker section is more for economic security and lust for male child.
- s) That they do not hold agricultural land. They are landless agriculture labour,
- t) That their share in policy making is negligible, so their interests are not protected,
- u) That they are socially, politically, economically and geographically marginalised,
- v) That most of the members of weaker section society belong to lower castes,

Though a smaller part of these people have achieved considerable success, but still most of these people are facing socio-economic deprivation. It is easy to observe that social discrimination against women, scheduled caste, tribes, labourers and other marginalised section has led to their socio-economic and political deprivation and it can be proved that majority of poor in India belong to these sections itself<sup>6</sup>.

#### **EFFECT OF NATURAL DISASTER ON WEAKER SECTION OF SOCIETY**

Every year, millions of people are affected by both manmade and natural disasters. As we have noted that disasters may be droughts, explosions, earthquakes, floods, hurricanes, tornados, fires, epidemic or pandemic and we face multiple dangers. Millions of people become homeless, shelter-less, foodless, workless, health-less, family-less and property-less. Disasters cause many mental and physical problems. The worst of the strata affected by disaster is the economically weaker section of society. Increasing disaster threats not only to life of a person but also socioeconomic characteristics of the population. Some of the factors affecting to the weaker section of the society can be examines as:

- i. Reduction in sources of Income:** With the attack of natural disasters, poor people often lose their assets and sources of income on which their survival depends. They always have limited resources to earn and due to natural disaster either these sources destroy or closed down. Many poor people's livelihoods depend on agriculture, industry, domestic work, tuck shops, auto drivers, rickshaw pulling, small shopkeepers, barbers, cleaners, mechanics, electricians, plumbers etc. Natural disaster COVID19 pandemic closed down all agricultural, economic and commercial activities, which is major source of income for poor. They feel less like a worker and more like a beggar, struggling to get wages or food. Millions in underdeveloped regions face penury and deprivation as economic activity grinds to a halt due to COVID19 lockdown.
- ii. Unhealthy Living Conditions:** Over 65 million or 22 per cent of India's total population lives in urban slums, which are characterized by acute poverty, over-crowding, unhealthy living conditions, and a weak urban public health

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6. Diva Raj, Discrimination of citizens under the Indian Constitution, IP Leaders (May 12, 2020, 04:15 PM), <https://blog.ipleaders.in/discrimination-of-citizens-under-the-indian-constitution/>.

setup. The effect of natural disaster affects the urban poor more than anyone else. Access to clean water, improved sanitation facilities, and safe cooking fuel prevents millions of deaths worldwide. Throughout India, unhealthy environments and poor living conditions impose a threat on families and communities. Unsafe disposal of human waste is a major health hazard in the country. A majority of the families living in slums are migrant workers who undertake both short and long duration movements to cities to look for higher wages and work opportunities. The work in an urban informal economy is intermittent, marked by low-skill requirements, low wages, severe competition, and constant job insecurity. Therefore, a migrant household living in urban slums may not have the luxury to “work from home” in a highly informal market. The families living under or near poverty may not have disposable cash to stockpile food or basic necessities, leaving them vulnerable to hunger, malnutrition, and increasing their vulnerability to the virus. A potential outmigration of the urban poor back to the villages may also exacerbate the extent of the outbreak in India<sup>7</sup>.

- iii. Food Problems:** India’s natural disasters and food insecurity are interconnected. Disasters like floods, hurricanes, tsunamis, droughts, earthquake, pandemic etc. weaken food security of India. Food materials like wheat, rice, pulses, oil become unaffordable during catastrophes. This puts an impact on market access, trade, commerce, food supply, reduced income, increased food prices, decreased income and employment<sup>8</sup>. Natural disasters create poverty, which in turn increases the prevalence of food insecurity and malnutrition. The poorest people in the community are affected by food insecurity and disasters. Without serious efforts to address them, the risks of disasters will become an increasingly serious obstacle to sustainable development and the achievement of sustainable development goals like end hunger, achieve food security and improved nutrition and provide minimum

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7. Vikas Choudhry and Vijay Avinandan, Why COVID-19 Outbreak In India's Slums Will Be Disastrous For The Urban Poor, Outlook India 11, 15(April 2020).

8. Happy M. Tirivangasi, Regional disaster risk management strategies for food security: Probing Southern African Development Community channels for influencing national policy, 10 (1) Jamba Journal Of Disaster Risk Studies 465,468 (2018).

food to needy people. In absence of proper distribution mechanisms, air dropped or manually distributed food packets do not reach all the victims. This results in stampedes, rioting and injuries during the distribution process. People living below the poverty line are the worst affected segment of the society.

- iv. **Health Issues:** Due to natural disasters people are subjected to many risks and dangers to their health. Every disaster is unique in its own way and presents unusual challenges to victims. In order to recognise the special features of the situation at hand, each disaster is evaluated independently by following past events. It not only disrupts basic and routine health services but creates problems in executions of existing health policies, because local health administrations focus on curtaining the spread of disaster like Covid-19. These include curtailed immunization schedules, restricted in-patient, out-patient and emergency treatment for infectious and non-communicable diseases, reduced laboratory investigations, and lowered access to mental health treatment. Primary health centres, community health centres, district hospitals and sub-district hospitals, as well as some private hospitals remain busy in curtailing the Covid19. Many health services for pregnant women, including giving iron and calcium supplements as well as tetanus injections fall down. Children do not receive their regular vaccination. Medical treatment, whether as inpatients, outpatients, or emergencies falls for all disease. Minimum medical services do not reach to the approach of an individual, hence chances of multiplicity of diseases increased and the mostly affected people are poor section of the society.
- v. **Unemployment:** During the Natural disaster like Covid19, restaurants become haunted outlets. Clubs, pubs, gyms, malls, showrooms, hotels, eating joints and other shopping centres remain closed. Streets and roads give deserted look. Schools, colleges, universities, coaching centres are shutdown. Cinemas and other sources of entertainment are shutdown. No international flights are allowed to land. Closure of all these adversely affect the economic

status and employment of common person. Many people live their life on earning of others. Thousands of daily-wage workers sit in the labour chowk since 9 am and moves back without any work because nobody comes to hire their services. Bolt from the Blue, Covid-19 has led to an economic lockdown. Millions of workers are engaged in casual work, comprising about a quarter of the total workforce. As Covid-19 wreaks havoc, the casual workers would be the worst affected. About 75% of workers are either self-employed (rickshaw pullers, carpenters and plumbers) or casual workers who are not covered under any provision or get any paid leave. Out of remaining 25%, half are regular workers and the rest informal workers. With the economy grinding to a halt, a very large segment of the workforce will be economically crushed and extremely vulnerable<sup>9</sup>.

- vi. Lack of Essential Services and Goods:** Essential services are the services and functions that are absolutely necessary during a pandemic. Without these services, sickness, poverty, violence, and chaos would likely result. During the Natural Disaster, supply of essential services gets disturbed and poor people remain away from these. There will be scarcity of, essential services and essential good, people with upper hand manage to get these. During disaster the moment lockdown is declared, markets across the country will see a sudden rise in traffic and footfalls as people rushed to stock up on supplies and poor section of society sit at home and wait for government help. Poverty is the severe lack of certain possessions which significantly reduces the quality of a person's life. People living in poverty struggle to meet basic needs, including having limited access to food, clothing, healthcare, education, shelter and safety. People affected by poverty may also lack social, economic, political or material income and resources. Poverty is a complex web of circumstances that hinders the very survival of people around the world.
- vii. Weaker Section: Least Privileged Class for Government:** During the period of disaster, many times government lockdown its cities, towns and even

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19. Yogima Seth Sharma, Unemployment rate in India at 24% for week ended May: CMIE, THE ECONOMIC TIMES, May 24, 2020, at 5.

villages also. Lockdown locks all the places of public importance to avoid large gathering. Therefore, government start providing the minimum facilities i.e. food, water, medicines, other essential goods to people so that they should not come out of their houses to create further problems for the govt. in order to provide these services and goods it has been noticed that most of the weaker sections of the society are not provided with these facilities or these facilities never reach to their door steps<sup>10</sup>. Disaster management occupies an important place in this country's policy framework as it is the poor and the under-privileged who are worst affected on account of any type of disasters.

- viii. Violation of their Human Rights:** Under international human rights law, governments have an obligation to protect the right to freedom of expression, including the right to seek, receive, and impart information of all kinds, regardless of frontiers. Permissible restrictions on freedom of expression for reasons of public health may not put in jeopardy the right itself. Governments are responsible for providing information necessary for the protection and promotion of rights, including the right to food, right to work, right to live in a dignified way, right to shelter and health. Many times, governments fail to uphold the right to freedom of expression, right to privacy, right to information, right to food, right to health services, right to service and even right to minimum wages. It is almost always the poor and marginalized who are disproportionately affected by natural disasters. The problems that are often encountered by persons affected by natural disasters include: unequal access to assistance; discrimination in aid provision; enforced relocation; sexual and gender-based violence; loss of documentation; recruitment of children into fighting forces; unsafe or involuntary return or resettlement; and issues of property restitution<sup>11</sup>.
- ix. Domestic Violence:** Women in disasters and conflict situations are often the most vulnerable group. The contributory factors to this group are stress and other associated risk factors such as unemployment, frustration, reduced

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10. Amita Singh, *Disaster Law: Emerging Thresholds* 68 (Taylor and Francis Publications, 2007).

11. Mahendra Lal Patel, *Supra note 4*, at 81.

income, limited resources, alcohol abuse and limited social support. Another serious issue with respect to domestic abuse or family violence is an increasing risk of suicides. Women are more vulnerable when they are literally trapped in their homes, and kept away from people who could help them. Such a situation can exacerbate the already weak position of women within the family — resources are normally limited for them, given that they are usually economically disempowered, and their voices are not heard. For women in India, with the law and order machinery already overstretched, it is unlikely that domestic violence will be a focus at the moment. The contributory factors to this issue are stress and associated risk factors such as unemployment, frustration, reduced income, limited resources, alcohol abuse and limited social support. The prolonged economic deprivation and fear of job losses often tend to create frustrations which fuel domestic violence. Another serious issue with respect to domestic abuse or family violence is an increasing risk of domestic violence-related homicide. Pandemic like disaster raise issues relating to domestic violence. Women are more vulnerable when they are literally trapped in their homes, and kept away from people who could help them. Domestic violence has several dimensions. In India, such a situation can exacerbate the already weak position of women within the family — resources are normally limited for them, given that they are usually economically disempowered, and their voices are not heard. For women in India, with the law and order machinery already overstretched, it is unlikely that domestic violence will be a focus at the moment. The victims of domestic violence also now face the prospect of economic marginalisation as the labour market shrinks for women. So, in many ways, the woman is more dependent on her spouse or partner, even if in an abusive relationship<sup>12</sup>.

- x. **Child Abuse:** Children are the most vulnerable in natural disasters<sup>13</sup>. In natural disaster, children are always the biggest victims. They become incapable of rebuilding their lives, rushing to safety and left to the whims of others. They can

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12. Lalita Panicker, The lockdown is making women more vulnerable, Hindustan Times April 04, 2020, at 7.

13. RN Srivastava, Rajeev Seth and Joan van Niekerk, Child Abuse and Neglect: Challenges and Opportunities 49 (JP Medical Ltd., 2013).

easily be coaxed into servitude and even exploitation with the promise of food and shelter, by predators, in the form of human trafficking. Children are dependent on their parents for access to food, cloth, shelter, medical care, security, and so on<sup>14</sup>. Disasters disrupt social structures bondage which leads to increased exposure and likelihood of the violence against children. When natural disasters occur, social connections are disrupted, the ability to sanction inappropriate behaviour is reduced, and individuals are more likely to exhibit anti-social conduct. It also results into increases of domestic violence in general, and child abuse in particular<sup>15</sup>. Children become target of the aggressive behaviour of parent's frustration. Due to increased stress and decreased social support, child maltreatment is increase.

- xi. Increase in Crime Rate against them:** Weaker section of the society is always victim in the hand of rich and upper class of society. During any type of natural disaster they face economic, political, social and psychological depressions. Due to displacement, they rush for food and security. They become homeless, jobless and moneyless. They are never considered as subject matter for the government for protection. Crime like eve teasing, rape and molestation increases against the women of weaker sections. Offences of theft, extortion and robbery increase. Child abuse, child exploitation and child prostitution increase. People of weaker section become prone to atrocities due to their socio-economic circumstances.
- xii. Weaker sections become a distinct class:** During natural disaster, different classes start their growth. Weaker section, which is based on per capita income, employment, occupation, residence, caste, community, profession, religion etc become a distinct class due to lack of government will for their protection, lack of medical facilities, lack of education, lack of information and communication. During the outbreak of Covid19, migratory labour became a class became a class of untouchables. Government failed to handle the corona

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14. *Ibid.*

15. Thom Curtis, Brent C. Miller and E. Helen Berry, Changes in Reports and Incidence of Childabuse, 24 (9) National Library of Medicine 16, 18 (2000).

virus, which adversely affected the poor people socially, economically, politically and psychologically.

- xiii. Discrimination in Matters of Opportunities:** A significant number of weaker sections suffer disproportionately because of discrimination against them by communities, by their governments and even by the aid agencies matters of facilities, services, goods and other state assistances. Ethnicity, language, religion, gender, age, physical disability may be some of the deep-rooted reasons of discrimination. It affects not only people's ability to survive the crisis of natural disaster, but also their capacity to recover and to regain their livelihoods. It has been noticed during Covid19 that millions of people of weaker section were discriminated in providing social security, shelter, food, medical assistance, public transport etc.
- xiv. Psychology and mental health:** Disasters and mental health are related to each other. Along with the social and economic losses, the individuals and weaker communities experience anxiety, mental and psychological instability. Generally, the disasters are measured by the cost of social and economic damage, but there is no comparison to the emotional sufferings a person undergoes during disaster<sup>16</sup>. Disasters are mostly unpredictable, which leaves the victims in a state of shock. The victims tend to deny the loss and try to escape from reality. It makes the weaker section more vulnerable to stress, anxiety and other different maladaptive reactions. Death of a closed one also leaves the victim in a state of insecurity because the sense of love, attachment and belongingness is deprived. There were various factors which lead to the psychological vulnerabilities of the sufferers such as the displacement of the family, death of a loved one, socio-economic loss, environmental loss, and lack of mental preparedness for disaster, disruption in the family bond, lack of social support and negative coping skills<sup>17</sup>.
- xv. Displacement and Homelessness:** Natural disasters leave thousands homeless. They do not get space to camp in, no alley to sleep in, and no bridge

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16. Deborah S.K. Thomas, Brenda D. Phillips, Alice Fothergill and Lynn Blinn Pike, *Social Vulnerability to Disasters* 269 (CRC Press, 2009).

17. *Id.* at 270.

to sleep under. Most of the people of weaker section live on temporary shelters, rented accommodations, illegal colonies outside cities, sheds on roadsides etc. During natural disaster either these houses are damaged, destroyed or damaged. Most of cities allow migratory labour or workers to work in the city but there is no arrangement of their stay in the respective city<sup>18</sup>. Leaving their houses either temporary or permanent, they move pillar to post for their survival.

- xvi. Official apathy about Obtaining and Receiving Aids:** Even though, government and non-government organisations create many provisions to help and provide necessary aids to them, but either these people are not aware of such type of aids or do not have resources to access these facilities. Due to their ignorance, lack of education or lack of awareness they remained empty handed from the government and non government facilities.
- xvii. Increase in Mortality Rate:** Due to poverty, weak health, unhygienic living conditions and socio-economic attitude of society and government, there is increase in mortality rate among the weaker section of the society.

### SUGGESTIVE MEASURES

Even though, many legislative and executive policies have been crafted to protect the interest of affected people during natural disaster, but no specific legislative or executive policy has been developed to safeguard the interests of weaker sections of the society<sup>19</sup>. They continue to suffer socially, economically, politically, emotionally, psychologically and even anthropologically. Special actions need to be taken for their well beings, so that they can lead a dignified life. Some of the following actions are suggested.

- i. Government should encompass all civil, social, political and economic guarantees to the affected persons by natural disaster. Efforts for their social security must be taken in such a way so that they can lead minimum survivorship.
- ii. It is the duty of States to respect and protect human rights of displaced persons.

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18. United Nations in India, International Organisation For Migration, UN Organisation (April 22, 2020, 09:10 PM), <https://in.one.un.org/who-we-are/iom-int/>.

19. Brinder Pal Singh Sehgal, Human Rights in India: Problems and Perspectives 95 (Deep and Deep Publications, 1995).

Therefore, state should take efforts to prevent violations of human rights from occurring and regard the right to life, dignity, liberty and security of weaker section of the society.

- iii. People should be allowed to move to other parts of the country so that they can reach their respective houses; rather this becomes the duty of state to create mechanism to send them at their desired destinations. They should be granted the opportunity to choose whether they want to return to their respective towns, remain in the area where they have been displaced to, or to resettle to another part of the country. Unless it is necessary, their health, evacuations against their will or prohibitions of their return, should not be supported by state.
- iv. During disaster and post disaster there are many chances of exploitation of weaker and marginalised section of society. Appropriate measures should be taken to protect weaker sections, particularly women, boys and girls, against trafficking, forced labour, slavery, forced prostitution, and sexual exploitation.
- v. Measures should be taken to ensure that they must have unhindered and non-discriminatory access to goods and services and other necessary things for their basic needs.
- vi. Adequate food, water, medicines, sanitation, shelter, clothing, and essential health services should be provided to them without any discrimination as to race, colour, sex, language, religion, political.
- vii. State should protect the property and other belongings left behind by persons or communities displaced by the natural disaster, against looting and destruction.
- viii. Awareness, education, preparedness, prediction and warning systems can reduce the disruptive impacts of a natural disaster on weaker section.
- ix. There is need to involve groups that participate in developing, adopting, implementing the policies to overcome natural disasters such as public officials, policy makers, finance experts, engineers, lawyers, planners, architects, members of civic society, educators, non-government organisations and so on.

- x. New hospitals and multi-purpose health centres need be constructed to reduce the damage by natural disasters. Strenuous efforts should be made to strengthen the existing facilities to combat disaster. Stringent legislations are required to ensure the protection of all rights of weaker sections of society.
- xi. Schools, colleges, community centres and other public buildings may serve as primary shelters for sufferers of disaster. Therefore, much care is required during their construction, repair and renovation.
- xii. Governments should set an example by maintaining and creating facilities for the affected people.

### **CONCLUSION**

Natural disasters are not uncommon events, though they are very much unpredictable. Countries with high levels of human development reduce the impact of natural disasters in terms of number of people died and handicapped. Human developments such as per capita income, education, housing, employment and medical facilities puts a deep impact on natural disaster fatalities. During the course of writing this paper, it has been observed that economic development and government management plays an important role in mitigating the impact of natural disasters like droughts, earthquakes, floods, storms, volcanoes, landslides, epidemic and pandemic<sup>20</sup>. Factors like population density, unemployment, investment, government consumption, openness, education and corruption also plays a great role in mitigating the impact of disaster. Policy execution around the mitigating factors should be given priority because it could work positively in the long term in reducing the damage and losses due to natural disasters. Government expenditure and consumption also need to be carefully planned and effectively executed to overcome the above discussed problem and difficulties of weaker sections of the society.

## **‘SOCIAL DISTANCING’ THE RIGHTS AND FREEDOMS DURING COVID-19: COMPARING PERSPECTIVES BETWEEN INDIA AND CANADA**

**Dr. Shruti Bedi\* & Sebastien Lafrance\*\***

### **INTRODUCTION**

India has been severely hit by this pandemic.<sup>1</sup> Courts in India had to deal with issues that would not have arisen otherwise, at least with such intensity. Indeed, the Supreme Court of India has already dealt with crucial issues that are connected directly to some of the consequences of this crisis.<sup>2</sup>

Canada is also not exempt.<sup>3</sup> Judges of its courts also have to turn their mind to issues that were triggered by this dangerous, and too often lethal, virus. As the Chief Justice of Canada states, “COVID 19 has dramatically changed the way we work”.<sup>4</sup> In addition, “Significant precautionary measures [in the battle against COVID-19] have been taken across all countries to control the pandemic. Some of these may conflict with civil liberties, such as freedom of association [and assembly], freedom of religion, and mobility rights ...,<sup>5</sup> as well as privacy rights”. This article explores some of these conflicts in both India and Canada.

Why compare India and Canada? To start with, “Canada and India share a great deal more in

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1. As of August 2, 2020, India has 1,751,919 citizens currently diagnosed with COVID-19, 37,403 deaths, and 1,146,879 people who recovered, <https://www.worldometers.info/coronavirus/country/india/>.
2. See e.g. In Re: Contagion of Covid 19 Virus in Prisons (Suo Motu WP(C) No. 1/2020): the court has dealt with multiple petitions related to COVID-19; In Re: Problems and Miseries of Migrant Labourers (Suo Motu WP (C) No. 6/2020): the Supreme Court took cognizance of the many media reports showing the conditions of the migrant workers walking on foot and bicycles covering long distances.
3. As of August 2, 2020, Canada has 116,599 citizens currently diagnosed with COVID-19, 8,941 deaths, and 101,436 people who recovered, <https://www.worldometers.info/coronavirus/country/canada/>.
4. Rt Hon Richard Wagner, P.C. Chief Justice of Canada, Chief Justice of Canada and Minister of Justice Launch Action Committee on Court Operations in Response to COVID-19, Dept. Justice Canada (May 8, 2020), <https://www.canada.ca/en/department-justice/news/2020/05/chief-justice-of-canada-and-minister-of-justice-launch-action-committee-on-court-operations-in-response-to-covid-19.html>.
5. Colleen M. Flood, Vanessa MacDonnell, Jane Philpott, Sophie Thériault & Sridhar Venkatapuram, Overview of COVID-19: Old and New Vulnerabilities, in Colleen M. Flood et al (eds), *Vulnerable: The Law, Policy and Ethics of COVID-19*, Univ Ottawa Press, 2020, 33 (italics added).

common with each other than with the European countries”<sup>6</sup>. In addition, their respective rights may be compared because “India’s system is particularly well suited to a comparison with the Canadian systems”<sup>7</sup>. Also, “some even call India and Canada ‘long lost siblings’ because their constitutional dynamics are similar”<sup>8</sup>. Therefore, the authors submit that this proximity should amply justify the comparison of each country regarding the impacts of government measures on fundamental rights.

Since the pandemic is perceived as an existential threat, the need to save lives takes precedence over all interests. This argument may be an appealing justification for the consequent violation of rights but is a dangerous state for a democracy as pointed out by Justice Khanna who stated that “governments acting for all the rights reasons are invariably prone to overreach.”<sup>9</sup> It is during such time that a temporary measure adopted to deal with the exigencies of the situation becomes entrenched. There is therefore, even a greater need to ensure that rights are not “permanently effaced”<sup>10</sup>.

#### INDIAN PERSPECTIVE

*The nation may be great, but our lives are miserable.*

*The wicked disease struck us and wrecked our lives.*

*What life is this, what life is this?*

*A wretched life, a pathetic life, an abject life, a broken life.*

*Is there a disease worse than poverty?*

*Is there a solace greater than being with one’s family?*

- Aadesh Ravi<sup>11</sup>

On the lines of other countries, India’s response to COVID-19 has been to impose “lockdowns”

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6. Vivek Krishnamurthy, Colonial Cousins: Explaining India and Canada’s Unwritten Constitutional Principles, 34 *Yale J. Int’l L.* 207, 211 (2009).
  7. Isabelle Gilles, Lessons from India’s Constitutional Culture: What Canada Can Learn, Faculty of Law, LLM Thesis, McGill Univ, 2012, 10.
  8. Id.; see Shruti Bedi & Sebastien Lafrance, The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada, in Salman Khurshid et al, *The Supreme Court and the Constitution*, Wolters Kluwer, 2020, 51; Sébastien Lafrance, Should Canadian Law Matter to Indian Jurists? Advocating for More Substantial Legal Discussion Between the ‘Long Lost Siblings’, *The Contemporary Law Forum* (2020), <https://tclf.in/2020/07/08/should-canadian-law-matter-to-indian-jurists-advocating-for-more-substantial-legal-discussion-between-the-long-lost-siblings/>.
  9. Suhrith Parthasarthy, Gautam Bhatia & Apar Gupta, Privacy Concerns During a Pandemic, *The Hindu*, (Apr. 29, 2020), <https://www.thehindu.com/opinion/op-ed/privacy-concerns-during-a-pandemic/article31456602.ece>.
  10. *Id.*
  11. The full song titled *The Long March of the Locked-down Migrants* can be accessed at People’s Archive of Rural India, YouTube channel, <https://www.youtube.com/watch?v=qQ5>

or “complete cessation of activities”.<sup>12</sup> However, in India it is the Union Ministry of Home Affairs which has the power to determine the time and duration of the lockdown. The concentration of power is in the hands of the central government, unlike Canada where it is the provinces, which prescribe the conditions of lockdown unless there is a state of emergency declared nationally. In the absence of a declaration of emergency in India, the union government exercises its powers under the Epidemic Diseases Act, 1897 and the National Disaster Management Act, 2005.<sup>13</sup> In fact, the legal system of any country has the responsibility to devise ways to avoid catastrophization of a disaster<sup>14</sup> and minimise its impact on the vulnerable.<sup>15</sup> As Upendra Baxi claims, “if the spread of a global pandemic was an act of misfortune, its catastrophization has to be located in the injustices of social structure and policy”<sup>16</sup>.

That the State is obligated to protect and provide for the population during calamities is an accepted legal principle since Grotius proclaimed it in the 17th century.<sup>17</sup> India in this respect does not follow the U.S. model as expressed by the U.S. supreme Court in *Lavine v. Milne*<sup>18</sup> and *Dandridge v. Williams*<sup>19</sup>. India is primarily a welfare state under the Indian Constitution<sup>20</sup> and

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12. The lockdown in India was imposed from 25th March 2020 and was extended till 3rd May, 2020, with conditional relaxations after 20 April. COVID-19: Lockdown across India, in line with WHO Guideline, UN News, (March 24, 2020), <https://news.un.org/en/story/2020/03/1060132>
  13. Akshay Aurora, The Constitutional Propriety of India’s COVID-19 Response from a Distribution of Powers Perspective, IACL-AIDC Blog, (2 June 2020), <https://blog-iacl-aidc.org/2020-posts/2020/6/2/the-constitutional-propriety-of-indias-covid-19-response-from-a-distribution-of-powers-perspective>.
  14. Pratiksha Baxi & Navsharan Singh, Gendering the Pandemic in the Prison, The India Forum, (July 14, 2020), <https://www.theindiaforum.in/article/gendering-pandemic-prison>
  15. The lockdown resulted in closure of all establishments and transport. Millions of migrant workers, dependent on daily earnings, were left with no money due to the loss their livelihoods. With no arrangements, millions were forced to start marching home on foot, undertaking journeys of hundreds of miles. Some died on the way. Anand Grover, COVID-19 in India: Lockdown, Legal Challenges and Disparate Impacts, Bill of Health, (May 18, 2020), <https://blog.petrieflom.law.harvard.edu/2020/05/18/india-global-responses-covid19/>
  16. Upendra Baxi, Exodus Constitutionalism: Mass Migration in Covid Lockdown Times, The India Forum, (June 29, 2020), <https://www.theindiaforum.in/article/exodus-constitutionalism>
  17. Hugo Grotius, The Law of War and Peace, (1625), compiled C. Kenny, Dept. Defense & Strategic Studies, Missouri State Univ, (July 27, 2015), <https://www.classicsofstrategy.com/2015/07/the-law-war-peace-grotius.html>
  18. *Lavine v. Milne*, 424 U.S. 577 (1976).
  19. *Dandridge v. Williams*, 397 U.S. 471 (1970). The Supreme Court in the two cases held that “welfare benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support.” See David Kelley, *A Life of One’s Own: Individual Rights and the Welfare State*, 19 (1998).
  20. The Directive Principles, Indian Constitution provide that India is a welfare state. ‘See also’ Mihir Desai, Covid-19 and the Indian Supreme Court, Bloomberg Quint, (May 28, 2020), <https://www.bloombergquint.com/coronavirus-outbreak/covid-19-and-the-indian-supreme-court>

therefore is bound by its constitutional obligations to protect and safeguard its people.<sup>21</sup> Giorgio Agamben, the Italian theorist propagated the theory of the State acquiring and expanding its powers, termed as the '*state of exception*' especially during emergencies.<sup>22</sup> During such times, the civil liberties and fundamental rights may be curtailed to meet the disaster.<sup>23</sup> However, the situation also elevates the directive principles to the level of fundamental rights especially the right to healthcare, food, water, etc.<sup>24</sup>

### **RIGHT TO HEALTH AND HEALTH CARE**

The Constitution of India does not explicitly guarantee a fundamental right to health but there are numerous references to the role of the State in providing healthcare and guaranteeing an attainable level of physical and mental health to every Indian.<sup>25</sup> Article 21 of the Constitution which guarantees the right to life and personal liberty has been interpreted expansively by the Supreme Court in this context. In *Bandhua Mukti Morcha v. Union of India*<sup>26</sup>, the Supreme Court held that the right to dignity under Article 21 also includes the State obligation to protect the health of its people. In *State of Punjab v. Mohinder Singh Chawla*<sup>27</sup>, the court provided that the right to health is integral to the right to life and the government has a constitutional obligation to provide health facilities. That failure of a government hospital to give timely medical treatment to a patient, results in violation of the patient's right to life.<sup>28</sup>

The Supreme Court on June 11, 2020 took *suomotu* cognizance of the appalling condition of the hospitals and health infrastructure in the country, particularly Delhi government's inability to provide healthcare to the residents.<sup>29</sup> This action was taken on the basis of news reports highlighting the violation of right to health of COVID-19 patients. The court passed two orders on June 12, 2020<sup>30</sup> and June 19, 2020<sup>31</sup>, holding that it was the duty of the State to ensure the right to health. Along with passing an order for increase in testing, the court also provided for

21. Const. of India, 1950, Article 38(1) states, "The state shall strive to promote the welfare of the people".

22. Giorgio Agamben, *State of Exception*, transl. Kevin Attell, (2005).

23. *State of Exception*, Law and Society@Kwantlen, (Nov. 19, 2020), <https://kpulawandsociety.wordpress.com/2012/11/19/state-of-exception-2/>

24. Desai, *supra*.

25. The right to health is present in the Directive Principles, where the State is under an obligation to look after public health under Articles 42 and 47.

26. *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

27. *State of Punjab v. Mohinder Singh Chawla*, (1997) 2 SCC 83.

28. *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, AIR 1996 SC 2426 at 2429, para 9.

29. *In Re: The Proper Treatment of COVID-19 Patients and Dignified Handling of Dead Bodies in the hospitals etc.*, *Suo Motu WP (C) No. 7/2020*, dated 12.6.2020, [https://images.assettype.com/barandbench/2020-06/cc6ffe3-b7bb-4b78-97f4-f3cdfad8133/Suo\\_Motu\\_Order.pdf](https://images.assettype.com/barandbench/2020-06/cc6ffe3-b7bb-4b78-97f4-f3cdfad8133/Suo_Motu_Order.pdf)

30. *Id.*

31. *In Re: The Proper Treatment of Covid 19 patients and Dignified Handling of Dead Bodies in the hospitals etc.*, *Suo*

installation of CCTV cameras and constitution of a committee to oversee the condition of hospitals in Delhi.<sup>32</sup> It is however recommended that the right to health is declared to be a fundamental right. Strong health laws are required to build societal resilience to combat public health emergencies.<sup>33</sup>

Everybody has been affected by the pandemic in one way or another. However, it is the poor who have paid the highest cost. The pandemic has allowed us to stretch our imagination along with the limits of available healthcare. According to Abhay Shukla, “despite the fact that public health services” in India have been “historically understaffed, under-resourced”, without “sufficient number of doctors and other resources”, they have creditably “stretched themselves to meet the challenge” of the epidemic.<sup>34</sup> Since it is the less privileged and the poor that have borne the brunt of the pandemic, it is their right to healthcare which needs attention. Time has come for India to invest more in the healthcare of the poor.<sup>35</sup>

#### **RIGHTS OF MIGRANT WORKERS**

India declared a lockdown to deal with the impact of the COVID-19 virus, wherein it witnessed the largest exodus of workers and migrants on the highways reminiscent of Partition.<sup>36</sup> Due to complete annihilation of their livelihood and non-payment of wages, the migrant workers were left with no option but to walk back home. Upendra Baxi says that this “phenomenon of the Covid-19 migrant on the move” was about the “senseless social suffering that thingified human beings and converted their suffering into commodities in markets of governance, justice, development, and human rights.”<sup>37</sup>

In a national survey conducted by *Gaon Connection* to document the impact of COVID-19 on rural India, it was shown that 23% migrant workers returned home walking during the

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Motu WP (C) No. 7/2020, dated 19.6.2020,

[https://images.assettype.com/barandbench/2020-06/88a7549e-f7ce-45a4-842315cde06fc64d/In\\_Re\\_The\\_Proper\\_Treatment\\_of\\_COVID19\\_Patients\\_and\\_Dignified\\_Handling\\_of\\_Dead\\_Bodies\\_in\\_the\\_Hospital.pdf](https://images.assettype.com/barandbench/2020-06/88a7549e-f7ce-45a4-842315cde06fc64d/In_Re_The_Proper_Treatment_of_COVID19_Patients_and_Dignified_Handling_of_Dead_Bodies_in_the_Hospital.pdf)

32. Id.

33. Nishant Sirohi, *Declaring the Right to Health a Fundamental Right*, Observer Research Foundation, (July 14, 2020), <https://www.orfonline.org/expert-speak/declaring-the-right-to-health-a-fundamental-right/>

34. Ramya Kanna, *Should healthcare be a fundamental right?*, *The Hindu*, (May 8, 2020), <https://www.thehindu.com/opinion/op-ed/should-healthcare-be-a-fundamental-right/article31528818.ece>.

35. T. Sundararaman in Kanna, *supra*.

36. Kalpana Kannabiran, *Justice and Rights in Viral Contexts*, *The India Forum*, (May 2, 2020), <https://www.theindiaforum.in/article/justice-and-rights-viral-contexts-india>.

37. Baxi, *supra*.

lockdown, 18% by bus and 12% by train.<sup>38</sup> In the nationwide lockdown, the modes of transport were shut which forced people including pregnant women and children to walk hundreds of kilometres. The government was unable to provide food to these people and nearly 200 people died trying to reach their home states.<sup>39</sup>

Immediately prior to the partial uplifting of the lockdown on May 1, 2020, the government arranged for special trains (Shramik trains) for the migrant workers. Initially they were made to pay the train fare which was later exempted. This “existential horror”<sup>40</sup> faced by the poor migrant worker has resulted in the violation of their constitutional right to equality (Art. 14), right to life (Art. 21) and most importantly the right to movement (Art. 19(d)). However, the Supreme Court, other than directing the government to place on record the proposed protocol for the movement of migrants<sup>41</sup>, did little else. More than the Supreme Court, the High Courts in India like Karnataka, Bombay, Tamil Nadu, Andhra Pradesh, Uttar Pradesh and Gujarat, proved to be proactive in defending peoples’ rights.<sup>42</sup>

The migrant workers have the same basic material needs like food, clothing, shelter and health and the rights to dignity, privacy, freedoms and information, etc., like the rest of the citizenry.<sup>43</sup> The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, which provides for basic travel allowance, housing, minimum wages, entitlements to these workers needs to be effectively implemented and the basic rights of the marginalised need to be sincerely protected.

### **RIGHT TO PRIVACY**

The pandemic seems to justify the ushering of some of the most intrusive surveillance technology. The UN Secretary-General Antonio Guterres is apprehensive about the “ungoverned use of digital technology” and warns us about the increase in the “danger of digital fragmentation”, “exacerbated by geopolitical divides, technological competition and polarisation.”<sup>44</sup> The dilemma is the debate between privacy and the danger of surveillance

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38. Shivani Gupta, Almost every fourth migrant worker returned home on foot during the lockdown, Gaon Connection, (Aug. 11, 2020), <https://en.gaonconnection.com/almost-every-fourth-migrant-worker-returned-home-on-foot-during-the-lockdown-33-want-to-go-back-to-cities-to-work/>.

39. Desai, *supra*.

40. Baxi, *supra*.

41. Jagdeep S. Chhokar v. Union of India, W.P. (Civil) No. 10947/2020, (April 27, 2020), [https://main.sci.gov.in/supremecourt/2020/10947/10947\\_2020\\_31\\_12\\_21870\\_Order\\_27-Apr-2020.pdf](https://main.sci.gov.in/supremecourt/2020/10947/10947_2020_31_12_21870_Order_27-Apr-2020.pdf)

42. Desai, *supra*.

43. Baxi, *supra*.

44. United Nations Secretary-General, Secretary General’s remarks to the Virtual-High level Meeting of Rapid Technological Change on the Achievement of the Sustainable Development Goals, UN, (June 11, 2020),

required to save people from the virus.<sup>45</sup> Undoubtedly, the effect and efficiency of contact-tracing and technological applications is of immense assistance in safeguarding people against the pandemic. However, in this fight, we need to tread with caution.

The right to privacy in India has been recognised as a part of Article 21 of the Constitution by the *Puttaswamy*<sup>46</sup> judgment. An intrusion in the citizens' privacy with the introduction of the 'Arogya-Setu' app, which tracks users' movements and checks if they are at the risk of contracting the virus. The app obtains the personal details of the user which have led to concerns regarding the privacy policy of the government.<sup>47</sup> The allegation is the disproportionate infringement of privacy due to lack of transparency.

The government of the State of Karnataka passed a direction on March 30, 2020 asking the people quarantined at home due to COVID-19 to send a "selfie image" of themselves every hour.<sup>48</sup> The selfie image was supposed to include location coordinates, informing the government as to the whereabouts of the person. Additionally, the State government had on March 25, 2020 decided to publish the personal details of the quarantined persons including their addresses on the website of Ministry of Karnataka Health and Family Services.<sup>49</sup> Similar publications leading to violation of privacy was also carried out by other states like Delhi, Rajasthan, Maharashtra and Punjab.<sup>50</sup>

The right to privacy, post *Puttaswamy* and the right to be forgotten (RTBF) are imbedded in the right to a dignified life under Article 21.<sup>51</sup> These rights stand violated when the information is not erased after the fulfilment of the purpose of data submission. Prof. Schonberger suggests that

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<https://www.un.org/sg/en/content/sg/statement/2020-06-11/secretary-generals-remarks-the-virtual-high-level-meeting-of-rapid-technological-change-the-achievement-of-the-sustainable-development-goals-delivered>

45. Web Desk, Privacy amid a Pandemic: A covid-19 app study warns against erosion of civil liberties, *The Week*, (June 16, 2020), <https://www.theweek.in/news/sci-tech/2020/06/16/privacy-amid-a-pandemic-a-covid-19-app-study-warns-against-erosion-of-civil-liberties.html>

46. *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

47. Parthasarthy et al., *supra*.

48. Those in home-quarantine in Karnataka directed to send selfies every hour to govt., *The Economic Times*, (Mar. 31, 2020), <https://economictimes.indiatimes.com/news/politics-and-nation/those-in-home-quarantine-in-karnataka-directed-to-send-selfies-every-hour-to-govt/articleshow/74907051.cms>

49. Nidhima Taneja, Karnataka's Approach in Dealing with COVID-19 Patient Data Triggers Privacy Debate, *The Wire*, (Mar. 29, 2020), <https://thewire.in/government/karnataka-covid-19-patient-data-privacy-concerns>

50. Basawa Prasad, Coronavirus and the Constitution – VII: Balancing Privacy and Public Health in Karnataka, in Gautam Bhatia, *Ind Const. L.Phil.*, (Apr. 3, 2020), <https://indconlawphil.wordpress.com/2020/04/03/coronavirus-and-the-constitution-vii-balancing-privacy-and-public-health-in-karnataka-guest-post/>

51. Karthik Rai, Coronavirus and the Constitution – XXIV: Arogya Setu and the Right to be Forgotten, in Gautam Bhatia, *Ind Const. L.Phil.* (May 7, 2020), <https://indconlawphil.wordpress.com/2020/05/07/coronavirus-and-the-constitution-xxiv-aarogya-setu-and-the-right-to-be-forgotten-guest-post/>

once the purpose of the data is complete, an automatic deletion of the data must occur.<sup>52</sup> Kritika Bhardwaj writes, “If surveillance is legitimately warranted to deal with a public health emergency, then it must be subject to a sunset clause.<sup>53</sup>” The pandemic cannot be used as a pretext to abnegate the constitutional freedoms and rights.

### **FREEDOM OF RELIGION**

Religion is an intrinsic part of the life of every Indian. The Constitution of India provides for a secular country and freedom of religion is guaranteed to every Indian (Articles 25 to 28). Article 25 provides that *all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion*. “Secularism” and “free conscience of religion” have been held to be a part of the basic structure of the Indian Constitution in *Indira Gandhi v. Raj Narain*<sup>54</sup>. This freedom of religion is subjected to two restrictions i.e. public order, health and morality; and to other provisions of Part III of the Constitution (Fundamental Rights).<sup>55</sup>

In March 2020 the Muslims held a Tablighi Jamaat event in Delhi which emerged as India’s first largest hotspot.<sup>56</sup> Following the Jamaat congregation, there was a sustained campaign against Muslims especially on social media. Along with the Tablighi Jamaat and its organisers, failure occurred at multiple levels of government and police. Although the government issued an advisory stating that the pandemic should not be linked to any religion<sup>57</sup>, there was little empathy displayed towards the Muslims.

A public interest litigation (PIL) petition was filed before the Punjab and Haryana High Court alleging the violation of his fundamental right to religion in not allowing the opening of religious places, while the Ministry of Home Affairs allowed the markets to open<sup>58</sup>. The court in *Mubeen Farooqi v. State of Punjab*<sup>59</sup> held that the restrictions do not “violate and fundamental or legal right” and that “the imposition of restrictions on religious places is in larger public interest”, the

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52. Viktor Mayer-Schoenberger, *Useful Void: The Art of Forgetting in the Age of Ubiquitous Computing*, KSG Working Paper No. RWP07-022, (Apr. 2007), SSRN: <https://ssrn.com/abstract=976541> or <http://dx.doi.org/10.2139/ssrn.976541>

53. Kritika Bhardwaj, *Digital Surveillance Systems to Combat COVID-19 May Do More Harm than Good*, 55 (23) *Eco. & Pol. Weekly* (June 2020).

54. *Indira Gandhi v. Raj Narain*, 1975 AIR 1590.

55. *Const. of India*, 1950, Art. 25 (1).

56. Shaikh Mujibur Rehman, *COVID-19 has no Religion*, *The Hindu*, (July 9, 2020), <https://www.thehindu.com/opinion/op-ed/covid-19-has-no-religion/article32024900.ece>

57. Ministry of health and Family Welfare, *Addressing Social Stigma Associated with COVID-19*, Government of India Advisory, <https://www.mohfw.gov.in/pdf/AddressingSocialStigmaAssociatedwithCOVID19.pdf>

58. *Mubeen Farooqi v. State of Punjab*, CWP-PIL-52-2020, dated May 22, 2020.

59. *Id.*

object being to “control the spread of Coronavirus.”<sup>60</sup> The freedom of religion is constitutionally protected in India and is subject to restrictions on the grounds of public order, morality and health.

Another issue which needs attention is the disposal of dead bodies. The Government of India, in the wake of the increasing threat of community transmission of COVID-19 released the COVID-19: Guidelines on Dead Body Management.<sup>61</sup> The guidelines provide for maintaining hygiene while handling dead bodies and imposes restrictions on large gatherings at crematoriums and burial grounds in addition to forbidding bathing, kissing, hugging, etc., of the dead body.<sup>62</sup> These guidelines have been alleged to be violating the fundamental right to freedom of religion.

In *Vareed Porinchukutty v. State of Kerala*<sup>63</sup> the court clearly stated that those “practices” which were “regarded by the community as part of its religion” were also “matters of religion”<sup>64</sup>. It was pointed out that different religions follow different practices and rituals for disposal of dead bodies, which is an “integral part” of their “faith” and that they are only exercising their “fundamental right regarding practice of religion.”<sup>65</sup> The pandemic has created a difficult situation where there exists a possibility of the spread of the virus from the dead body. The Government of India issued guidelines for disposal which do not allow the proper rituals to be followed. However, this has been done keeping the health of the people in mind which makes it a valid restriction under the fundamental freedom of religion.

Recently, in cases where it was reported that dead bodies were found lying in the wards, lobby and waiting areas<sup>66</sup>, the Supreme Court took *suomotucognizance* of former Union Law Minister Ashwani Kumar’s letter highlighting the undignified treatment and disposal of bodies of COVID-19 patients.<sup>67</sup> The Supreme Court in *Common Cause (A Regd. Society) v. Union of*

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60. *Id.* at para 26.

61. COVID-19: Guidelines on Dead Body Management, Government of India, Ministry of Health and Family Welfare, (Mar. 15, 2020), [https://www.mohfw.gov.in/pdf/1584423700568\\_COVID19GuidelinesonDeadbodymanagement.pdf](https://www.mohfw.gov.in/pdf/1584423700568_COVID19GuidelinesonDeadbodymanagement.pdf)

62. *Id.*

63. *Vareed Porinchukutty v. State of Kerala*, 1971 KLT 204.

64. *Id.* at para 22.

65. *Id.*

66. ‘They are being treated worse than animals’: SC issues notice on COVID-19 treatment and disposal of bodies, National Herald, (June 12, 2020), <https://www.nationalheraldindia.com/india/theyre-being-treated-worse-than-animals-sc-issues-notice-on-covid-19-treatment-and-disposal-of-bodies>

67. Supreme Court takes note of ‘undignified treatment, disposal of bodies of virus patients’, The Hindu, (June 11, 2020), <https://www.thehindu.com/news/national/sc-takes-note-of-undignified-treatment-disposal-of-bodies-of-virus-patients/article31807083.ece>

India<sup>68</sup> recognised the right to die with dignity as a fundamental right. It therefore follows that dead bodies must be treated in a dignified manner which is an accepted right under Article 21. These incidents highlight the peculiarity of freedom of religion in the Indian context. Ceremonies and rituals are an important part of any religious community. However, they have to be restricted by secular policies and health and safety concerns.

### **RIGHT TO EDUCATION**

The nation-wide lockdown in India was imposed in the third week of March which led to closure of schools, colleges, universities and other educational institutions. It was a time for final examinations and entrance examinations for various institutions which had to be postponed. This has resulted in a lot of confusion and delay in ascertaining the status of education. The right to education of the students which is a fundamental right under Article 21A, stands violated as they are unable to learn and develop educational skills.

The Ministry of Human Resource Development, released free online learning resources<sup>69</sup> to provide “access”<sup>70</sup> to education during the lockdown. The Ministry of Finance has also introduced a number of initiatives<sup>71</sup> for advancing the reach of quality educational material to the remote areas in the country. Commendable though the efforts of the government, people remain devoid of these facilities on account of various issues like poor electricity facilities, the lower-income families cannot afford computers and mobiles; and internet connectivity.<sup>72</sup> This situation further projects the huge gap between the underprivileged and the privileged class.

### **WOMEN: RIGHTS AGAINST VIOLENCE AND ABUSE**

The lockdown has brought to light the increased risk of violence towards women who have been trapped in abusive relationships across the world. According to the UN Secretary General, Antonio Guterres the problems of women were exacerbated as many were stuck at home with their abusers, unable to access friends, family, legal institutions and police during the

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68. Common Cause (A Regd. Soc.) v. Union of India, (2018) 13 SCC 440.

69. Online Learning Resources of MHRD, Ministry of Human Resource Development, [https://www.mhrd.gov.in/sites/upload\\_files/mhrd/files/upload\\_document/Write\\_up\\_online\\_learning\\_resources.pdf](https://www.mhrd.gov.in/sites/upload_files/mhrd/files/upload_document/Write_up_online_learning_resources.pdf)

70. Access to the National Online Education Platform SWAYAM and other Digital Initiatives of HRD ministry has tripled in the last one-week Press Information Bureau, Gov. of India, (Mar. 27, 2020), [https://www.mhrd.gov.in/sites/upload\\_files/mhrd/files/pr\\_2703\\_0.pdf](https://www.mhrd.gov.in/sites/upload_files/mhrd/files/pr_2703_0.pdf)

71. Union Finance Minister announces several initiatives to boost Education Sector Press Information Bureau, Gov. of India, (May 18, 2020), [https://www.mhrd.gov.in/sites/upload\\_files/mhrd/files/pr\\_fm\\_0.pdf](https://www.mhrd.gov.in/sites/upload_files/mhrd/files/pr_fm_0.pdf)

72. Aparajitha Narayanan, India: A Backbencher in the Education Sector During Covid-19, *Opinio Juris*, (June 26, 2020), <https://opiniojuris.org/2020/06/26/india-a-backbencher-in-the-education-sector-during-covid-19/>

lockdown.<sup>73</sup> In this respect the position in India is similar to many other countries including Canada. Canada has an integrated funding for domestic violence against women as part of their national plan to counter the impact of COVID-19. Prime Minister Trudeau has promised millions of dollars to support women's NGOs, shelters and sexual assault centres in Canada.<sup>74</sup>

In India, the Jammu and Kashmir High Court was the first court to take suo motu notice of the adverse impact of the lockdown on women. Chief Justice *Gita Mittal and Justice Oswal in Re: Court on its own Motion*<sup>75</sup> issued directions to the governments of Jammu & Kashmir and Ladakh and the Secretary, Department of Social Welfare to provide special assistance to women and children especially from economically weaker communities. Adverting to the Protection of Women from Domestic Violence Act, 2005 (PWDV): the statutory mechanism in existence for protection of rights of women from violence of any kind occurring within the family, the court stated that a duty is cast upon the government under Section 11(a) to take all measures to give wide publicity to the provisions of the law through public media.<sup>76</sup> The court further directed the officials to take the necessary remedial measures to mitigate the suffering and place a report on the action undertaken before the court.<sup>77</sup>

Although we have a law to deal with cases of domestic violence, however as Flavia Agnes wrote in 2019, "even after a decade and a half, the assurances made in the act have not been actualised when we examine the cases which are filed under this act."<sup>78</sup> While there are laws in place to "protect against domestic abuse", without the "societal will", the judicial system finds it difficult "to break into the stranglehold of the patriarchal family."<sup>79</sup>

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73. UN supporting 'trapped' domestic violence victims during Covid-19 pandemic Dept. of Global Communications, UN, (June 12, 2020), <https://www.un.org/en/coronavirus/un-supporting-%E2%80%98trapped%E2%80%99-domestic-violence-victims-during-covid-19-pandemic>

74. Prime Minister announces support for vulnerable Canadians affected by COVID-19, Justin Trudeau, PM, Canada, (Mar. 29, 2020), <https://pm.gc.ca/en/news/news-releases/2020/03/29/prime-minister-announces-support-vulnerable-canadians-affected-covid>

75. In Re: Court on its own Motion v. UTs of Jammu & Kashmir and Ladakh, WP (C) PIL – of 2020 (through video conferencing), HC J & K, Order Apr. 16, 2020, [http://jkhighcourt.nic.in/doc/upload/orders&cir/ordersuc\\_jmu/Suo%20Moto%20PIL\\_18042020.pdf](http://jkhighcourt.nic.in/doc/upload/orders&cir/ordersuc_jmu/Suo%20Moto%20PIL_18042020.pdf)

76. Id. at para 16. 'See also' Devika, J&K HC: Rising domestic violence amid lockdown – Court suggests measures and directions, takes cognizance suo motu, The SCC Online Blog, (Apr.19, 2020), <https://www.sconline.com/blog/post/2020/04/19/jk-hc-rising-domestic-violence-amid-lockdown-court-suggests-measures-and-directions-takes-cognizance-suo-motu/>

77. Id. at para 17.

78. Flavia Agnes, What Survivors of Domestic Violence Need From Their Government, 54 (17) Eco. & Pol. Weekly, (Apr. 2019).

79. EPW Engage, Covid-19, Domestic Abuse and Violence: Where do Indian Women Stand?, Eco. & Pol. Weekly, (Apr. 2020).

The pandemic has imposed a great challenge on the government to save people from being infected and simultaneously protecting the rights of their people under the Constitution. As discussed, many rights have been impacted in India. The courts despite their best intention, have not have been able to deliver justice efficiently and the Supreme Court of India has been criticised of prevarication.<sup>80</sup>

### CANADIAN PERSPECTIVE

A Canadian decision aptly summarized the COVID-19 pandemic crisis that affects the entire world:<sup>81</sup>

The world is in the middle of a COVID-19 pandemic. The virus has caused thousands of deaths and, thus far, there have been well over a million confirmed cases of the virus across the world. Even heads of state have become seriously ill as a result of this virus. It is expected that this virus will cause thousands of deaths in Canada and has caused many thousands of deaths around the world.

Conrad Nyamutata opined, “The responses of Western states were *marginally different*: the most familiar reaction by these states to COVID-19 was declaring emergencies. Cities if not whole countries or regions were placed on lockdowns after flight bans and internal restrictive regimes.”<sup>82</sup> With respect to Canada more specifically, its “path through COVID-19 is perhaps best described as a middle ground”.<sup>83</sup> For example, no governments, federal or provincial, imposed strict lockdowns but “provinces have, however, imposed various restrictions on large and small gatherings... and issued physical distancing guidelines”<sup>84</sup>, among other measures. In addition, Canada’s path through COVID-19 could also be described as a middle ground because, even if a viral pandemic qualifies as an emergency<sup>85</sup> under the *Emergencies Act*<sup>86</sup>, the Prime Minister of Canada stated that invoking this Act “is a significant step that can and should be taken when we’ve *exhausted all other steps*”<sup>87</sup>. It is a significant step, indeed, because the adoption of government measures based on the authority given under this Act could legitimately

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80. Desai, *supra*.

81. R. v. McConnell, 2020 ONCJ 177, para. 16.

82. Conrad Nyamutata, Do Civil Liberties Really Matter During Pandemics?, 9 IHRLR, 62-98, 78 (2020) (italics added).

83. Flood et al., *supra*, 21.

84. *Id.*

85. See e.g. Peter Rosenthal, The New Emergencies Act: Four Times the War Measures Act, 20-3 Man.LJ 563 (1991).

86. Emergencies Act, R.S.C. 1985, c. 22 (4th Supp).

87. Global News, Canada not at the point of declaring a federal emergency over COVID-19: Trudeau (March 22, 2020), <https://globalnews.ca/news/6715159/coronavirus-canada-federal-emergency/> (italics added).

result in the limitation of rights and freedoms of Canadian citizens - even if the legality and constitutionality of these measures would still remain eventually under the scrutiny of the courts.<sup>88</sup>

In Canada, the main source of constitutional rights that protect citizens is the *Charter of Rights and Freedoms [hereinafter 'Charter']*<sup>89</sup>. It is enshrined in the Canadian Constitution. In a nutshell, “all of the fundamental freedoms enshrined in section 2 of the federal Charter and all of the ‘legal guarantees’ listed in sections 7 to 15 [that are] guaranteed by the Charter may be restricted by law, provided that it is “within limits that are reasonable and the justification of which can be demonstrated in the context of a democratic society” (Section 1)”<sup>90</sup>.

### **FREEDOM OF ASSEMBLY**

Kristopher Kinsinger and Brian Bird remarked, “One of the cornerstones of the fight against COVID-19 has been, from day one, severe restrictions on in-person gatherings of nearly all shapes and sizes. To date, the general consensus among lawyers and legal scholars has been that most of these drastic policies are constitutional.”<sup>91</sup> In order to deal with the COVID 19 virus, the Premier of the province of Quebec, one of the two most populous provinces of Canada with Ontario, was the first to declare on March 14, 2020 a state of emergency on all Quebec soil. A week later, on March 21, 2020, in order to ensure the protection of the population because of the spread of the COVID-19 virus, the government of the province of Quebec forbade, by way of decree<sup>92</sup>, gatherings inside or outside the home no matter the number of people involved, with a

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88. Jacques-Yvan Morin, *L'état de droit: émergence d'un principe du droit international* [The Rule of Law: Emergence of a Principle of International Law], *Collected Courses of The Hague Academy of International Law*, vol. 254 (1995), 150-151. See also Sébastien Lafrance, *The State of Health Emergency and Fundamental Rights and Freedoms in Canada*, Conference Paper, Law on the State of Emergency, University of Melbourne, Australia, 16-17 June 2020, <https://law.unimelb.edu.au/centres/alc/news-and-events/law-on-the-state-of-emergency-online-conference/papers>

89. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982 c. 1 [hereinafter 'Charter'].

90. Morin, *supra*. See also the seminal decision of the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, that created what is commonly called the Oakes (legal) test with respect to the interpretation and application of s. 1 of the Charter. See also Hin-Yan Liu, *The Constitutional Right to Express Hatred: A Comparative Analysis*, 1(1) *KSLR* (2009), 12;

91. Kristopher Kinsinger & Brian Bird, *The Freedoms We Cannot Afford to Ignore During COVID-19*, Centre for Constitutional Studies, Blog (June 29, 2020), <https://ualawccsprod.srv.ualberta.ca/2020/06/the-freedoms-we-cannot-afford-to-ignore-during-covid-19/>.

92. “The decree is a written regulatory decision that emanates from the executive power”, namely the government: Decrees, regulations and decisions of the Council of Ministers, Ministry of the Executive Council, Government of Quebec's website, see online: <http://www4.gouv.qc.ca/fr/Portail/citoyens/programme-service/Pages/Info.aspx?sqctype=sujet&sqcid=854> [translated from French by Sébastien Lafrance].

few exceptions.<sup>93</sup> The government of the province of Ontario, the most populous province of the country<sup>94</sup>, followed and also declared a state of emergency on March 17, 2020. These measures are the ones that caused so far the strongest reaction among a portion of the Canadian population. Some have even protested in public against these measures.<sup>95</sup> However, given the seriousness of this pandemic, it is less than likely, at least at this juncture, that Canadian courts would not eventually render decisions in favour of the confinement and isolation measures adopted by provincial governments in the context where “[t]here can be no more unexpected and exceptional event than a global pandemic.”<sup>96</sup> The uncertainty surrounding the *spread* of this potentially lethal virus combined with the number of deaths it caused so far, not forgetting the number of citizens affected by it, should be enough to justify the adoption of these draconian measures.

### **FREEDOM OF RELIGION**

In *SyndicatNorthcrest v. Amselem*, the Supreme Court of Canada summarizes its views and decisions on the freedom of religion:<sup>97</sup>

... our Court’s past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

COVID-19 had an impact on the practice of religious beliefs. Kristopher Kinsinger and Brian Bird recalled, “For certain faith traditions, physical presence is required in order to celebrate

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93. Government of Quebec’s website, <https://www.quebec.ca/premier-ministre/actualites/detail/le-gouvernement-du-quebec-interdit-tout-rassemblement-interieur-ou-exterieur/>.

94. Population Projections for Canada, Provinces and Territories, September 17, 2019, Statistics Canada, <https://www150.statcan.gc.ca/n1/pub/91-520-x/2019001/hi-fs-eng.htm>: “Ontario and Quebec would continue to be the most populous provinces in Canada over the next 25 years according to all projection scenarios.”

95. Nicole Mortillaro, Mixed messages, frustration with lockdowns fuel some skepticism about lockdown, CBC News (May 15, 2020), <https://www.cbc.ca/news/technology/psychology-covid-19-1.5561847>.

96. Reported by Aaron Hutchins, Marie-Danielle Smith, Jason Markusoff, Nick Taylor-Vaisey & Christina Gonzales, Quarantine nation: Inside the lockdown that will change Canada forever, *McLean’s* (April 7, 2020), <https://www.macleans.ca/society/coronavirus-in-canada-inside-the-lockdown-that-will-change-the-country-forever/>.

97. [2004] 2 SCR 551, para 46. Freedom of association is protected by s. 2(d) and freedom of peaceful assembly is protected by s. 2(c) of the Charter.

rites, sacraments, and ceremonies.”<sup>98</sup> Therefore, “for religious groups, freedom of peaceful assembly is not the only Charter freedom that has felt the impact of COVID-19 restrictions. Freedom of religion is also at stake as a result.”<sup>99</sup> However, several Canadian provinces recently started to relax lockdown measures, including for religious services. For example, in Ontario, “The persons conducting the wedding, funeral, service, rite or ceremony must ensure that the number of persons occupying any room in the building or structure while attending the gathering does not exceed 30 per cent of the capacity of the particular room.”<sup>100</sup>

### MOBILITY RIGHTS

Conrad Nyamutata writes, “Quarantine ... entails considerable deprivation of an individual’s freedom, sequestration and isolation reveal the conflict between the interests of society in protecting the health of its citizens and an individual’s civil liberties, such as freedom of movement.”<sup>101</sup> With respect to the freedom of movement in Canada, Sujit Choudhry notes, “Canada has imposed new border controls, including an interim order under the Aeronautics Act that air carriers screen Canadian citizens trying to board flights back to Canada and not board those who have suspected signs or symptoms of COVID-19. It has been argued that this policy may be unconstitutional under the Charter. Section 6(1) of the Charter guarantees the right of every Canadian to enter Canada.”<sup>102</sup>

The Supreme Court of Canada discussed in *Divito v. Canada (Public Safety and Emergency Preparedness)*, the extent of mobility rights in Canada:<sup>103</sup>

*Mobility rights are protected by s. 6 of the Canadian Charter of Rights and Freedoms. ...*

*The international law inspiration for s. 6(1) of the Charter is generally considered to be art. 12 of the International Covenant on Civil and Political Rights ...*

*As a treaty to which Canada is a signatory, the ICCPR is binding. As a result, the rights protected by the ICCPR provide a minimum level of protection in interpreting the mobility rights under the Charter. Article 12 of the ICCPR states:*

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98. Kinsinger & Bird, *supra*.

99. *Id.*

100. s. 6(2)1. of the Regulation O. Reg. 276/20: Order under Subsection 7.0.2(4) of the Act – Organized Public Events, Certain Gatherings.

101. Nyamutata, *supra*, 90 (2020).

102. Sujit Choudhry, COVID-19 & the Canadian Constitution (Apr. 16, 2020),

<https://medium.com/@SujitChoudhry/covid-19-the-canadian-constitution-52221ef31dc3>.

103. [2013] 3 S.C.R. 157, paras 1, 24 & 25 (emphasis added).

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order ... public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*
4. No one shall be arbitrarily deprived of the right to enter his own country.  
Therefore, in light of Divito, it is fair to suggest that the power given to the government provided in the *Quarantine Act*<sup>104</sup>, that gives the government the power to control the entry into and exit from Canada of citizens potentially affected by an infectious virus<sup>105</sup>, would survive a potential challenge of its constitutionality, more specifically based on section 6 of the Charter, which argument could be grounded on one of the exceptions to mobility rights, i.e. such control of the entry and exit of the country is “necessary to protect ... public health”<sup>106</sup>.

Canada is comprised of ten provinces and three territories. David Robitaille mentions, “During the COVID-19 pandemic, several provinces decided to carry out different types of check points at their interprovincial borders and to limit entry of Canadian citizens living in other provinces.” According to Sujit Choudhry, these “interprovincial travel restrictions also raise potential constitutional issues. ... First, under s. 6(2) of the Charter, Canadians and permanent residents have the right to economic mobility - that is “to move to and take up residence in any province” and “to pursue the gaining of a livelihood in any province.” This right would encompass the inter-provincial provision of a service. However, it does not extend to strictly social travel - for example, to visit an ailing family member.”<sup>107</sup> Therefore, the decision to bar a woman from entering Newfoundland, a Canadian province, to attend her mother’s funeral could be justified

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104. S.C. 2005, c. 20.

105. *Id.* s. 2.

106. David Robitaille, *Confinements, déplacements et urgence nationale : le partage des compétences en temps de crise sanitaire* [Confinements, Displacements and National Emergency: the Division of Powers in Times of Health Crisis], 98-1 R. du B. 144, 162 (2020).

107. Sujit Choudhry, *Part Two: COVID-19 & the Canadian Constitution*, Centre for Constitutional Studies, Blog (May 12, 2020), <https://ualawccsprod.srv.ualberta.ca/2020/05/part-two-covid-19-the-canadian-constitution/>

under this rationale.<sup>108</sup>

### PRIVACY RIGHTS

Sujit Choudhry somehow foresaw in April 2020 what was cooking in the minds of public health authorities who were dedicated to creating a new technological tool to combat COVID-19: “a key element will be contact tracing, which has long been an important weapon in the arsenal of public health authorities. The basic idea behind contact tracing is simple: to identify individuals who have come into contact with those who have tested positive for COVID-19, and to notify them that they may be infected and should therefore go into self-isolation.”<sup>109</sup> Indeed, in July 2020, the government of Canada launched the cell phone application ‘COVID Alert’, which “let people know of possible exposures before any symptoms appear.”<sup>110</sup>

The government of Canada claims that privacy is protected with this application, mostly because it has no way of knowing your location, name or address, phone’s contacts and health information or the health information of anyone you are near.<sup>111</sup> Even though some questions regarding privacy have been answered by the safeguards claimed to exist by the government of Canada, some questions still remain at this point, including, for example, “What would the forms of legal and political oversight and accountability be [regarding this new application]?”<sup>112</sup> Further, as Michael Geist points out, “Given the privacy risks associated with these uses of sensitive health and location tracking, we must ensure that it does not become the new normal.”<sup>113</sup> However, the Privacy Commissioner of Canada contends, “During a public health crisis, privacy laws still apply, but they are not a barrier to appropriate information sharing.”<sup>114</sup> In Canadian constitutional law, “The Charter does not *expressly* protect the right to privacy, unlike many other constitutions. ... The Court has not had many opportunities to develop the

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108. Brian Platt, Civil liberties group filing Charter challenge over Newfoundland’s ban on travel into province, *The Chronicle Herald* (May 21, 2020).

109. Sujit Choudhry (Apr. 16, 2020), *supra*.

110. Government of Canada, <https://www.canada.ca/en/public-health/services/diseases/coronavirus-disease-covid-19/covid-alert.html>

11. *Id.*

112. Sujit Choudhry (Apr. 16, 2020), *supra*.

113. Michael Geist, Canada should ensure cellphone tracking to counter the spread of coronavirus does not become the new normal, *The Globe and Mail* (March 22, 2020).

114. Office of the Privacy Commissioner of Canada, Privacy and the COVID-19 Outbreak (March 2020), [https://www.priv.gc.ca/en/privacy-topics/health-genetic-and-other-body-information/health-emergencies/gd\\_covid\\_202003/](https://www.priv.gc.ca/en/privacy-topics/health-genetic-and-other-body-information/health-emergencies/gd_covid_202003/)

right to informational privacy *in the non-criminal context*, unlike courts in other jurisdictions. What can be expected, though, is that differences in app design and governance will have a direct bearing on whether a contact tracing program is constitutional.”<sup>115</sup> However, the Supreme Court of Canada made clear in *Hunter v. Southam Inc.*, that the objective of s. 8 of the *Charter* is “to protect individuals from unjustified state intrusions upon their privacy”.<sup>116</sup>

### LIMITATIONS OF RIGHTS AND FREEDOMS

As the Supreme Court of Canada repeatedly stated in various circumstances involving different rights and freedoms<sup>117</sup>, *Charter* rights are not absolute. The legal analysis to be applied to determine whether a *Charter* breach may be saved may be summarized as follows:<sup>118</sup>

Two central criteria must be met for a limit on a *Charter* right to be justified under s. 1. First, the objective of the measure must be pressing and substantial in order to justify a limit on a *Charter* right. ... Second, the means by which the objective is furthered must be proportionate. The proportionality inquiry comprises three components: (i) rational connection to the objective, (ii) minimal impairment of the right, and (iii) proportionality between the effects of the measure (including a balancing of its salutary and deleterious effects) and the stated legislative objective.

It must be noted that the Supreme Court of Canada “has expressed doubt about whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, *except perhaps in times of war or national emergencies*”<sup>119</sup>. However, so far, “the federal government in Canada – unlike other countries – has not declared COVID-19 a national emergency.”<sup>120</sup> Therefore, it may be ill-advised to suggest that the federal government could eventually justify in court the limit imposed on a

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115. Sujit Choudhry (Apr. 16, 2020), *supra*. In *R. v. Spencer*, [2014] 2 S.C.R. 212, the Supreme Court of Canada explained, at paragraph 39, “Informational privacy is often equated with secrecy or confidentiality. For example, a patient has a reasonable expectation that his or her medical information will be held in trust and confidence by the patient’s physician.” This decision of the Supreme Court of Canada was cited in the landmark decision of the Supreme Court of India in *Puttaswamy*, Part K, *supra*, which decision holds that the right to privacy is protected as a fundamental constitutional right under Articles 14, 19 & 21 of the Constitution of India. As a side note, it must be noted that, unlike the *Charter*, some provincial charter of rights and freedoms explicitly protect the right to privacy, e.g. *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12, s. 5 in the province of Quebec.

116. [1984] 2 S.C.R. 145, 160.

117. See e.g. *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467; *R. v. Gomboc*, [2010] 3 SCR 211; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 SCR 519; *R. v. Crawford*, [1995] 1 SCR 858; *R. v. Keegstra*, [1990] 3 SCR 697, etc.

118. *Frank v. Canada (Attorney General)*, [2019] 1 SCR 3, para 38.

119. *R. v. Heywood*, 1994 CanLII 34 (SCC), [1994] 3 SCR 761 (italics added); see also *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, para 119.

120. *Flood et al.*, *supra*, 23 (italics added).

Charter right or freedom on the existence of COVID-19 as a ‘national emergency’.

However, federal (national) and provincial “governments may justify intrusion into civil liberties as being *proportionate* to the need to respond to a public health crisis on the scale of COVID-19, and ... that courts are likely to be deferential to governmental choices in such a situation.<sup>121</sup>”

### CONCLUSION: COMPARING THE TWO SIBLINGS

Social distancing and other restrictions are necessary to combat the impact of the pandemic. However, this pandemic is all about human rights as it has attacked the right to health and life and has imperilled the right to livelihood amongst others.<sup>122</sup> Accordingly, all restrictions on civil liberties must find their basis in valid legislations. India and Canada have both been severely affected by the virus on more fronts than one. Despite the non-imposition of a formal emergency in the two democracies, the rights and liberties have been curtailed to deal with a *state of emergency*. The rights impacted are similar in both countries, though the ground level consequences may be different. Freedom of movement and assembly has been curtailed as a necessary measure to protect the people. It however, impacts the poor and vulnerable harshly. Needless to say, that the right to health has been impacted sagaciously. The feeble capacity of the Indian healthcare system is being stretched and similarly, the pandemic has highlighted the unpreparedness of the Canadian healthcare system.<sup>123</sup>

While Canada deals with the policing of protests (a spill-over from US after the death of George Floyd), India combats the worst ever humanitarian crisis in the violation of dignity of the migrant worker and his loss of livelihood. In Canada, right to privacy is not constitutionally protected, but the use of surveillance technology has given rise to privacy concerns. In India right to privacy has been recognised as a fundamental right by the Supreme Court, however, there are similar apprehensions facing the citizens. Undoubtedly, some restrictions on right to privacy are required in the interest of public health. However, the restrictions imposed must pursue a legitimate aim and most significantly, be based in law.<sup>124</sup>

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121. *Id.* 34 (italics added).

122. Alex Neve & Isabelle Langlois, Canada’s COVID-19 response demands human-rights oversight, *The Globe and Mail*, (April 15, 2020), <https://www.theglobeandmail.com/opinion/article-canadas-covid-19-response-demands-human-rights-oversight/>

123. Preeti Nangal, COVID-19 spotlights unpreparedness of health systems in US and Canada, forces Indian students to choose cost over care, *Firstpost*, (May 22, 2020), <https://www.firstpost.com/health/covid-19-spotlights-unpreparedness-of-health-systems-in-us-and-canada-forces-indian-students-to-choose-cost-over-care-8290061.html>

124. Bhardwaj, *supra*.

Freedom of religion has been recognised as an important part of basic civil liberties in both countries. Due to its sensitivity, religion gives rise to multifarious problems which require adept tackling. Restrictions have been imposed in both India and Canada regarding the performance of ceremonies and rituals; and public gatherings during weddings, funerals etc. This has led to increase in agitation amongst the people that their freedom to practice religion in accordance with its tenets is being violated. However, public health is a valid ground of restriction which has been imposed legitimately. However, the restrictions imposed must be weighed against the gravity of the situation.

Today we face a unique kind of emergency, where rights violation looks different. Civil liberties are not just for times of peace and harmony. During emergencies they acquire critical significance. During the pandemic, the checks and balances which are usually taken for granted have been set aside on the pretext of combatting the virus. New regulations, directives and orders are passed frequently while the rule of law lags behind. It is time therefore, to display a higher degree of vigilance in protecting our rights and freedoms. The governments of both India and Canada are working to keeping us safe, but we cannot afford to disregard our history. In the clash with a public emergency, rights rarely emerge unscathed.

This paper is only an interim assessment of the impact of COVID-19 on the rights and liberties in India and Canada. It also shares a word of caution on the repercussions of the decisions taken by governments for the times to come. Although we hope the worst is behind us, the worst of the pandemic and its impact on civil liberties, there are lessons to be learnt. Hopefully, things will change for the better.

## THE NEW PLASTICS ECONOMY: TODAY'S OPPORTUNITY AND TOMORROW'S REALITY

Ms. Tanya Mittal\* & Dr. Dinesh Kumar\*\*

### INTRODUCTION

Today, imagining a world without plastics is nearly impossible. Plastics are made up of synthetic organic polymers that are widely used in different applications ranging from clothing, water bottles, food packaging, footwear, electronic appliances, construction materials, medical devices, industrial machinery, automobiles, optical media, etc. From 1950 to 2018, an estimated 6.3 billion tonnes of plastics have been produced worldwide. Plastic was initially invented as a synthetic substitute for ivory and it was praised for its ability to create perfect replicas of increasingly expensive materials. But, with the passage of time 'cheap' became synonymous with 'throwaway' and 'replaceable'.

Plastics are of many types, but most plastics have the following general attributes: plastics can be very resistant to chemicals and corrosion. Plastics can be both thermal and electrical insulators. Plastics have a very high strength to weight ratio. Plastics can be highly durable, resistant to water, and have low toxicity. Plastics are materials with a seemingly limitless range of characteristics and colours and are easy to manufacture.<sup>1</sup> As plastic breaks down, it finds its way into the food chain and the stomachs of birds, fish, mammals including humans. Some researchers suggest that by 2050 there could be more plastic than fish in the oceans by weight. Plastics are a problem mostly due to their unbiodegradable nature, the materials used for plastic production, and the challenges behind properly discarding them.<sup>2</sup> Another area for major concern is 'microplastics' which are pieces of plastic 5 millimetres or smaller, such as fragments, fiber, foam, nurdles and microbeads.<sup>3</sup>

The production and use of plastics, thus, necessitates waste management. Inadequate waste management and indiscriminate dumping have resulted into a specific category of environmental pollution which is known as "Plastic Pollution". Plastic pollution not only

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1. Arthur H. Landrock, Handbook Of Plastic Foams: Types, Properties, Manufacture And Applications 45 (Noyes Publications 1995).
2. <https://www.jstor.org/stable/10.2307/26465140> (last visited August 21, 2020).
3. A.L. Lusher, P.C.H. Hollman, J.J. Mendoza-Hill, Microplastics in fisheries and aquaculture: status of knowledge on their occurrence and implications for aquatic organisms and food safety, 615 FAO Fisheries And Aquaculture Technical Paper (2017).

enhances other categories of environmental pollution such as land, air and water pollution, it also affects every creature on the earth.<sup>4</sup> To date, Plastics have caused deaths of innumerable birds, turtles, fishes, sea lions, seals and other marine animals, mostly by ingestion or entanglement. Newspapers, of almost every country in the world, are full of such incidents.<sup>5</sup> According to a recent study commissioned by the environmental charity WWF International, plastic pollution is so widespread in the environment that humans may be ingesting five grams of plastic each week, the equivalent of eating a credit card. The study by Australia's University of Newcastle said the largest source of plastic ingestion was drinking water, but another major source was shellfish, which tended to be eaten whole so the plastic in their digestive system was consumed too. The amount of plastic pollution varies by location, but nowhere is untouched, said the report, which was based on the conclusions of 52 other studies. In the United States, 94.4% of tap water samples contained plastic fiber, with an average of 9.6 fiber per litre. European water was less polluted, with fiber showing up in only 72.2% of water samples, and only 3.8 fiber per litre.<sup>6</sup>

To tackle this growing menace of plastic pollution, various practices which are adopted for plastic waste management are: land filling, incineration and recycling amongst others. A top priority of waste management has always been recycling as it not only helps in protecting the environment, but it also contributes to reuse the waste productively, thereby, plummeting the space of land fill. Land fills should always be preferred as the last resort in order to minimize the environmental impact caused by residual plastic waste. However, in India, the situation is totally opposite. Here, plastic waste is discarded into dumpsites which are not even landfills in their technical sense. Even worldwide also, only an estimated 9% and another 12% of the total plastic produced from 1950 to 2018, has been recycled and incinerated, respectively. One more

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4. C. Hamlet, T. Matte, S. Mehta, Combating Plastic Air Pollution on Earth's Day, Vital Strategies Environmental Health Division (2018).

5. [https://inshorts.com/en/news/thai-baby-dugong-mariam-dies-with-plastic-in-stomach-1566064221347?utm\\_source=news\\_share&forward\\_to\\_store=true](https://inshorts.com/en/news/thai-baby-dugong-mariam-dies-with-plastic-in-stomach-1566064221347?utm_source=news_share&forward_to_store=true) (last visited August 21, 2020); [https://inshorts.com/en/news/2footlong-plastic-shower-found-in-dead-dolphins-stomach-in-us-1558876562606?utm\\_source=news\\_share&forward\\_to\\_store=true](https://inshorts.com/en/news/2footlong-plastic-shower-found-in-dead-dolphins-stomach-in-us-1558876562606?utm_source=news_share&forward_to_store=true) (last visited August 21, 2020); <https://inshorts.com/m/en/news/working-pen-drive-found-in-antarctic-seals-yearold-frozen-poop-1549458251972> (last visited August 21, 2020); <https://inshorts.com/m/en/news/115-cups-among-6-kg-plastic-found-inside-dead-whale-in-indonesia-1542801912961> (last visited August 21, 2020).

6. You may be Eating a Credit Cards Worth of Plastic each week: Study (last visited August 27, 2020) [https://www.reuters.com/article/us-environment-plastic/you-may-be-eating-a-credit-cards-worth-of-plastic-each-week-study-id-USKCN1TD009?utm\\_campaign=fullarticle&utm\\_medium=referral&utm\\_source=inshorts](https://www.reuters.com/article/us-environment-plastic/you-may-be-eating-a-credit-cards-worth-of-plastic-each-week-study-id-USKCN1TD009?utm_campaign=fullarticle&utm_medium=referral&utm_source=inshorts).

problem which is faced while recycling is that not all plastics are recyclable or recycled, sometimes due to insufficient waste streams. Also, the production of virgin plastics costs less than the process of recycling.<sup>7</sup>

The problem of plastic pollution requires a modern solution keeping in consideration the current dimensions of it. This is why any solution to our current plastic problem must take place within a systemic change that considers the benefits of a circular economy. The amount of unnecessary plastic that is produced is the issue that needs to be addressed. We need supermarkets to stop using plastic that is designed to be disposed of as soon as the packet is opened. This should not just be about making sure all plastic is recyclable but considering whether the packaging is necessary at all. Solving the problem of plastic waste must go further than creating biodegradable and recyclable packaging. We must address plastic production as well as its consumption. Crucial is that the rush to replace plastic does not lead to unsustainable or otherwise polluting replacements that also contribute to global environmental problems.<sup>8</sup>

In this paper, the authors have tried to explain the concept of circular economy and how it is relevant in combating the growing menace of plastic pollution. Also, the authors have discussed how the concept of new plastics economy has been welcomed by various countries of the world, including India. In the end, the paper has concluded the differences which have been and can be brought with the help of this concept. A few suggestions have also been made with respect to it.

### **Circular Economy**

A circular economy is an alternative to a traditional linear economy. Linear economy is based on the concept of MAKE, USE, DISPOSE. Linear economy considers that resources are infinite, but this is not true in reality. Therefore, Circular economy focuses on the concept of MAKE, USE AND RETURN. In circular economy, resources are kept in use for as long as possible, extract the maximum value from them whilst in use, then recover and regenerate products and materials at the end of each service life. A circular economy is restorative and regenerative by design. This means that materials constantly flow around a 'closed loop' system, rather than being used once and then discarded. As a result, the value of materials is not lost by being thrown away. In the case of plastic, this means simultaneously keeping the value of plastics in the

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7. T. Fleischman, Polymer additive could Revolutionize Plastics Recycling, Cornell. Edu.(2018).

8. UK Plastic Pact is Promising but There is a Long Way to go (last visited August 28, 2020)<https://ejfoundation.org/news-media/uk-plastics-pact-is-promising-but-there-is-a-long-way-to-go>.

economy, without leakage into the natural environment.<sup>9</sup>

The concept of circular economy rests on three main principles:

- 1) preserving and enhancing natural capital by controlling finite stocks and balancing renewable resource flows,
- 2) optimizing resource yields by circulating products, components and materials in use at the highest utility at all times in both technical and biological cycles, and
- 3) fostering system effectiveness by revealing and designing out negative externalities.<sup>10</sup>

Multiple research efforts and the identification of best-practice examples have shown that a transition towards the Circular Economy can bring about the lasting benefits of a more innovative, resilient, and productive economy. For example, the 2015 study ‘Growth Within: A Circular Economy Vision for a Competitive Europe’ estimated that a shift to the circular economy development path in just three core areas- mobility, food and built environment- would generate annual total benefits for Europe of around EUR 1.8 trillion (USD 2.0 trillion).<sup>11</sup> And Plastics are key enablers of a circular economy, directly facilitating the circularity of products and improving resource efficiency and sustainability along the value chain. Plastics have a positive impact on a range of circularity levers across product life cycles, including, materials efficiency, energy efficiency, carbon dioxide reduction, recyclability, durability and biodegradability.<sup>12</sup>

### **Objectives of Circular Economy**

Circular economy has the following main objectives to be achieved:

1. Design out waste and pollution from the system
2. Keep products and materials in use
3. Regenerate natural systems
4. Redefine growth and focus on positive society-wide benefits

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9. Plastic Packaging (last visited August 21, 2020) <http://www.wrap.org.uk/category/materials-and-products/plastics>.

10. Peter Lacy, Jessica Long, Wesley Spindler, *The Circular Economy Handbook: Realizing The Circular Advantage* (Palgrave Macmillan 2020).

11. Rethinking Plastic Packaging (last visited August 25, 2020) <https://www.unilever.com/sustainable-living/reducing-environmental-impact/waste-and-packaging/rethinking-plastic-packaging/>.

12. <https://youtu.be/qheyH19sE1Y> (last visited August 29, 2020).

5. Gradually decoupling economic activity from consumption of finite resources
6. Transition to renewable energy sources
7. Builds economic, natural and social capital<sup>13</sup>

Thus, Circular Economy is important for not only creating new opportunities for growth, but also for reducing waste, driving greater resource productivity, delivering a more competitive economy, placing the world in a better position to address emerging resource security/scarcity issues in future and also helping in reducing the environmental impacts of production and consumption in the world.

#### **Circular Economy Solutions in Plastic Sector**

Circular economy offers the following solutions in plastic sector: Producing plastics from alternative feedstocks; using plastic waste as resource, for example, in case of construction of roads, making of bricks, etc.; redesigning plastic manufacturing processes and products to improve longevity, reusability and waste prevention; increasing collaboration between business and consumers to increase awareness on plastic recycling and reusing and abandoning the throwaway culture; developing robust information platforms.

#### **NEW PLASTICS ECONOMY**

The overarching vision of the New Plastics Economy is that plastics never become waste; rather, they re-enter the economy as valuable technical or biological nutrients. The New Plastics Economy is underpinned by and aligns with principles of the circular economy. It is determined to deliver better system-wide economic and environmental outcomes by creating an effective after-use plastics economy, drastically reducing the leakage of plastics into natural systems (in particular the ocean) and other negative externalities; and decoupling from fossil feedstocks.<sup>14</sup> Some of the modes by which the New Plastic Economy is trying to achieve its vision are as follows:

#### **Create an Effective After-Use Plastics Economy**

Creating an effective after-use plastics economy is the cornerstone of the New Plastics Economy and its first priority. Not only is it crucial to capture more material value and increase resource productivity, it also provides a direct economic incentive to avoid leakage into natural systems and will help enable the transition to renewably sourced feedstock by reducing the scale of the

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13. <https://youtu.be/GT2Ruqbg02E> (last visited August 29, 2020).

14. Oecd, *Improving Markets For Recycled Plastics: Trends, Prospects And Policy Responses* (OECD Publishing 2018).

transition.

- **Radically increase the economics, quality and uptake of recycling**-Establish a cross- value chain dialogue mechanism and develop a Global Plastics Protocol to set direction on the redesign and convergence of materials, formats, and after-use systems to substantially improve collection, sorting and reprocessing yields, quality and economics, while allowing for regional differences and continued innovation. Enable secondary markets for recycled materials through the introduction and scale-up of matchmaking mechanisms, industry commitments and/or policy interventions. Focus on key innovation opportunities that have the potential to scale up, such as investments in new or improved materials and reprocessing technologies. Explore the overall enabling role of policy.
- **Scale up the adoption of reusable packaging** within business-to-business applications as a priority, but also in targeted business-to- consumer applications such as plastic bags.
- **Scale up the adoption of industrially compostable plastic packaging for targeted applications** such as garbage bags for organic waste and food packaging for events, fast food enterprises, canteens and other closed systems, where there is low risk of mixing with the recycling stream and where the pairing of a compostable package with organic contents helps return nutrients in the contents to the soil.<sup>15</sup>

#### **DRASTICALLY REDUCE THE LEAKAGE OF PLASTICS INTO NATURAL SYSTEMS**

Achieving a drastic reduction in leakage would require joint efforts along three axes: improving after-use infrastructure in high-leakage countries, increasing the economic attractiveness of keeping materials in the system and reducing the negative impact of plastic packaging when it does escape collection and reprocessing systems. In addition, efforts related to substances of concern could be scaled up and accelerated.<sup>16</sup>

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15. New Plastic Economy(last visited August 26, 2020)<https://www.newplasticseconomy.org>.

16. World Economic Forum, The New Plastics Economy: Rethinking The Future Of Plastics (2016).

- Improve after-use collection, storage and reprocessing infrastructure in high-leakage countries. This is a critical first step, but likely not sufficient in isolation. As discussed in the Ocean Conservancy's 2015 report *Stemming the Tide*, even under the very best current scenarios for improving infrastructure, leakage would only be stabilised, not eliminated, implying that the cumulative total volume of plastics in the ocean would continue to increase strongly.
- Increase the economic attractiveness of keeping materials in the system. Creating an effective after-use plastics economy as described above contributes to a root-cause solution to leakage. Improved economics make the build-up of after-use collection and reprocessing infrastructure more attractive. Increasing the value of after-use plastic packaging reduces the likelihood that it escapes the collection system, especially in countries with an informal waste sector.
- Steer innovation investment towards creating materials and formats that reduce the negative environmental impact of plastic packaging leakage. Current plastic packaging offers great functional benefits, but it has an inherent design failure: its intended useful life is typically less than one year; however, the material persists for centuries, which is particularly damaging if it leaks outside collection systems, as happens today with 32% of plastic packaging. The efforts described above will reduce leakage, but it is doubtful that leakage can ever be fully eliminated – and even at a leakage rate of just 1%, about 1 million tonnes of plastic packaging would escape collection systems and accumulate in natural systems each year. The ambitious objective would be to develop 'bio-benign' plastic packaging that would reduce the negative impacts on natural systems when leaked, while also being recyclable and competitive in terms of functionality and costs. Today's biodegradable plastics rarely measure up to that ambition, as they are typically compostable only under controlled conditions (e.g. in industrial composters). Further research and game-changing innovation are needed.

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17. New Plastics Economy A circular economy for plastic in which it never becomes waste (last visited August 23, 2020) <https://www.ellenmacarthurfoundation.org/our-work/activities/new-plastics-economy>.

18. Sander Defruyt, *Towards a New Plastics Economy* (last visited August 23, 2020) <https://journals.openedition.org/factsreports/5369>.

- Scale up existing efforts to understand the potential impact of substances raising concerns and to accelerate development and application of safe alternatives.<sup>17</sup>

### **Decouple Plastics from Fossil Feedstocks**

Decoupling plastics from fossil feedstocks would allow the plastic packaging industry to complement its contributions to resource productivity during use with a low-carbon production process, enabling it to effectively participate in the low-carbon world that is inevitably drawing closer. Creating an effective after-use economy is key to decoupling because it would, along with dematerialisation levers, reduce the need for virgin feedstock. Another central part of this effort would be the development of renewably sourced materials to provide the virgin feedstock that would still be required to compensate for remaining cycle losses, despite the increased recycling and reuse.<sup>18</sup>

### **VISION OF CIRCULAR ECONOMY FOR PLASTIC PACKAGING**

Plastic packaging is plastics' largest application, representing 26% of the total volume. As packaging materials, plastics are especially inexpensive, lightweight and high performing. Between 2000 and 2015, the share of plastic packaging as a share of global packaging volumes has increased from 17% to 25% driven by a strong growth in the global plastic packaging market of 5% annually. Plastic packaging volumes are expected to continue their strong growth, doubling within 15 years and more than quadrupling by 2050, to 318 million tonnes annually—more than the entire plastics industry today.<sup>19</sup>

Today, 95% of plastic packaging material value or USD 80–120 billion annually is lost to the economy after a short first use. More than 40 years after the launch of the well-known recycling symbol, only 14% of plastic packaging is collected for recycling. In addition, plastic packaging is almost exclusively single-use, especially in business-to-consumer applications. The plastics industry as a whole is highly reliant on finite stocks of oil and gas, which make up more than 90% of its feedstock. For plastic packaging, this number is even higher, as the recycling of plastics into packaging applications is limited.<sup>20</sup>

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19. Tom Szaky, *The Future Of Packaging: From Linear To Circular* (Berrett-Koehler Publishers 2019).

20. Albert Bates, *Transforming Plastic: From Pollution To Evolution* (Groundswell Books 2019).

For plastic packaging, specifically, it is recognised that a circular economy is defined by six characteristics:<sup>21</sup>

- 1) **Elimination of problematic or unnecessary plastic packaging through redesign, innovation, and new delivery models is a priority:** Plastic brings many benefits. At the same time, there are some problematic items on the market that need to be eliminated to achieve a circular economy, and sometimes, plastic packaging can be avoided altogether while maintaining utility.
- 2) **Reuse models are applied where relevant, reducing the need for single-use packaging:** While improving recycling is crucial, we cannot recycle our way out of the plastic issues we currently face. Wherever relevant, reuse business models should be explored as a preferred ‘inner loop’, reducing the need for single-use plastic packaging.
- 3) **All plastic packaging is 100% reusable, recyclable, or compostable:** This requires a combination of redesign and innovation in business models, materials, packaging design, and reprocessing technologies. Compostable plastic packaging is not a blanket solution, but rather one for specific, targeted applications.
- 4) **All plastic packaging is reused, recycled, or composted in practice:** No plastic should end up in the environment. Landfill, incineration, and waste-to-energy are not part of the circular economy target state. Businesses producing and/or selling packaging have a responsibility beyond the design and use of their packaging, which includes contributing towards it being collected and reused, recycled, or composted in practice. Governments are essential in setting up effective collection infrastructure, facilitating the establishment of related self-sustaining funding mechanisms, and providing an enabling regulatory and policy landscape.
- 5) **The use of plastic is fully decoupled from the consumption of finite resources:** This decoupling should happen first and foremost through reducing

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21. A Vision of a Circular Economy for Plastic (last visited August 23, 2020)  
<https://www.newplasticseconomy.org/assets/doc/npec-vision.pdf>.

the use of virgin plastic (by way of dematerialisation, reuse, and recycling). Using recycled content is essential both to decouple from finite feedstocks and to stimulate demand for collection and recycling. Over time, remaining virgin inputs should switch to renewable feedstocks where proven to be environmentally beneficial and to come from responsibly managed sources. Over time, the production and recycling of plastic should be powered entirely by renewable energy.

- 6) **All plastic packaging is free of hazardous chemicals, and the health, safety, and rights of all people involved are respected:** The use of hazardous chemicals in packaging and its manufacturing and recycling processes should be eliminated. It is essential to respect the health, safety, and rights of all people involved in all parts of the plastics system, and particularly to improve worker conditions in informal (waste picker) sectors.

This vision is the target state we seek over time, acknowledging that realising it will require significant effort and investment; recognising the importance of taking a full life-cycle and systems perspective, aiming for better economic and environmental outcomes overall; and above all, recognising the time to act is now.

## **SOME CASE STUDIES ON NEW PLASTICS ECONOMY**

### **A European Strategy for Plastics in a Circular Economy**

In December 2015, the European Commission adopted the European Union Action Plan for a circular economy.<sup>22</sup> There, it identified plastics as a key priority and committed itself to ‘prepare a strategy addressing the challenges posed by plastics throughout the value chain and taking into account their entire life-cycle’. In 2017, the European Commission confirmed it would focus on plastics production and use and work towards the goal of ensuring that all plastic packaging is recyclable by 2030. The first-ever *European Strategy for plastics in a circular economy*<sup>23</sup> adopted on January 2018 was meant to transform the way plastic products are designed, used, produced and recycled in the European Union. According to the strategy, better design of plastic

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22. [https://ec.europa.eu/environment/circular-economy/first\\_circular\\_economy\\_action\\_plan.html](https://ec.europa.eu/environment/circular-economy/first_circular_economy_action_plan.html) (last visited August 24, 2020).

23. Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions: A European Strategy for Plastics in a Circular Economy (last visited August 24, 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1516265440535&uri=COM:2018:28:FIN>.

products, higher plastic waste recycling rates, more and better quality recycles will help boosting the market for recycled plastics. It will deliver greater added value for a more competitive, resilient plastics industry.<sup>24</sup>

The strategy is part of Europe's transition towards a circular economy, and will also contribute to reaching the Sustainable Development Goals, the global climate commitments and the EU's industrial policy objectives. This strategy will help protect the environment, reduce marine litter, greenhouse gas emissions and dependence on imported fossil fuels. It will support more sustainable and safer consumption and production patterns for plastics.

A smart, innovative and sustainable plastics industry, where design and production fully respect the needs of reuse, repair, and recycling, brings growth and jobs to Europe and helps cut EU's greenhouse gas emissions and dependence on imported fossil fuels is the vision of the above mentioned strategy and the time frame to achieve the same is as follows.

- By 2030, all plastics packaging placed on the EU market is either reusable or can be recycled in a cost-effective manner.
- By 2030, more than half of plastics waste generated in Europe is recycled. Separate collection of plastics waste reaches very high levels. Recycling of plastics packaging waste achieves levels comparable with those of other packaging materials.
- By 2030, sorting and recycling capacity has increased fourfold since 2015, leading to the creation of 2,00,000 new jobs, spread all across Europe.<sup>25</sup>

The European Strategy focusses on four areas: improve the economics and quality of plastics recycling, curb plastic waste and littering, drive investments and innovation towards circular solutions, and harness global action.<sup>26</sup>

### **The United Kingdom Plastics Pact**

The UK Plastics Pact is a trailblazing, collaborative initiative, delivered by WRAP, that will create a circular economy for plastics. It brings together the entire plastics packaging value chain behind a common vision and ambitious set of targets:

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24. Single Use Plastic (last visited August 24, 2020) [https://ec.europa.eu/environment/waste/plastic\\_waste.htm](https://ec.europa.eu/environment/waste/plastic_waste.htm).

25. XIRA Ruiz-campillo, Transformation Of The European Union: The Impact Of Climate Change In European Policies (World Scientific Publishing Europe Ltd. 2020).

26. [https://ec.europa.eu/commission/sites/beta-political/files/plastics-factsheet-challenges-opportunities\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/plastics-factsheet-challenges-opportunities_en.pdf) (last visited August 25, 2020).

- 1) By 2025, 100% of plastic packaging to be reusable, recyclable or compostable
- 2) By 2025, 70% of plastic packaging effectively recycled or composed
- 3) By 2025, take action to eliminate problematic or unnecessary single-use packaging items through redesign, innovation or alternative (re-use) delivery models
- 4) By 2025, 30% average recycled content across all plastic packaging<sup>27</sup>

The Pact will stimulate innovative new business models to reduce the total amount of plastic packaging. It will also help build a stronger recycling system, where one takes more responsibility for one's own waste, and ensure plastic packaging can be effectively recycled and made into new products and packaging and, with the support of governments, ensure consistent UK recycling is met.

#### **Unilever - Steps Towards A Circular Economy**

Unilever, owner of brands including Dove, Ben & Jerry's, Lipton and Omro has announced four ambitious commitments to reduce its plastic waste and help create a circular economy for plastics. Unilever has confirmed that by 2025 it will:

- 1) Halve its use of virgin plastic, by reducing its absolute use of plastic packaging by more than 100,000 tonnes and accelerating its use of recycled plastic.
- 2) Help collect and process more plastic packaging than it sells
- 3) Ensure that 100% of its plastic packaging is designed to be fully reusable, recyclable or compostable
- 4) Increase the use of post-consumer recycled plastic material in its packaging to at least 25%.<sup>28</sup>

This commitment makes Unilever the first major global consumer goods company to commit to an absolute plastics reduction across its portfolio. Unilever's commitment will require the business to help collect and process around 600,000 tonnes of plastic annually by 2025. This will be delivered through investment and partnerships which improve waste management infrastructure in many of the countries in which Unilever operates.<sup>29</sup>

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27. The UK Plastics Pact (last visited August 24, 2020) <https://www.wrap.org.uk/content/what-uk-plastics-pact>.

28. Rethinking Plastic Packaging (last visited August 24, 2020) <https://www.unilever.com/sustainable-living/reducing-environmental-impact/waste-and-packaging/rethinking-plastic-packaging/>.

29. *Id.*

Since 2017, Unilever has been transforming its approach to plastic packaging through its 'Less, Better, No' plastic framework. Through Less Plastic Unilever has explored new ways of packaging and delivering products- including concentrates, such as its new Coif Eco-refill which eliminates 75% of plastic, and new refill stations for shampoo and laundry detergent rolled out across shops, universities and mobile vending in South East Asia. Better plastic has led to pioneering innovations such as the new detectable pigment being used by Axe (Lynx) and TRE Semmé, which makes black plastic recyclable, as it can now be seen and sorted by recycling plant scanners, and the Lipton 'festival bottle' which is made of 100% recycled plastic and is collected using a deposit scheme.<sup>30</sup>

As part of No plastic, Unilever has brought to the market innovations including shampoo bars, refillable toothpaste tablets, cardboard deodorant sticks and bamboo toothbrushes. It has also signed up to the Loop platform, which is exploring new ways of delivering and collecting reusable products from consumers' homes.<sup>31</sup>

#### **STRATEGY FOR BUILDING THE CIRCULAR ECONOMY IN ONTARIO, CANADA**

In 2016, to support a shift toward a circular economy, Ontario passed the Waste-Free Ontario Act, 2016 and *The Resource Recovery and Circular Economy Act, 2016*.

Goals: The goals are to achieve a zero waste Ontario and zero greenhouse gas emissions from the waste sector. Zero waste Ontario is a visionary goal that provides the guiding principles needed to work toward the elimination of waste. It is a new approach that focuses on preventing waste in the first place rather than relying on traditional end-of-life waste management solutions.

The *Resource Recovery and Circular Economy Act, 2016*, establishes the outcomes-based producer responsibility regime. This Act:

- Identifies the provincial interest in resource recovery and waste reduction to provide overarching government direction
- Establishes full producer responsibility by making producers environmentally accountable and financially responsible for recovering resources and reducing waste associated with their products and packaging

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30. Unilever Announces Ambitious New Commitment for a Waste-free World (last visited August 24, 2020) <https://www.unilever.com/news/press-releases/2019/unilever-announces-ambitious-new-commitments-for-a-waste-free-world.html>.

31. *Id.*,

- Establishes the Resource Productivity and Recovery Authority to operate the Resource Productivity and Recovery Registry (i.e. data clearinghouse) and oversee producer performance by conducting compliance and enforcement activities<sup>32</sup>

In implementing the Resource Recovery and Circular Economy Act, 2016, Ontario will consider end-of-life materials as resources rather than waste, which will result in fewer raw materials being used and the production of long-lasting and reusable goods. This brings more opportunities to businesses and provides an incentive for future investment. Through regulations, the government will establish outcomes-based requirements that producers will have to meet, such as reduction, reuse and recycling targets, service standards and promotion and education requirements. This outcomes-based approach supports competition and provides opportunities for businesses to compete in an open and fair marketplace. Ontario's resource recovery and waste reduction priorities focus on reducing, reusing, recycling and reintegrating materials into the economy.<sup>33</sup>

#### **INDIAN PERSPECTIVE ON NEW PLASTICS ECONOMY**

Though India has not taken direct steps in line with the New Plastics Economy, its resolution on banning single-use plastics in the country is a big step towards achieving an economy free of plastic waste. The Centre has issued an advisory to States and Union Territories, asking them to curb production of plastic bags, plastic cutlery and cutlery made of thermocol before October 2, 2019. Prime Minister Shri Narendra Modi further launched 'Swachhata Hi Seva', a cleanliness initiative building up to Gandhi Jayanti on October 2, 2019<sup>34</sup> with a call to action 'Say No To Plastic' and 'Make India Single-Use-Plastic Free'<sup>35</sup>. Many States and Union Territories in India have initiated different forms of the plastic ban as their way to support the nationwide plastic-free movement.<sup>36</sup> For example, Environment Department, Chandigarh Administration has

32. The Circular Economy (last visited August 26, 2020) <https://rpra.ca/about-us/the-circular-economy/>.

33. Strategy for a Waste-Free Ontario: Building the Circular Economy (last visited August 25, 2020) <https://www.ontario.ca/page/strategy-waste-free-ontario-building-circular-economy>.

34. [https://indianexpress.com/article/india/mann-ki-baat-live-updates-pm-modi-begins-his-address/?utm\\_campaign=fullarticle&utm\\_medium=referral&utm\\_source=inshorts](https://indianexpress.com/article/india/mann-ki-baat-live-updates-pm-modi-begins-his-address/?utm_campaign=fullarticle&utm_medium=referral&utm_source=inshorts) (last visited August 25, 2020).

35. Anisha Bhatia, Prime Minister Narendra Modi Launches Swachhata Hi Seva 3.0 With A Nationwide Call To Action 'Say No To Plastic' (last visited August 25, 2020) <https://swachhindia.ndtv.com/prime-minister-narendra-modi-launches-swachhata-hi-seva-3-0-with-a-nationwide-call-to-action-say-no-to-plastic-37979/>.

36. Anisha Bhatia, Can India be a Plastic Free Country' By 2022? (last visited August 25, 2020) <https://swachhindia.ndtv.com/can-india-be-a-plastic-free-country-by-2022-40088/>.

issued a Notification on September 27, 2019 putting the ban on single use of plastics in UT Chandigarh.<sup>37</sup>

While Prime Minister Narendra Modi's declarations have renewed the impetus to tackle plastic waste in India, true long-term impact can only be achieved by establishing better waste management systems across the country. At present, these systems depend on a large pool of unorganized, informal labour. Without standardization and governing principles, there is little opportunity to transform the entire system as it is often unique to each community, village or city. India must adopt a country-wide approach to segregating waste at its source, as well as collecting solid waste at a municipal level. Once collected, this waste can then be transported to recycling facilities. It will require infrastructure and robust measures to monitor the recycling (including incentivizing recyclers), new regulations on plastic packaging and support for developing alternatives to plastic.

As the government seeks to implement change, so too must business. Every business along the plastic value chain has a key strategic interest in investing in business solutions to reduce plastic waste. Business drivers include the loss of core business, regulatory risks, reputational risks, and innovation potential. However, businesses can take steps to mitigate and adept at the effects of these drivers by being pro-active about developing alternative products, rethinking packaging and product design, designing technology to improve garbage sorting and collection and developing new business models.<sup>38</sup>

### **CONCLUSION AND SUGGESTIONS**

Every country in the world desires to shift from its traditional linear economy to circular economy, whereby any product, whether plastic or not, is not disposed of after its use. The circular economy focusses on designing, manufacturing, and packaging of a product in such a way that it does not produce any waste after its life of consumption ends. Similarly, in the world of plastics, the concept of New Plastics Economy is gaining momentum, which also puts emphasis on the production, designing and packaging of plastic and its various products in such a way that in the end, it does not pollute our environment and does not leak into our ecosystem,

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37. Ban on Single Use of Plastic in UT Chandigarh (last visited August 28, 2020)  
<http://chdpr.gov.in/dashboard/?q=node/80776>.

38. Towards a better way of Managing Plastic Waste in India (last visited August 28, 2020) <https://www.wbcsd.org/Overview/About-us/Our-offices/India/News/Towards-a-better-way-of-managing-plastic-waste-in-India>.

which if leaked will remain there for coming hundred years and will continue to affect every creature on the earth.

Thus, New Plastics Economy in order to produce 'zero waste' focusses on three basic principles which are: REDESIGN, REUSE, AND RECYCLE. It asks to work on the ground itself, and not wait until a plastic product is dumped into the garbage as in case of a linear economy. Desire is one thing, working towards achieving it is another. Though many companies and governments in the world have started taking positive steps in this direction, it is not possible until they get support from consumers, investors, or in general, the people of earth.

As in the case of India, it can be seen that the Central Government is striving towards achieving a ban on single-use plastics by the end of 2022 throughout the whole country. However, we all know it is not possible unless the industries are provided with alternatives through which they can support this move. Support of all States and Union Territories in India along with the people of India is also imperative. Nonetheless, this step of India towards banning single-use plastics, however small it is in terms of New Plastics Economy, is a big effort towards beating plastic pollution in India, a menace eating the whole world for centuries. It will still take decades to remove plastics in all forms, from each and every corner of the country.

Thus, greener alternatives to plastics such as bioplastics, biodegradable and compostable plastics which have come into existence in this modern era, are not the only solution to this growing menace of plastic pollution. The real solution lies in achieving a circular economy where the products are made, used, and then returned. Recycling and resource recovery are the two powerful weapons towards achieving it' while land filling and incineration are the two weapons working against it. It is for us to decide by which weapons we want to lead our nation, whether towards a better future or on the path of destruction.

## **SOCIAL MEDIA, GOVERNMENT SURVEILLANCE AND THE INDEPENDENT OVERSIGHT: THE CASE FOR PROTECTING PRIVACY RIGHTS IN THE CYBERSPACE**

**Vibhuti Jaswal\***

### **INTRODUCTION**

Social media has profound capabilities to strengthen the public sphere, and can make the pluralistic society more inclusive than ever. It enables its users to be united, and empowers them to participate in the democracy. Relative to the social media, the traditional modes of mass communication, including print media, radio, telephone, and so on and so forth, were restrictive and selective in nature. Issues of great concern for democratic purposes used to remain in obscurity because of the monotonous media. Whereas the social media platforms that allow omniscient learning about education, health, science, traditions, cultures, environment, etc, has increased the opportunities for all individuals to participate politically, socially, and economically regardless of their statuses. Social Networking as a new media is a fundamental freedom of speech and expression guaranteed under the rule of law. Exchange of ideas on the social media by the individuals is igniting 21st century's mass revolutions, which are the protests against the dictatorships, authoritarians, and totalitarians. However, surveillance of social media by governments and big corporate undermines the public sphere, civil liberties and democracy. The governments while using the sophisticated technologies provided by the high tech companies can monitor every activity of an individual user of the digital platforms. The present research paper will examine the use of social media surveillance by the governments. After examining the use, the author will discuss the significance of the privacy rights. In third section of the paper, the dangers of social media surveillance have been discussed. In conclusion, the author offers the constitutional choice to protect the privacy rights against the rise of social media surveillance.

### **GOVERNMENT USE OF SOCIAL MEDIA SURVEILLANCE**

Social media surveillance is possible because the software and hardware companies easily provide monitoring techniques to the government (and to other privacy violators). The software namely XI Social Discovery, Geofeedia, Dataminr, Duanmi, Media Sonar, and Socio Spyder

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have been sold to the various agencies of the United States government to monitor an individual's activities on Facebook, Twitter, My space, and so on and so forth. The list of such kind of monitoring software is not exhaustive. IN-Q-TEL is venture fund of Central Investigation Agency (CIA) which invests in the Social Media Monitoring Technology.<sup>1</sup> These monitoring devices or software are cheap and invisible. It empowers the governments to conduct random social media monitoring at mass level *without any legislation, public scrutiny, and due process*.

Social Discovery provides for a matter-centric workflow from search and collection through production in searchable native format, while preserving critical metadata not possible through image capture, printouts, or raw data archival of RSS feeds.<sup>2</sup> Geofeedia, which is an investigative and monitoring tool, associates social media posts with geographic locations. According to American Civil Liberties Union, Twitter, Facebook and Instagram have provided users' data access to Geofeedia.<sup>3</sup> Sociospyder keeps tabs on the social media users, and downloads and stores the data very easily. The law enforcement agencies, especially the military, are the prime buyers of the product. Sociospyder can configure the comments and posts or tweets, and map the user-to-user relationships. It gives the graphic representation of the whole data to the analysts<sup>4</sup>. MediaSonar software allows the law enforcement agencies to detect the online threats and to track the protestors using particular hashtags.<sup>5</sup> Raytheon, one of the world's largest defence contractors, has created an "extreme-scale analytics" system, known as Rapid Information Overlay Technology or RIOT, which can gather vast amounts of information about people from websites including Facebook, Twitter and Foursquare. RIOT is capable of tracking people's movements and predicting future behaviour by mining data from social networking websites.<sup>6</sup>

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1. Jim Edwards, Social Media Is a Tool of the CIA. Seriously, CBS News, July 11, 2011, available at <https://www.cbsnews.com/news/social-media-is-a-tool-of-the-cia-seriously/> (last visited October 3, 2020).
  2. X1 Social Discovery, Forensic Computers Incorporated, available at <https://www.forensiccomputers.com/x1-social-discovery.html> (last visited October 4, 2020).
  3. Lora Kolodny, Facebook, Twitter cut off data access for Geofeedia, a social media surveillance startup, TechCrunch, available at <https://techcrunch.com/2016/10/11/facebook-twitter-cut-off-data-access-for-geofeedia-a-social-media-surveillance-startup/> (last visited October 4, 2020).
  4. Joseph Cox, SocioSpyder: The Tool Bought By the FBI to Monitor Social Media, Vice, February 23, 2016, available at <https://www.vice.com/en/article/8q8g73/sociospyder-the-tool-bought-by-the-fbi-to-monitor-social-media> (last visited October 4, 2020).
  5. OSINT & Dark Web Threat Detection & Investigation, Mediasonar, available at <https://mediasonar.com/> (last visited October 4, 2020).
  6. Ryan Gallagher, Software that tracks people on social media created by defence firm, The Guardian, February 10, 2013, available at <https://www.theguardian.com/world/2013/feb/10/software-tracks-social-media-defence> (last visited October 4, 2020).

In United Kingdom, as Privacy International group reported, GCHQ and other government authorities, including police and the local ones, use Social Media Monitoring, or Social Media Intelligence (SOCMINT)<sup>7</sup> to snoop the comments or tweets posted by the individuals on Facebook, Twitter, YouTube, etc. It was reported that GCHQ while having access to the private companies' databases has collected individuals' personal information including religion, ethnicity, sexual orientation, political views and "otherwise confidential" information.<sup>8</sup> Local authorities use social media monitoring tools for the purposes of council tax payments, children's services, benefits and monitoring protests and demonstrations. Privacy International Group asserted that the local authorities' decisions based on the collected information from the social media tools would affect the interests of those persons who live under the most vulnerable and precarious conditions. And denial of welfare support is one of them.<sup>9</sup> Police extensively use the facial recognition technology, and matches it with the social media images of the individuals. United Kingdom police stores the photographs of millions of innocent individuals without any justification. Whereas the prevention or detection of a crime under the rule of law requires human decisions based on the principle of proportionality, the facial recognition technology, which most of the times wrongly matches the photographs, decides the case arbitrarily. It leads to the unlawful arrests of innocent individuals, especially the minorities and marginalised sections of the society. Algorithmic facial recognition is also leading to racial profiling, and is impeding the civil liberties and political participation of those who have been fighting against the perennial discrimination and servitude. Moreover, the law enforcement agencies are using the algorithmic facial recognition technology without effective and independent oversight.<sup>10</sup>

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7. Social media monitoring, or social media intelligence (also defined as SOCMINT), refers to the techniques and technologies that allow the monitoring and gathering of information on social media platforms such as Facebook and Twitter which provides valuable intelligence to others, who want to monitor, profile, and manipulate people and groups... Governments across the world – democratic and undemocratic alike – have been developing a growing appetite for this "fast, cheap and easy" form of surveillance, and it has already been well documented that law enforcement agencies or security services are using SOCMINT to undertake overt and covert surveillance which is transforming intelligence and surveillance activities. "The use of social media monitoring by local authorities – who is a target?," Privacy International, available at <https://privacyinternational.org/explainer/3587/use-social-media-monitoring-local-authorities-who-target> (last visited October 5, 2020).
  8. GCHQ is using social media for mass surveillance, Wired, October 18, 2017, available at <https://www.wired.co.uk/article/wired-awake-181017> accessed on October 5, 2020.
  9. The use of social media monitoring by local authorities – who is a target?, Privacy International, available at <https://privacyinternational.org/explainer/3587/use-social-media-monitoring-local-authorities-who-target> accessed on October 5, 2020.
  10. Big Brother Watch Report titled Stop Facial Recognition, available at <https://bigbrotherwatch.org.uk/campaigns/stop-facial-recognition/report/> (last visited November 20, 2020).

Indian government is equipped with the surveillance tools, including software, to monitor the social media posts under the guise of detecting fake news. In past, the government had already made many efforts to get complete control over the social media content of the users. This time the government is planning to develop a surveillance tool to know all emotions, expressions, sentiments, ideology and feelings of the users of the digital platforms.<sup>11</sup> E-Vidur is a real time sentiment analysis for social media streams.<sup>12</sup> This surveillance software helps the government to track people's political opinions, dissents and ideas about government policies.<sup>13</sup> Despite the protests against the idea of surveillance state, the government departments have been using surveillance tools for monitoring social media activities systematically for last many years. In its annual reports, the Electronic Ministry acknowledged that forty government departments are using Advanced Application for Social Media Analytics or AASMA for its internal purposes<sup>14</sup>. However, AASMA is being used by political parties to monitor the political interests of the social media users.<sup>15</sup> Increasingly, the government has recently ordered that online news, social media and video streaming platforms such as Netflix and Amazon Prime will be subject to the State regulation.<sup>16</sup>

Moreover, the social media companies accept the *governments' conditions of having complete access without legal oversight* to their databases in order to run their businesses in the local

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11. Soumyarendra Barik, The government wants to surveil social media users, and track their 'sentiments', Medianama, October 08, 2020, available at <https://www.medianama.com/2020/10/223-india-social-media-surveillance/> (last visited October 10, 2020).
  12. Centre for Development of Advanced Computing: C-DAC, July 1, 2019, available at <https://www.facebook.com/CDACINDIA/posts/2772590039478558> (last visited October 5, 2020).
  13. Federal Bureau, C-DAC develops tool to analyse social media data, Financial Express, March 28, 2017, available at <https://www.financialexpress.com/industry/technology/c-dac-develops-tool-to-analyse-social-media-data/605147/> (last visited October 5, 2020).
  14. "Government of India has officially declared this project as STRATEGIC in nature and is closely monitoring the growth of the same," says the Indraprastha Institute of Information Technology's annual report of 2016-2017. According to the report, more than 40 state and Central government departments had deployed the tool by April 2017 and another 75 had requested its installation at the time. The report goes on to say, "AASMA has been discussed at the secretary / minister level... Some agencies have also given formal feedback in writing that the tool is very useful to them and they are using it for their internal purposes." Kumar Sambhav Shrivastava, 40 government departments are using a social media surveillance tool - Scroll.in, MediaNama, September 5, 2018, available at <https://www.medianama.com/2018/09/223-40-government-departments-are-using-a-social-media-surveillance-tool-scroll-in/> (last visited October 5, 2020).
  15. Kumar Sambhav Shrivastava, From New Delhi to Patna, govt is watching your social media from 61 places, Business Standard, December 27, 2018, available at [https://www.business-standard.com/article/economy-policy/from-new-delhi-to-patna-govt-is-watching-your-social-media-from-61-places-118122700271\\_1.html](https://www.business-standard.com/article/economy-policy/from-new-delhi-to-patna-govt-is-watching-your-social-media-from-61-places-118122700271_1.html) (last visited October 5, 2020).
  16. Hannah Ellis-Petersen, Indian move to regulate digital media raises censorship fears, The Guardian, November 11, 2020, available at <https://www.theguardian.com/world/2020/nov/11/india-to-regulate-netflix-and-amazon-streaming-content> (last visited November 19, 2020).

markets. Digital intermediaries shake hands either under fear or for economic profits. In this sense, social networking sites breach the public trust, and violate the associational rights, speech rights, and privacy rights of their individual users. TikTok has been banned in the United States and India because the governments alleged that it provides the users' personal information to China.<sup>17</sup> *Zuboff's Surveillance Capitalism* that controls and exploits the human nature is being systematically used in the totalitarian regimes, like China. Totalitarian regimes using Artificial Intelligence, as argued under the Surveillance Capitalism, are constructing the thinking processes of the mass population to ensure the permanence of the regimes.<sup>18</sup>

### MEANING AND SIGNIFICANCE OF PRIVACY

Since privacy is essential for the self-realization, and for conducting free democratic discourses, an individual needs its protection in both private and public spaces. In democratic societies, as Alan Westin explained, personal autonomy, emotional release, self-evaluation, limited and protected communications are the functions of the individuals' privacy.<sup>19</sup> Further, Daniel Solove argues that these privacy functions are related with the freedom of speech, freedom of association, freedom of thought, freedom to speak anonymously, and so on and so forth. For Solove, a society without privacy is suffocating and oppressive one. While the totalitarian idea is to make everyone conformist to its single ideology by monitoring individuals' all private actions and denies them the natural processes of knowing themselves, the concept of Privacy guaranteed under the constitutional democracy provides breathing space to an individual to manage his or her personal and social relationships. Complete transparency or nakedness frustrates an individual's psychological well-being.<sup>20</sup> Vance Packard argued that naked society impacts upon the behaviour patterns and value systems of the individuals.<sup>21</sup> And because of the growing surveillance, as he warned, the right to be different, the right to hope for tolerant forgiveness or overlooking of past foolishness, errors, humiliations, or minor sins, and the right to make a fresh start would be in danger.<sup>22</sup>

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17. Saurabh Singh, TikTok goes offline to comply with Govt of India ban, active users can't access app or website anymore, Financial Express, June 30, 2020, available at

<https://www.financialexpress.com/industry/technology/tiktok-goes-offline-to-comply-with-govt-of-india-ban-active-users-cant-access-app-or-website-anymore/2009100/> (last visited November 19, 2020).

18. John Gray, The new tech totalitarianism, NewStatesman, February 6, 2019, available at <https://www.newstatesman.com/culture/books/2019/02/new-tech-totalitarianism> (last visited November 12, 2020).

19. Alan F. Westin, *Privacy And Freedom*, 35 (Atheneum Press 1967).

20. See Daniel J. Solove, *Privacy, Information And Technology*, (Aspen 2006).

21. Vance Packard, *The Naked Society*, 40 (David McKay 1964).

22. *Id.* at 41.

Anglo-American jurisprudence to limit the King's or government's powers relating to search and seizure gave a constitutional status to the fundamental right to privacy. King's arbitrary powers of issuing general search warrants and allowing his forces to billet themselves in anyone's house were intended to be removed through the passage of Magna Carta, Writ of Habeas Corpus, Bill of Rights, and so on and so forth.<sup>23</sup> Although the common law recognised privacy as a tort or civil wrong and acknowledged the fair practices to counter nuisance, assault, defamation, breach of confidence, etc, Samuel Warren and Louis Brandeis showed its insufficiency to protect privacy interests involved in the rise of sophisticated and intrusive technologies.<sup>24</sup> Justice Louis Brandeis in *Olmstead v. U.S.*,<sup>25</sup> endorsed the principle that Fourth Amendment's protection is available in cases of both tangible and intangible searches. Privacy protects people, not places. As Justice Louis Brandeis observed, intangible or non-physical trespass to search a place while using the modern inventions brings same consequences and violates one's right to privacy.

Autonomy over personal information and personal decisions as a part of right to privacy too has been recognised by the various constitutional courts of the world. Informational privacy means right to have control over the personal information, and decisional privacy means right to personal autonomy over personal decisions relating to body, mind and soul. Both informational and decisional privacy protect an individual from being subjected to discrimination, which exists in all world societies just because of the inequalities made by the humans. Being of an individual would not be judged by the social morality when the privacy is guaranteed under the constitutional morality. Privacy protection and awareness about the constitutional morality do not give room to the autocratic or arrogant governments to use the *social morality judgments* against the private lives of the political opponents, dissidents, investigative journalists, human rights activities, etc.

But the rise of the information technology that tends to make every detail of the personal information available to the public view has threatened the functions of privacy in the contemporary world. Even fair practices for preserving privacy of individuals and families, which are being followed by the world societies to maintain a balance between private and public life and are the unbroken threads of the fabric of social solidarity, are getting lost when

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23. See Martha Bridegam, *Search And Seizure*, (Chelsea House 2005).

24. See Warren & Brandeis, *Right to Privacy*, 4 Harv. L. REV.193,193-220 (1890).

25. 277 U.S. 438, 478 (1928).

everybody at home uses mobile phone cameras to post the personal images and videos on social media platforms without expecting any danger. Ignorance and unawareness among people bring best opportunities for the privacy violators. Moreover, posting or commenting on social media by a user in a particular context can be read out of the context, and subjected to larger public scrutiny. Populism and Judgy Society would troll the post or comment, and change the time and space of the expression completely. Social media monitoring tools enhance these possibilities by aggregating the scattered information, which was never intended to be read collectively or summarily by the speaker or the user of the social media.

Privacy on social media needs to be protected for strengthening the public discourse. Although people voluntarily share their personal information with the public via social media, it does not mean that they lose the reasonable expectation of privacy of their constitutionally protected speech. As mentioned above, with the increase of the hate speech and populism, it has become normal to feel that anyone's constitutionally protected online speech can be subjected to be bullied or trolled. Bullying or trolling of an individual's online protected speech, and considering it as a threat to the national security is a politicisation of every private action.

State is bound under the rule of law to perform both negative and positive duty in order to protect the fundamental freedoms of an individual. State should take positive measures to protect an individual's privacy and free speech on the social media. An individual's fear of being trolled on social media reduces online free speech, and should be of great concern for every democratic state. Social media has inspired mass revolutions and transformed the dictatorship regimes into democratic ones. It has the potential to increase the public sphere and make the inclusive society. Deliberative democracy on social media increases the accountability, transparency and good governance in the system. According to Daniel Solove, right to speak freely, right to speak anonymously, right to association, right to be forgotten, etc, on internet should be ensured.<sup>26</sup> Increasingly, arbitrary and unregulated police powers to combat an offensive speech empower the *Judgy Society* to judge it in an injudicious sense and punish the speaker extra-judicially. This kind of reign of terror threatens an innocent expression as well. More importantly, the individuals afraid of sharing personal information on internet, or self-censor their online speech when the governments conduct mass surveillance on their social media accounts. Social media

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26. See Daniel J. Solove, *Privacy, Information And Technology*, (Wolters Kluwer 2006).

surveillance for political gains undermines the functions of democracy, and violates the privacy rights and speech rights of the users.<sup>27</sup>

### **EFFECTS OF SOCIAL MEDIA MONITORING**

Mass and indiscriminate surveillance of social media accounts involves serious repercussions for both an individual and democratic society. Social media surveillance has chilling effect over our freedom of speech and expression, and freedom of association. It is very dangerous for the religious minorities and the unpopular expressions. People who exercise the speech rights guaranteed under the Constitution, including Journalists, human rights activists and protestors criticising government's policies by holding peaceful rallies or movements, are targets of the governments' social media monitoring.<sup>28</sup>

Where xenophobic feelings are growing in all regions of the world, and populist leaders use the hatred feelings while conducting social media monitoring so that locals should support their political ideology, the immigrants, refugees, foreign visitors, internally displaced persons and the stateless individuals do afraid of using the social media platforms. Whereas soaring percentage of statelessness can only be controlled through the political participation of the victims.<sup>29</sup> Social media monitoring enables the governments to discriminate individuals on the basis of their religion, race, ethnicity, gender, sexual orientation, and so on, and so forth, while implementing their public policies. Social media monitoring aggravates the problems like systemic racism in the United States and other countries.<sup>30</sup>

Moreover, social media monitoring is not reliable to predict whether an individual contributes to democracy or indulges in terrorists' activities. On the contrary, inaccurate digital information could lead to wrongful arrest, detention or deportation, and causes harassment to the innocent

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27. See Jeramie D. Scott, *Social Media and Government Surveillance: The Case for Better Privacy Protections for Our Newest Public Space*, 12 *J. Bus. & Tech. L.* 151 (2017), available at <http://digitalcommons.law.umaryland.edu/jbtl/vol12/iss2/2>

28. See Ian Brown, *Social Media Surveillance*, *The International Encyclopedia of Digital Communication and Society*, Wiley Online Library, (2014), available at <https://onlinelibrary.wiley.com/doi/full/10.1002/9781118767771.wbiedcs122>

29. According to Hannah Arendt, Refugees driven from country to country represent the vanguard of their people—if they keep their identity. Arendt H. (1943/2007) '2007 We Refugee. In Kohn J., Feldman R. H. (eds) *The Jewish Writings*. (New York: Schocken Books), pp. 264–274. Quoted in Cindy Horst, *Miracles in Dark Times: Hannah Arendt and Refugees as 'Vanguard'*, *Journal of Refugee Studies*, fez057, (2019) available at <https://doi.org/10.1093/jrs/fez057>

30. The surveillance of more powerful groups is often used to further their privileged access to resources, while for more marginalized groups surveillance can reinforce and exacerbate existing inequalities. K. Ball, K. Haggerty, & D. Lyon (eds.), *Routledge Handbook Of Surveillance Studies*, 3 (Routledge 2012).

individuals. Even the United States courts have questioned the role of mass surveillance programs in preventing terrorists' attacks.<sup>31</sup> Algorithmic error about an individual's behaviour leads to irreparable injury to reputation and privacy.

Despite the fact that social media monitoring has potential to bring serious implications for society, the current laws of the world legal systems are insufficient to prevent it. Increasingly, the governments hire private actors to conduct social media monitoring on their behalf, or purchase the software tools from private companies to conduct surreptitious surveillance. Such clandestine actions of the governments protect them from public scrutiny and other standards of accountability, for people never get to know about the extent of indiscriminate monitoring of their social media accounts and the consequences. Secretive mechanisms involved in social media monitoring has removed the public discussion that could see whether the surveillance is just, fair, reasonable, or effective.

#### **EXISTING LEGAL APPROACH PROVIDES INSUFFICIENT PROTECTION**

In almost all constitutional democracies, the current law or legal framework dealing with the social media monitoring provides little attention to protect privacy rights against the mass surveillance of social media. The violations of speech rights in case of publicly available information on social media due to government surveillance are a manifestation of the insufficiency of the current law. The existing legal frameworks provide very little protection to the social media posts and information from government's mass monitoring.

In the United States, government surveillance of social media is not a search within the meaning of the Fourth Amendment to the United States Constitution, and therefore, the law enforcement agencies do not need to require court's search warrant before accessing or monitoring the social media accounts. Further, there is no reasonable expectation of privacy in the publicly available social media posts and information. Moreover, social media information is "third party information", and the Supreme Court of the United States has already declared that

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31. U.S. District Judge Richard Leon on December 16, 2013, said, "The government does not cite a single case in which analysis of the NSA's bulk metadata collection actually stopped an imminent terrorist attack." Judge Leon further expressed that "Given the limited record before me at this point in the litigation – most notably, the utter lack of evidence that a terrorist attack has ever been prevented because searching the NSA database was faster than other investigative tactics – I have serious doubts about the efficacy of the metadata collection program as a means of conducting time-sensitive investigations in cases involving imminent threats of terrorism." Quoted in "NSA phone surveillance program likely unconstitutional, federal judge rules," *The Guardian* Monday 16 December 2013 20:38 GMT, available at <http://www.theguardian.com/world/2013/dec/16/nsa-phone-surveillance-likely-unconstitutional-judge> (last visited March 11, 2018, at 1:00 a.m. IST).

government's access to third party information without judicial warrant is valid. The United States Supreme Court has been applying the trespassory doctrine even in case of advanced and sophisticated surveillance techniques. The Supreme Court provided Fourth Amendment protection against the thermal imager search in *Kyllov. United States*<sup>32</sup>; against Global Positioning System (GPS) device search in *United States v. Jones*<sup>33</sup>; and against a cell phone search in *Riley v. California*<sup>34</sup>. Although the United States' Supreme Court in *Carpenter v. United States*<sup>35</sup> did not apply third party doctrine while requiring the law enforcement agencies to have prior court warrant before accessing the cell phone location records, it is still unclear that the same approach would be applied in case of social media monitoring. If the laws protecting privacy rights declare that the mass surveillance of social media accounts is a search within the meaning of the Fourth Amendment to the United States Constitution, the victims of unauthorized interception would be able to claim their rights against the governmental action.

In India, exclusionary rule does not apply in deciding the admissibility of evidence collected by the police in a court of law. Indian Evidence law focuses on the relevancy of the evidence. If the evidence is relevant to the facts of the case, it will be admissible in the court of law, regardless of the mode of its collection. It means that the relevant evidence is admissible in the court of law even if it has been collected through illegal search or seizure. Although the Supreme Court of India has recognised right to compensation to the victims of abuse of police powers in *Nandini Satpathi*<sup>36</sup>, *Rudul Shah*<sup>37</sup>, *DK Basu*<sup>38</sup>, etc., and right to mental privacy against the lie-detection tests in *Selvi v. State of Karnataka*<sup>39</sup>, the absence of exclusionary rule can motivate the law enforcement agencies to conduct random (digital also) search and seizures. Till now, the Supreme Court of India has recognised right to privacy against the tangible searches only. In *Kharak Singh v. State of UP*<sup>40</sup> the Supreme Court held that domiciliary visits at night violated one's right to private home. In *Govind v. State of M.P.*<sup>41</sup> the Court held that only compelling interests of the State can restrict right to privacy. In *Malak Singh v. State of Punjab*<sup>42</sup>, the court

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32. 533 U.S. 27 (2001)

33. 565 U.S. 400 (2012)

34. 573 U.S. 373 (2014)

35. 585 US 22 (2018)

36. *Nandini Satpathy v. P.L. Dani*, AIR 1978 SC 1025

37. *Rudul Shah v. State of Bihar*, (1983) 4 SCC 141

38. *D.K. Basu v. State of W.B.*, (1997) 1 SCC 416

39. 2010(4) SCALE 690

40. AIR 1963 SC 1295

41. 1975 SCR (3) 946

recognized right to privacy against the surveillance powers of the State. In *People's Union for Civil Liberties v. Union of India*,<sup>43</sup> the Supreme Court held that wiretapping is a serious invasion of an individual's privacy. In *District Registrar and Collector v. Canara Bank*,<sup>44</sup> the Court recognized the right to privacy in bank records. Right to privacy deals with persons and not places.

Whereas the exclusion of the power of judicial review is a violation of basic structure doctrine in India, mass electronic surveillance has the potential to bypass the judicial control or oversight. Under the Information Technology legislations, the law enforcement agencies are authorised to conduct social media monitoring on the prescribed grounds, and the Review Committee is empowered to oversee the government's communication surveillance under the Information Technology legislation. Review Committee was constituted by the Supreme Court of India in *People's Union for Civil Liberties v. Union of India*<sup>45</sup> to regulate wiretapping, which was held as a violation of right to privacy.<sup>46</sup> Central government adopted the same Review Committee to oversee wiretapping (in 1999 notification) and electronic surveillance (in 2000)<sup>47</sup>. However, the Review Committee is essentially an executive body because all of its members are being appointed by the executive, and the committee which was constituted for wiretapping does not have effective, independent, and sufficient powers to protect an individual's right to privacy against today's indiscriminate electronic surveillance. Information Technology legislation governing interception of electronic communications does not provide right to be informed and right to compensation to the victims of unlawful interception. The existing law regulating electronic surveillance powers lack prior judicial review or independent oversight, and does not prescribe any effective and independent due process.

Moreover, lack of judicial oversight or judicial review of the social media monitoring violates

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42. AIR 1981 SC 760

43. AIR 1997 SC 568

44. AIR 2005 SC 186

45. AIR 1997 SC 568

46. The Court ordered to constitute Review Committee that consists of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. And the Review Committee at the State level should consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary.

47. Indian Telegraph Act 1885, s. 5; Indian Telegraph Rules 1951, r.419-A; Information Technology Act, 2000. Ss. 69, 69A and 69B; Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, r. 22 and 2(q); The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, r. 14 and 2(i); The Information Technology (Procedure and Safeguards for Monitoring and Collecting traffic Data or Information) Rules, 2009, r. 7 and 2(n)

the principles of natural justice (right to be heard and rule against bias) and principle of checks and balances, which have been recognised by the Supreme Court of India as minimum safeguards under Article 14, 19 and 21 to limit the administrative actions. In *Maneka Gandhi v. Union of India*<sup>48</sup>, the Supreme Court held that the administrative procedure should be just, fair, and reasonable. In *A.K. Kraipak v. Union of India*,<sup>49</sup> the Court held that there must be a fair play in action in all kinds of administrative functions.

In *K.S. Puttaswamy v. Union of India*,<sup>50</sup> the Supreme Court has held that substantive and procedural due processes are part of Article 21 of the Indian Constitution. Substantive due process includes right to privacy. Right to privacy further includes right to personal autonomy in personal decisions. In *Navtej Singh Johar v. Union of India*,<sup>51</sup> the Supreme Court held that LGBTIQ (lesbian, gay, bisexual, transgender/transsexual, intersex and queer/questioning) people have right to live with human dignity. They have right to personal autonomy over their sexual orientation. The Court held that Section 377 of the IPC violates their right to privacy. In *NALSA v. Union of India*,<sup>52</sup> the Court said that the State should protect the transgenders from any kind of social stigma.

As mentioned above, the Supreme Court of India has yet to get the opportunity to recognise right to privacy against the unprecedented capabilities of mass electronic surveillance programs. Government's Central Monitoring System, National Intelligence Grid, Aadhaar or Biometric Identity Cards, and so on and so forth involve serious implications for right to privacy, especially for the vulnerable sections of the society. Social sorting and racial profiling, which are the dangers of indiscriminate surveillance in the absence of effective data protection regime, could exacerbate the conditions of religious minorities and undocumented citizens. Therefore, it is being argued that since right to privacy is a fundamental right under the Indian Constitution, it should also be protected against the clandestine social media monitoring.

In the United Kingdom, Social media monitoring by the government authorities, including local bodies, is being conducted without having an effective and independent oversight mechanism. Many reports have recommended that prior judicial authorization and ex post judicial oversight

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48. AIR 1978 SC 597

49. AIR 1970 SC 150

50. (2017) 10 SCC 1

51. (2018) 1 SCC 791

52. AIR 2014 SC 1863

would check the legality, necessity, and proportionality of the communication surveillance.<sup>53</sup> Even local authorities monitor social media accounts without informing anyone, and most of the authorities do not have any auditing policy to monitor social media.<sup>54</sup> The fact that the confidentiality of the journalists' sources is a freedom of expression requires judicial oversight, which is missing under the Regulation of Investigatory Powers Act to regulate GCHQ's investigative powers.<sup>55</sup>

Social media monitoring through advanced algorithmic techniques that can construct the users' content in a very prejudicial context and cause serious harm to his or her inner and outer personality needs to be regulated by bringing major reforms in the existing legal approach. Only adequate safeguards would protect the privacy rights of the individuals, including freedom of speech and expression, and association.

#### **NEED FOR PUBLIC DISCUSSION AND INDEPENDENT OVERSIGHT MECHANISMS**

In order to protect the privacy rights, including speech, association and expression, the laws regulating government surveillance should invite public discussion and provide independent oversight mechanism. Public participation would be helpful in deciding the necessity, proportionality, transparency, and accountability of the social media monitoring. Community participation is needed to oversee the due process that is being followed by the law enforcement agencies in social media monitoring, and to see whether civil liberties and privacy rights have been protected or not. These regulatory laws should also recognise the fact that the monitoring and analysis of the social media posts, comments, and information has potential to reveal an individual's sensitive and personal information including political ideology, religion, race, sexual orientation, profession, etc., and the disclosure of the personal information could bring serious implications for the individual and society. Independent oversight mechanism, including judicial and parliamentary supervision, serves the purpose of principles of checks and balances. Unfettered and unregulated government powers in the field of communication

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53. See report of the UN High Commissioner on Human Rights on the right to privacy in the digital age, UN doc. A/HRC/27/37, 30 June 2014; and report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN doc. A/69/397, 23 September 2014.

54. A significant number of local authorities are now using 'overt' social media monitoring and this substantially outpaces the use of 'covert' social media monitoring. "Methodology: Social Media Monitoring by Local Authorities" Privacy International, 24 May, 2020, available at <https://privacyinternational.org/report/3530/methodology-social-media-monitoring-local-authorities>

55. "UK report shows surveillance efforts involving journalists," Committee to Protect Journalists, March 09, 2020, available at <https://cpj.org/2020/03/uk-report-shows-surveillance-efforts-in/>

surveillance are against the idea of constitutionalism that limits the government. Social media monitoring cases that require *ex ante* judicial warrant should be specifically mentioned under the regulations.

The European Court of Human Rights in its various decisions has asked the member states of the European Union to follow sufficient and adequate safeguards for conducting communication surveillance. In *Roman Zakharov v. Russia*,<sup>56</sup> the European Court noted that indiscriminate communication surveillance for fighting broad categories of offences is arbitrary and a threat to democracy. The Court held that Russian law governing interception of communication to pursue legitimate aims of national security and public safety did not provide adequate safeguards against arbitrariness and the threat of abuse. The Court focussed on adequate safeguards to prevent the abuse of secret surveillance.<sup>57</sup> The Court also held that the existing judicial authorization is very limited in nature.<sup>58</sup> In *Szabó and Vissy v. Hungary*,<sup>59</sup> the Court held that Hungary's anti-terrorism legislation that enabled the National Security Services to conduct random electronic surveillance without the knowledge or consent of the persons affected, and that conferred wide discretionary powers on the government bodies authorising the electronic surveillance violated right to privacy guaranteed under Article 8 of the European Convention on Human Rights. The Court concluded that the surveillance powers were unlimited, the authorising bodies did not carry out assessments of strict necessity, and the surveillance practices were not subject to any judicial supervision.<sup>60</sup>

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56. *Roman Zakharov v. Russia*, No. 47143/06, 4 December 2015, available at [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-159324%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-159324%22])

57. In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in law in order to avoid abuses of power: the nature of offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed. *Id.* § 231.

58. The Court noted that in Russia judicial scrutiny is limited in scope. Thus, materials containing information about undercover agents or police informers or about the organisation and tactics of operational-search measures may not be submitted to the judge and are therefore excluded from the court's scope of review (see paragraph 37 above). The Court considers that the failure to disclose the relevant information to the courts deprives them of the power to assess whether there is a sufficient factual basis to suspect the person in respect of whom operational-search measures are requested of a criminal offence or of activities endangering national, military, economic or ecological security. *Id.* § 261.

59. *Szabó and Vissy v. Hungary*, No. 37138/14, 12 January 2016, available at [https://hudoc.echr.coe.int/eng#%22itemid%22:\[%22001-160020%22\]](https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-160020%22])

60. The Court held: [G]iven the particular character of the interference in question and the potential of cutting-edge surveillance technologies to invade citizens' privacy, the Court considers that the requirement "necessary in a democratic society" must be interpreted in this context as requiring "strict necessity" in two aspects. A measure of

The Court of Justice of the European Union (CJEU), in *Digital Rights Ireland Ltdv. Minister for Communications, Marine and Natural Resources and others*<sup>61</sup>, held that European Union directive requiring Internet Service Providers (ISPs) to store telecommunications data in order to facilitate the prevention and prosecution of crime violated right to privacy and right to data protection under Articles 7 and 8 of the Convention. The Court found the EU directive disproportionate and unlimited, and held that the directive did not provide adequate protection to the telecommunication data. The directive put all Europeans' personal data at stake. The Court found that the directive was not clear about the conditions of data storage and the obligations of both Internet Service Providers and security agencies accessing the data. Prior review either by court or an independent body to measure the necessity and proportionality of the electronic surveillance would be an adequate check on the unlimited powers of the national competent authorities.<sup>62</sup>

Following the Digital Rights case, an application seeking judicial review of United Kingdom's retention power of data under the Data Retention and Investigatory Powers Act (DRIPA) was filed before High Court of Justice in the United Kingdom. DRIPA empowered Home Secretary to retain the telecommunication data for 12 months. The High Court held that the regime was inconsistent with the European Court of Justice's ruling. Home Secretary challenged the decision in Court of Appeal. The Court of Appeal then asked European Court of Justice to give a preliminary ruling on whether the Digital Rights judgment applicable to a member state's domestic regime governing access to data. The European Court of Justice in joined

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secret surveillance can be found as being in compliance with the Convention only if it is strictly necessary, as a general consideration, for the safeguarding the democratic institutions and, moreover, if it is strictly necessary, as a particular consideration, for the obtaining of vital intelligence in an individual operation. In the Court's view, any measure of secret surveillance which does not correspond to these criteria will be prone to abuse by the authorities with formidable technologies at their disposal. The Court notes that both the Court of Justice of the European Union and the United Nations Special Rapporteur require secret surveillance measures to answer to strict necessity. Id. § 73.

61. CJEU, Joined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [GC], 8 April 2014, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=511178> (last visited on June 30, 2020).

62. [A]bove all, the access by the competent national authorities to the data retained must be made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued and which intervenes following a reasoned request of those authorities submitted within the framework of procedures of prevention, detection or criminal prosecutions. Id. § 62.

cases *Tele2/Watson*<sup>63</sup> held that that national legislation conducting mass surveillance of electronic communications for combating crime violated the right to privacy and the right to data protection. In this case too, the Court reiterated that the data retention obligation must be targeted and limited, and the competent national authorities' access to the retained data must be subject to prior review by a court or an independent administrative authority. The data should be retained within the EU, and positive measures are needed to be taken for the protection of the data. European Union legislators cannot violate right to respect for private life and right to data protection, and it is judicial review which can determine the necessity, limitation and proportionality of the legislations restricting these rights.

The European Court observed that although the bulk interception in itself is not incompatible with the European Convention on Human Rights, conducting it without due process violates right to privacy and freedom of expression. In *Big Brother Watch v. The United Kingdom*<sup>64</sup> the regime of bulk interception in the United Kingdom violates right to privacy and freedom of expression because it did not provide for independent oversight. The Court also held that the regime for obtaining communications data from communications service providers violated the Convention because its use was unlimited, it was not subject to prior review by an independent national authority, and it did not protect journalists' sources. Recently, the Court of Justice of European Union in *Data Protection Commissioner v. Facebook Ireland Ltd, Maximillian Schrems*, held that EU-US data sharing agreement (Privacy Shield) failed to provide sufficient security to right to privacy and right to personal data of the European Union's users in the United States. On this ground, the Court invalidated the privacy shield. United States lack effective data protection laws, and the data privacy is not in accordance with General Data Protection Regulation (GDPR).

### **CONCLUSION**

The expansive, unregulated, and secretive use of social media monitoring tools by the governments to analyse our social media posts and information would undermine the ideals of democracy, which include right to privacy and speech rights. Public sphere that promotes

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63. *Joined Cases Tele2 Sverige AB v Post- och telestyrelsen (C-203/15) and Secretary of State for the Home Department v. Watson (C-698/15)*, ECJ, Judgment, 21 December 2016.

64. App nos. 58170/13, 62322/14 and 24960/15, decided on September 13, 2018.

65. Case C-311/18, decided on July 16, 2020.

inclusive and participative discussion on the issues can recognise the consequences of the mass surveillance programs, and would call for the protection of privacy in public. Independent oversight mechanisms are essential to bring transparency, proportionality and accountability in the government's use of social media monitoring tools.

## NEED FOR COMPETITION AND REGULATORY REFORM IN DEVELOPING COUNTRIES: CASE OF INDIAN COMPETITION LAW ENFORCEMENT

Dr. Vijay Kumar Singh\*

### INTRODUCTION

The present competition law in India, i.e. the Competition Act of 2002 (“the Act”) has been brought into action on the recommendations of a High Level Committee<sup>1</sup>. The Committee had observed that the Monopolies and Restrictive Trade Practices Act of 1969 (“MRTP Act”) is limited in its sweep and in the present competitive milieu it fails to fulfill the needs of competition law<sup>3</sup>. There were two sets of arguments at the time of introduction of this Competition Bill in the Parliament – one which raised apprehensions of India losing its bargaining power at the WTO negotiations, hence suggestions to defer the enactment; Indian industry, both private and public required safeguards and protection; the Bill would allow MNCs to capture Indian industry and services sector, hence no hurry be shown in passing the Bill and that MRTP Act may be suitably amended to meet the requirements. However, the another shade of opinions favoured the passage of the Bill, one of the prime arguments being that MRTP Act is based on old economic theory which is no longer efficacious enough to check the onslaught of foreign companies against Indian companies<sup>3</sup>.

The philosophy on which the MRTP Act was based was ‘concentration of economic power’<sup>4</sup>. The Committee which recommended for the MRTP Act, observed “...in a large number of industries, a single undertaking is the only supplier or at least has to its credit a very large

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1. SVS Raghavan Committee vide Order dated October 25, 1999 issued by the Department of Company Affairs. Nine members High Level Committee submitted its Report in two volumes. Volume-I of the Report was on Competition Policy and Law; Volume-II contained the concept Bill on Competition policy christened as ‘Indian Competition Act–Draft Bill’.
2. Para 6.1, Report of the Department-Related Parliamentary Standing Committee on Home Affairs, 93rd Report on Competition Bill, 2001 (August 2002) INDIA.
3. *Id.* Para 7.22, 7.23 and 7.24.
4. Report of the Monopolies Enquiry Commission, 1965, Vol I & II. Terms of reference of the Committee which recommended for the MRTP Act was to enquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive practices in important sectors of economic activity other than agriculture with special reference to (i) the factors responsible for such concentration and monopolistic and restrictive practices; (ii) their social and economic consequences, and the extent to which they might work to the common detriment; and to suggest legislative measures to cure the problem.

*portion of the market compared to its competitors.*<sup>5</sup>” It was more so driven by the sentiments of a common man, as noted by the MIC – “*in the eyes of the common man in India concentrated economic power is wholly evil.*”<sup>6</sup> This had also to do with our history of being ruled by *Company Sarkar*<sup>7</sup>. The things changed with the winds of liberalization, privatization and globalization in India, and the present competition law and policy is a result of gradual lifting of barriers in the markets of India<sup>8</sup>. However, the actual enforcement of the Act only began in 2009 (20th May) with all provisions, including combinations, being enforced only from June 2011. It is important to note this background to assess the regulatory reforms done so far and the need for more reforms and further an assessment as to how far they have been achieved.

### **NEED FOR COMPETITION AND REGULATORY REFORM**

There is no doubt that a robust competition policy promotes economic development<sup>9</sup>. It not only contributes directly, but also pushes the other policies indirectly to perform and contribute to economic development<sup>10</sup>. The Financial Sector Legislative Reforms Commission (FSLRC) in India recognized that competition is a powerful tool for the protection of consumers<sup>11</sup>. The FSLRC report is important as it recognizes the importance of competition in public policy discourses (in this case the financial policy of unification of various financial regulators) and reiterates that the Competition Act enshrines a non-sectoral approach to competition policy envisaging a detailed mechanism for better co-operation between financial regulators and the Competition Commission through which there is greater harmony in the quest for greater competition. This raises an important question as to what is the ultimate goal of competition law and policy (discussed *infra*).<sup>12</sup>

Public perception is of critical importance in success of any reform agenda. The role played by politicians, policy makers, civil servants and regulatory institutions is equally important. India has witnessed a series of reforms post 1991; however, some of them have seen a lot of resistance

5. *Id.* Chapter V: Monopolistic and Restrictive Practices.

6. *Id.* Chapter VI: Consequences of Concentration.

7. See Vijay Kumar Singh, Competition Law and Policy in India: The Journey in a Decade, 4 NUJS Law Review, 523 (2011).

8. Several changes were made over a period of time, for e.g. FERA changing to FEMA (regulation to management).

9. Anderson & Muller, Competition Policy and Poverty Reduction: A Holistic Approach, Staff Working Paper ERSD-2013-02 WTO, (20 February, 2013).

10. UNCTAD, The Role of Competition Policy in promoting economic development: The appropriate design and effectiveness of competition law and policy, TD/RBP/CONF.7/3, (30th August 2010). Also see OECD note by Secretariat on Factsheet on Competition and Growth, DAF/COMP/WP2(2013)11, (18th September, 2013).

11. Report of FSLRC, Government of India, (March 2013), vol. 1.

12. Vijay Kumar Singh, Competition Policy and Financial Regulations - case of a Unified Competition Regulator, 2013 34 E.C.L.R., Issue 7, 376-385.

from politicians and policy makers, like FDI in multi-brand retail, land reforms, and GST. It is pertinent to note that at the bottom of many of these reforms the objective have been promotion of competition, as is evident from the recommendations of FSLRC so also other reports on sectoral regulators including the one on Market Infrastructure Institutions<sup>13</sup>. There is also a significant role played by civil servants in their role as regulators, and appropriately, the 2nd Administrative Reforms Commission in India recommended for a 'code of ethics' for Regulators and recommended for evolution of objective, transparent and fair decision making processes and enforcement mechanisms<sup>14</sup>.

### ULTIMATE GOAL OF COMPETITION POLICY

This is indeed a difficult topic to address, and is rightly referred to as "*antitrust consumer welfare paradox*"<sup>15</sup>. At the outset, people would say that competition law and policy promotes 'consumer welfare', which is a term of economics with specific meaning<sup>16</sup>. On the other hand, many would argue that the goal of antitrust laws should be maximization of the aggregate welfare in a market<sup>17</sup>, that is, the sum of consumer surplus and producer surplus, irrespective of the distribution of surplus between these groups<sup>18</sup>.

While it is a truism that competition and consumer protection share a common goal, i.e. the enhancement of consumer welfare through lower prices, more innovation, higher quality and greater choice<sup>19</sup>, there may be other objectives also behind a competition policy. For e.g. in EU, goals of competition law transcends also to market integration, the protection of small and medium-sized companies, aspects of industrial policy, efficiency, and integration with other Community policy objectives<sup>20</sup>. Not the least, even social and political reasons have been taken

13. Report of the Committee on 'Review of Ownership and Governance of Market Infrastructure Institutions', (November, 2010) SEBI.

14. Chapter 2.8, Fourth Report of Second Administrative Reforms Commission, "Ethics in Governance", Government of India (January 2007).

15. Barak Y. Orbach, the Antitrust Consumer Welfare Paradox, Arizona Legal Studies Discussion Paper No. 10-(07, February 2011).

16. Means the benefits a buyer derives from the consumption of goods and services.

17. Total Welfare refers to the aggregate value that an economy produces, without regard for way that gains or losses are distributed. It is concerned with minimizing deadweight loss.

18. Dennis W. Carlton, "Does antitrust need to be Modernized?". 21 J. Econ. Persp. 155, 156-59 (2007). Also see Jack Kirkwood, "The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency", 84 Notre Dame Law Review, 191 (2008) – Demonstrating the Fundamental Goal of Antitrust Law is to Protect Consumers.

19. See OECD Policy Roundtable, The Interface Between Competition and Consumer Policies, DAF/COMP/GF(2008)10; also see Consumer Protection and Competition Policy, Planning Commission, Eleventh Five Year Plan, Chapter 11, available at [http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11\\_v1/11v1\\_ch11.pdf](http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11v1_ch11.pdf)

20. Laura Parret, "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition Law and Policy", European Competition Journal, (August 2010), 339, 359.

into account<sup>21</sup>. No doubt, the ultimate goal of competition law and policy is to promote consumer welfare (broader definition of the 'consumer' which even includes an intermediary in the supply chain distinguishing it from the definition in Consumer Protection Act) directly and indirectly, but in any case could not be to maintain inefficient business at the cost of taxpayers in the name of distributive justice<sup>22</sup>.

Competition Law in India goes far ahead of the developed jurisdictions in terms of providing for the principles of competition, as is evident from the definition of '*enterprise*' which is very broad and includes even the Government Department with an exclusion of Sovereign Functions<sup>23</sup>. The question remains on the effective enforcement of these provisions which will be discussed in the following paragraphs.

#### **The Public Interest Element**

The Department of Company Affairs (as it was then) had stated that public interest and consumer interest are not synonymous<sup>24</sup>. The Central Government in India is empowered to exempt any class of enterprises or any practice or agreement from the application of the Competition Act on the grounds of interest of security of the State or public interest, or treaty obligations, or sovereign functions<sup>25</sup>. In spite of lobbying from various quarters, like insurance, telecom, banking, etc., so far only exemptions granted have been in relation to agreements in shipping industry with a sunset clause of one year further limited to only some class of agreements<sup>26</sup>, banking sector from application of combination provisions that too in case of

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21. M. Motta, *Competition Policy: Theory and Practice*, Cambridge University Press, 2004, 30.

22. Herbert Hovenkamp, *Distributive Justice and Consumer Welfare in Antitrust*, (August 2011), available at [https://www.ucl.ac.uk/cles/research\\_initiatives/theory-history-comp-law/tabs/cycle\\_distributive\\_justice/hovenkamp\\_paper\\_13\\_july\\_2011](https://www.ucl.ac.uk/cles/research_initiatives/theory-history-comp-law/tabs/cycle_distributive_justice/hovenkamp_paper_13_july_2011).

23. Section 2(h) of the Competition Act, 2002 defines 'enterprise'. In this context a discussion in Minority opinion of CCI is worth noting, in which it was held that the activity of 'procurement of services for construction of roads and bridges by tendering' by a Public Works Department cannot be a sovereign function and thus covered under the definition of enterprise. Case 70 of 2014 (Rajat Verma against PWD Govt. of Haryana), dated 12.01.2015.

24. See, Para 7.16, Report, supra note 2 - Such protection will normally be for a limited period, to enable the particular sector to accept the challenge of competition, become competitive and compete domestically and globally. The Competition Bill, in most of its provisions, gives consumer interest primacy and place of pride. But there could be occasions and circumstances, when public interest may have a larger relevance than consumer interest. For instance, global competition may extinguish the domestic industries in a particular sector, for various reasons. In such a circumstance, in terms of cost benefit analysis, if the damage to public interest, namely, the larger society, is very significant, Government should have the power to exempt that sector (a class of enterprises) from the operation of Competition Law (presently available under Section 54 of the Competition Act 2002).

25. Section 54 of the Competition Act, 2002.

26. Vessel Sharing Agreements (VSAs), see <http://pib.nic.in/newsite/PrintRelease.aspx?relid=118581>.

failing banks<sup>27</sup>, and for mergers in oil and gas sector<sup>28</sup>. While compulsory licensing<sup>29</sup> is not the topic to be discussed in this paper, it is an important area necessitating reforms<sup>30</sup>.

*Mr. Narayana Murthy* in his CCI Annual Day Lecture<sup>31</sup>, emphasized the role of the government beyond its interface with businesses in the following words:

“It should be minimum and is to defend the country against foreign invaders; law and order; monetary policy and taxation; judiciary; efficient allocation of public resources like land; and running common good institutions or public works that benefit the society as a whole like roads, dams, harbors, commons and other sectors where the investment by private parties is infeasible. Services like education, healthcare, nutrition, ports and airports should ideally be run by the private sector. There are two important principles in this. One, only those who use these services should pay for these services based on their usage, and, second, the government should provide direct subsidy in the form of vouchers to people with income below a certain level for availing of services that are basic like education, healthcare, transportation and nutrition and shelter”.

This underlines the need for prioritization of state efforts in sustaining the momentum of competition reforms. One of the significant challenges would be to show to the common man that how competition enforcement results in reduction in prices, better choices and enhanced consumer welfare rather than pushing inefficiencies by Government handling activities which they are not good at.

### **IMPACT OF COMPETITION POLICY ON SUSTAINABLE DEVELOPMENT**

Achieving sustainable and inclusive growth and development requires a good policy mix that needs to take into consideration the specific economic, social and environmental circumstances

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27. Has exempted a banking company in respect of which the Central Government has issued a notification under Section 45 of the Banking Regulation Act, 1949 ('Banking Regulation Act'), from the application of the provisions of Sections 5 and 6 of the Competition Act for a period of five years. – see Ministry of Corporate Affairs notification S.O. 93 (E) dated 8th January, 2013.

28. See MCA notification dated 22nd November 2017 (exemption for 5 years), available [https://www.mca.gov.in/Ministry/pdf/Notification\\_27112017.pdf](https://www.mca.gov.in/Ministry/pdf/Notification_27112017.pdf)

29. See Naval S. Chopra and Dinoo Muthappa, “The Curious Case of Compulsory Licensing in India”, *Competition Law International*, Vol 8 No. 2. (August 2012).

30. For example, see the Draft National IPR Policy submitted by IPR think tank (Justice Prabha Sridevan – Chairperson), (19th December 2014), available at [http://dipp.nic.in/English/Schemes/Intellectual\\_Property\\_Rights/IPR\\_Policy\\_24December2014.pdf](http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/IPR_Policy_24December2014.pdf)

31. On the 6th Annual Day Lecture of CCI, available at <http://www.cci.gov.in/May2011/Advocacy/anmay2015.pdf>.

of a country<sup>32</sup>. Competition policy is one of the tools which can complement sustainable development along with the other policies.

### **Competition Policy and Industrial Policy interface**

One policy that can appear to conflict with competition is industrial policy<sup>33</sup>, which includes micro-industrial Government policies like reservation for the small scale industrial sector, privatization and regulatory reform, trade policy including tariffs, quotas, subsidies, anti-dumping action etc., state monopolies policy, and labour policy<sup>34</sup>.

Ensuring fair competition and protection of Small and Medium Sized Enterprises (SMEs) is the most common example of policy conflict. In India, the Parliamentary Committee examining the subject of Competition noted that:

Small-scale sector is also not proving beneficial to the consumers because of high cost of its products which is largely due to poor economy of scale as well as technological obsolescence. Therefore, small-scale sector, too, should be exposed to competition. This exposure of Indian industry to competition will herald the transition of an old economy to a new economy based on the new economic doctrine being pursued in the country for over last one decade. This transition will not only help Indian economy to adapt itself to changing environment but will also produce wealth and employment<sup>35</sup>.

The competition law of India does not allow any exemption to SMEs from application of the Act and accordingly in many instances they have been penalized (for cartelizing – bid-rigging in public procurement). The latest call of government regarding ‘Aatmanirbhar Bharat’ would need a relook on the support to be provided to the MSMEs at the same time balancing the competitive neutrality principles.

### **ROLE OF COMPETITION REGULATOR AND SECTORAL OVERLAPS**

There is a tendency to associate regulation with the post-privatization control of the utilities, however, language and practice of regulation has a much longer history<sup>36</sup>. One of the prominent rationales for regulating is monopolies and natural monopolies coupled with other factors like information asymmetry, unequal bargaining power, anticompetitive behaviour and predatory

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32. The Role of Competition Policy in Promoting Sustainable and Inclusive Growth, Note by UNCTAD Secretariat, (27th April, 2015), TD/RBP/CONF.8/6.

33. Peter Freeman, “Is Competition Everything?”, (2008) *Comp Law*, 214, 220.

34. Para 2.1, SVS Raghavan Committee Report, *supra* note 1.

35. Para 7.24, see Report at *supra* note 2.

36. Robert Baldwin, Martin Cave, Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice*, 2nd Edn, Oxford (2012) p.4.

pricing, etc.<sup>37</sup> While reforms have been in the key areas of public utilities, like Electricity, Telecommunication and internet, Broadcasting and Cable TV, posts, airports, railways, coal, etc., the focus of reform have been opening up of markets to private sector, either wholly or through Private-Partnership (PPP) mode, so as to allocate resources thereby improving general economic efficiency<sup>38</sup>. Given this thrust, it is not surprising that competition agencies are vitally interested in and affected by the reforms worldwide<sup>39</sup>. This has further led to conflicts between CCI and sectoral regulators due to legislative ambiguity or potential jurisdictional overlap or legislative omission<sup>40</sup>. In this context, the draft National Competition Policy had also recommended for appropriate coordination mechanism between CCI and sectoral regulators<sup>41</sup>. Be as it may, one of the key roles of Competition Regulators is to build “competition culture” by way of its enforcement actions and advocacy measures. Let us see how, CCI has made its mark.

#### **ENFORCEMENT ACTIONS BY CCI**

Competition Commission of India (CCI) has been termed one of the most effective regulators in India (another one being the Insolvency and Bankruptcy Board of India – IBBI) and this is so because of its prompt enforcement actions, enormous advocacy, focus on learning from mistakes and capacity building of its officers. However, still much needs to be done in terms of linking competition reforms agenda with various government agendas. This can be possible only with aggressive enforcement by more suo motu cases (igniting the active role) and pursuing its cases before higher courts consistently. An aggressive enforcement could only bring in reforms, which in turn would create competitive markets. Some of the important decisions by CCI which has contributed towards reform in some key sectors in India may be highlighted as follows:

**Real Estate** – CCI gave one of its significant orders in the DLF Case, imposing a penalty of INR

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37. *Id.* at p. 24.

38. See the Draft Regulatory Reform Bill 2013, available at <http://www.prsindia.org/uploads/media/draft/Draft%20Regulatory%20Reform%20Bill.pdf>

39. OECD, “Relationship Between Regulators And Competition Authorities”, DAF/CLP(99)8

40. Working Group on Competition Policy (2007) Chapter VII, para 7.2.5

41. Draft National Competition Policy of the Government of India (version July 27, 2011) available at [http://www.mca.gov.in/Ministry/pdf/DraftNationalCompetitionPolicyForIndia-28th\\_July2011.pdf](http://www.mca.gov.in/Ministry/pdf/DraftNationalCompetitionPolicyForIndia-28th_July2011.pdf) (Last visited on August 15, 2011). This draft is submitted by a Committee under the Chairmanship of Shri Dhanendra Kumar, former Chairman, CCI constituted by MCA vide its order F. No. 5/15/2005/IGC/CS dated June 8, 2011, available at <http://www.taxmann.com/taxmannflashes/whatsnew.aspx?styp=1&sid=6091> (Last visited on August 15, 2011). Version II of the Draft National Competition Policy 2011 was put up on the website of MCA for comments until September 19, 2011, available at [http://www.mca.gov.in/Ministry/pdf/Draft\\_National\\_Competition\\_Policy.pdf](http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf) (Last visited on October 8, 2011).

630 crores by which ripples were created in the real estate sector<sup>42</sup>. The Commission further recognized the need of a sectoral regulator in this area<sup>43</sup> and also provided for a model agreement (subject matter of abuse) on the directions of the Competition Appellate Tribunal (COMPAT)<sup>44</sup>, though not considered by Appellate Court at the later stage. The matter is presently pending before Hon'ble Supreme Court of India<sup>45</sup>. While DLF case has been important, similarly situated other real estate cases were closed by the Commission on the ground of finding no dominance in relevant market, even against the same DLF which was penalized in the aforesaid case<sup>46</sup>. The question is why not the theory of 'locked-in customers' was applied in these cases too, which has been later applied subsequently by the Commission in *Car Case*<sup>47</sup>.

**Insurance:** Both life insurance and general insurance business in India were dominated by the public sector enterprises<sup>48</sup>. Post introduction of regulatory reforms in the Insurance Sector and coming up of Insurance Regulator (IRDA), the services in the insurance sector has definitely improved, for example there is now a 14-day cooling off period available to the insured to cancel the policy if not satisfied, mandatory training and code of conduct for insurance agents, tap on deceptive advertising, etc. Recently, CCI found the four public sector insurance companies blatantly engaging into bid-rigging in response to the tenders issued by the Government of Kerala for implementation of RSBY/ CHIS schemes, and accordingly imposed penalties

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42. Order of CCI in Case No. 19 of 2010 (Belaire Owner's Association v. DLF) dated 12.08.2011.

43. *Id.* Para 12.114...."The responsibility of such authorities assumes even greater importance in view of the fact that these consumers are normally not in a position to organize or act meaningfully for redressal of their grievances, or the protection of their interests, even though often their life-savings may be at stake. The absence of any single sectoral regulator to regulate the real estate sector in totality, so as to ensure adoption of transparent & ethical business practices and protect the consumers, has only made the situation in the real estate sector worse."

44. Order in Appeal nos. 20 of 2011, 22 of 2011, 23 of 2011, 12 of 2012, 19 of 2012, 20 of 2012, 8 of 2013, 9 of 2013, 11 of 2013 and 29 of 2013 dated 19.05.2014.

45. See Civil Appeal no. 6328 of 2014 (DLF v. CCI) and batch of related appeals.

46. For e.g. see Case 29 of 2012 (DGCOM Buyers & Owners Association, Chennai against DLF), decided on 27.11.2012; Case 10 of 2011 (M/s Rajarhat Welfare Association & Anr. against DLF Commercial Complexes) decided on 25.05.2011 – [DLF enjoying a dominant position in developing commercial space in Kolkata has neither been established by the informant nor it has been substantiated from the information available in public domain].

47. Order of CCI in Case 3 of 2011 (Shamsher Kataria and Honda Siel and Ors.) dated 25.08.2014 and 27.07.2015  
Thus, in the opinion of the Commission, a purchaser of a product in the primary market is to a great extent locked in with the primary product and the feasibility of switching to another primary product to avoid a price increase in the secondary market of spare parts or repair services is greatly limited.

48. LIC of India in Life Insurance and the four Public Sector Insurance Companies in General Insurance, i.e. M/s National Insurance Co. Ltd., New India Assurance Co. Ltd., Oriental Insurance Co. Ltd. and United India Insurance Co. Ltd.

ranging from 100 crores to 250 crores<sup>49</sup> This decision must have sent out a strong signal to PSUs that their natural monopoly background would not help in taking an exemption from the applicability of Competition Law in India.

**Electricity:** The Electricity Act, 2003 opened up the power market in India to competition with introduction of “open access”, identification of ‘electricity trade’ as a distinct activity, protection of interest of electricity consumers, etc.<sup>51</sup> Recently, Hon’ble Supreme Court of India held that a distribution licensee (BEST) in an area cannot stop another distribution licensee (TPC) to lay down its network and supply electricity to willing consumers, in spite of the fact that other distribution licensee (BEST) has been recognized as ‘Local Authority’<sup>52</sup>. A case on this issue was also brought before CCI, which got covered through the aforesaid decision of the Apex Court. The Apex Court of India has already given due recognition of the objective to promote competition through Electricity Act, 2003.

**Transportation:** An exemption into the shipping industry has already been noted supra. There are issues surrounding the Airlines sector including the allegations of cartelization in hiking of prices during festivals and peak seasons<sup>53</sup>, some regulatory barriers like 5/20 rule<sup>54</sup>. Air India, the public sector airline, has opposed relaxation of this rule recently<sup>55</sup>. In another case relating to Railways<sup>56</sup>, CCI highlighted the larger issue of policy design for incentivizing private participation in container transport and advised the Ministry of Railways to overcome the issue of frequent changes in haulage charges which acts as disincentive. Further, “the Commission noted that there is a conflict of interest in as much as Railway Board / IR exercise multiple roles as a licensor and operator, apart from owning the railway network. In view of this, it is desirable

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49. Suo Motu Case 02 of 2014 (In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for RashtriyaSwasthyaBimaYojna / Comprehensive Health Insurance Scheme) dated 10.07.2015 available at <http://www.cci.gov.in/May2011/OrderOfCommission/27/022014S.pdf>

50. [http://www.ixindia.com/Uploads/Reports/14\\_01\\_2015IEX\\_India\\_IPM\\_Report.pdf](http://www.ixindia.com/Uploads/Reports/14_01_2015IEX_India_IPM_Report.pdf)

51. Brihanmumbai Electric Supply and Transport (BEST) Undertaking v. Maharashtra Electricity Regulatory Commission (MERC) and Ors., AIR2015SC1224.

52. Case 43 of 2014 (Anila Gupta v. BEST Undertaking) and Case 06 of 2010 (Anila Gupta).

53. See Ref. Case 01 of 2011 (In Re: Domestic Airlines). Also see the news report <http://timesofindia.indiatimes.com/business/india-business/CCI-probes-airfares-Govt-says-carriers-free-to-fix-price/articleshow/46215144.cms>.

54. Requirement to have at least 5 years of flying record and a fleet of 20 aircrafts, before being permitted to fly abroad has been causing impediments for airlines like Vistara and Air Asia to expand..

55. [http://www.moneycontrol.com/news/special/air-india-asks-government-to-reconsider-easing520-rule\\_1552241.html](http://www.moneycontrol.com/news/special/air-india-asks-government-to-reconsider-easing520-rule_1552241.html).

56. Para 21.1, Arshiya Rail Infrastructure Limited (ARIL) v. Ministry of Railways (MoR) through the Chairman, Railway Board (KB) and Container Corporation of India Limited (CONCOR), [2013]112CLA297(CCI).

that these functions be delegated to independent entities<sup>57</sup>.

## CONCLUSION

India, in its last six years of competition law enforcement, has shown the need for competition and regulatory reform, which is quite evident from the four sample cases discussed aforesaid. The aforesaid discussion shows that competition law and policy can greatly contribute to the development of economy and in turn create jobs and employment for youth in the country. However, this momentum of reforms needs to be sustained over a period. It has to be done both at the policy level and the enforcement level.

*Tony Posner* identified the legislative mandate, accountability, due process, expertise and efficiency as the five criteria for good regulation<sup>58</sup>. Applying these criterion in India, one can find that while the mandate of competition law and policy in India had been pan India, the enforcement pattern shows a skewed enforcement in only northern part of the country (near to the seat of the Commission i.e. New Delhi). No doubt that the Commission under its mandate of advocacy has worked exceptionally to build awareness about this law and tried to instill 'competition culture', a lot still needs to be done. Till now, the Commission's enforcement priorities have been to address the information received (the passive role). There needs to be done a lot on the front of "promoting and sustaining competition in markets" in India (the active role). The cases decided by the Commission have been appreciated by the stakeholders, but the procedural issues under appeal and time consumed by the same are taking away the sheen from these deterrent orders in the long run. There is a strong message needs to be given to the fear among some that the Commission will not turn into another MRTP Commission over time.

There is a need to assess the impact of competition enforcement, the competition agency must rate itself on the basis of its work carried out both in terms of enforcement and advocacy. Good agency performance consists of using superior administrative techniques to achieve good substantive results, including establishment of effective internal quality control mechanism and a commitment to seek continuing improvements in its operations and in its substantive programs<sup>59</sup>. For example, it needs to be assessed whether penalty in cement cartelization case

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57. Id.

58. Tony Posner, *Law and the Regulators*, Clarendon Press, Oxford (1997). 26.

59. William E. Kovacic, "Rating the Competition Agencies: What Constitutes Good Performance", *Geo. Mason L. Rev.*, Vol 16: 4 (2009) 903.

deterred the cartelists and consumers were benefited, whether the decisions of the Commission makes impact on policy changes or not (for example, real estate sector discussed above, Coal India case, etc.).

To achieve consistency, it is important that the cases under Competition Act are decided fast even by appellate courts. Matters when linger in Higher Courts just waiting for final interpretation of a term, the actual implementation of the policy suffers. For example, the issue whether CCI may impose penalty on the basis of 'relevant turnover' or just 'turnover' was pending before the Hon'ble Supreme Court of India for a long time due to which a number of cases awaited its final disposal. There has been a long-felt need for having a penalty guidelines. Such issues cannot be kept waiting for its usual turn in the litigation, which would require 5-6 years for a policy to settle. Comparatively, setting of jurisprudence under IBC has been very quick both at the regulator's level as well as at the judicial level.

There is another important requirement of capacity building and knowledge management. Jean Tirole (Noble Prize winner of 2014) highlighted how it is important in competition analysis that the regulators "benchmark the firm's performance with similar firms", and an action otherwise would lead to poor regulation. That's the reason he advocates for "*information light policies*", i.e. which does not require too many specialist enquiries to regulate. Two sectors cannot be treated with same set of competition assessment, for e.g. the nature of two-sided markets (search engines) may not be similar to a normal market. Another significant impediment is authentic data. It has been observed in all sectors that a significant chunk is thriving in unorganized platform, but why? Reason is absence of proper policy framework. People fear to enter the system formally which puts them into unnecessary regulatory compliances.

The aforesaid discussion points out that Government can use the competition law and policy tool to promote sustainable economic growth and removing inefficiencies in the system to the benefit of poor and downtrodden. The task is to prioritize, converge, and implement.

## PANDEMIC COVID-19, PATENTS AND PUBLIC HEALTH IN INDIA

Dr. V. K. Ahuja\*

### INTRODUCTION

The pandemic Covid-19<sup>1</sup> has infected around 75 million people worldwide and killed more than 1.6 million of them. In India alone, around 10 million people have been infected from the pandemic and more than 1.4 lakh people lost their lives.<sup>2</sup> The deadly virus originated from Wuhan city of China from where it spread in the entire world. It remains a mystery to trace the source of the virus. There are various versions on its source ranging from “bats”<sup>3</sup> to “seafood market”<sup>4</sup> to “biological weapon from Wuhan labs”<sup>5</sup>. There seems to be not even a single person of the world population of 7 billion people who has not been affected by the pandemic in one way or the other. Apart from health, it caused economic devastation and forced people to take extreme steps including to commit suicide. A lot of deaths can be attributed to this pandemic even though the people died otherwise, such as the migrant workers died in accidents or otherwise while walking to their native places, post-covid complications, suicides, etc.

Covid-19 is the most severe pandemic after influenza pandemic of 1918 which was caused by an H1N1 virus. There have been few more pandemics in between 1918 to 2019,<sup>6</sup> but none was so deadly as influenza pandemic or Covid-19. In influenza pandemic, 500 million people were infected and 50 million people lost their lives globally. There was no vaccine or medicine at that

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1. The genesis of “Covid-19” can be traced to “Coronaviruses (CoV)” which are “a large family of viruses that cause illness ranging from the common cold to more severe diseases”. A “novel coronavirus (nCoV)” was identified on January 7, 2020 and was named as “2019-nCoV”. Subsequently, it was renamed as “Covid-19 virus”. See Coronavirus Disease (COVID-19) Pandemic, WORLD HEALTH ORGANIZATION available at <https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19> last visited on Aug 25, 2020).
2. See Covid-19 Coronavirus Pandemic, Worldometer available at <https://www.worldometers.info/coronavirus/> last visited on December 13, 2020.
3. See also David Cyranoski, The biggest mystery: what it will take to trace the coronavirus source, NATURE RESEARCH JOURNAL available at <https://www.nature.com/articles/d41586-020-01541-z>. last visited on Aug 25, 2020.
4. Lauren M. Sauer, M.S., What Is Coronavirus? John Hopkins available at <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus> last visited on Aug 25, 2020.
5. Sudhanshu Tripathi, Is Corona virus a new bio-weapon?, the Times Of India Blogs dated April 23, 2020 available at <https://timesofindia.indiatimes.com/blogs/abhiram/is-corona-virus-a-new-bio-weapon/> last visited on Aug 25, 2020.
6. See also 1918 Pandemic (H1N1 Virus), Centers for Disease Control and Prevention available at <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> last visited on Aug 19, 2020.

time to protect people from the pandemic. Therefore, the entire efforts to contain that pandemic were focused on “non-pharmaceutical interventions such as isolation, quarantine, good personal hygiene, use of disinfectants, and limitations of public gatherings”, etc.<sup>7</sup>

In case of Covid-19 also, there was no vaccine or other medicine to treat the disease for one year and like in case of influenza pandemic, non-pharmaceutical measures proved effective to certain extent. Plasma therapy however, proved to be useful to treat certain patients and the governments opened plasma banks requesting the people who got cured from Covid-19 to donate plasma. The recovery rate in India was better than the average rate of the world and the mortality rate per million was quite less comparatively. The question arises what caused this pandemic to infect so many people and claim so many lives worldwide and in India in particular?

The World Health Organization (WHO) works throughout the world “to promote health, keep the world safe, and serve the vulnerable”. As far as health emergencies are concerned, it prepares “for emergencies by identifying, mitigating and managing risks”<sup>8</sup>. The WHO was obligated to inform the world about the virus and its nature when the pandemic broke out in Wuhan, China. It is alleged that WHO failed in its responsibility of alerting the world timely and relied on the views of China, which kept on misleading it. On March 11, 2020, the WHO announced “Covid-19 outbreak as a pandemic”<sup>9</sup>, by then it was too late and the virus had already started spreading in various countries. The US and European nations were the early victims of this pandemic. The role of WHO was sharply criticized and the United States first stopped financial assistance to WHO and subsequently withdrew from it.<sup>10</sup> The situation went out of control in various countries. The article discusses the right to health of people under Constitution of India as well as the government’s obligation to use patent law in public interest to overcome the pandemic.

### **RIGHT TO HEALTH IN INDIA**

“Health” is defined under the Constitution of WHO, 1946 as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”<sup>11</sup>. It has also

7. *Ibid.*

8. See What we do, World Health Organization available at <https://www.who.int/about/what-we-do> last visited on Aug 25, 2020.

9. See Coronavirus disease (COVID-19) pandemic, World Health Organization available at <https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19> last visited on Aug 19, 2020.

10. See also US formally notifies UN of decision to withdraw from Who, India Times Dated July 8, 2020 available at <https://economictimes.indiatimes.com/news/international/world-news/us-formally-notifies-un-of-decision-to-withdraw-from-who/articleshow/76845421.cms> last visited on Aug 19, 2020.

11. Preamble, Constitution of the World Health Organization, 1946.

been stated that without any kind of distinction on the basis of race, political belief, religion, social or economic condition, “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being” and the Governments are under an obligation to protect health of their peoples. This obligation can be performed by making provisions of “adequate health and social measures”<sup>12</sup>.

Right to health is recognized in Universal Declaration of Human Rights (UDHR) which was adopted in 1948. The UDHR recognizes the right to a “standard of living adequate for the health and well-being” including medical care for every person. Special care and medical assistance for motherhood and childhood is also recognized.<sup>13</sup> Though UDHR is a Declaration not a treaty, its provisions are applicable as customary international law. The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 also recognizes the right to health. Article 12 recognizes the right to “the enjoyment of the highest attainable standard of physical and mental health”. The State Parties are obligated to take steps necessary to reduce the “stillbirth-rate and infant mortality”; prevent, treat and control the “epidemic, endemic, occupational and other diseases”; and ensure “all medical service and medical attention in the event of sickness”. This is a comprehensive provision in comparison to UDHR and obligates State Parties to take certain positive measures to ensure the fulfillment of aforesaid conditions in their jurisdictions. It is a binding instrument and India is a party to it. Apart from that, the Convention on Right to Child (CRC),<sup>14</sup> and Convention on Rights of Persons with Disabilities (CRPD)<sup>15</sup> also recognize the right to health of Children and persons with disabilities (PwD) respectively.

In India, the right to health has not been mentioned in the Constitution as such. There are couple of provisions in the Directive Principles of State Policies (DPSP) dealing with health; but there is no direct provision laying down the right to health of persons. Article 39(e) obligates State to direct its policy to secure that “the health and strength of workers” are not abused. According to Article 41, the State is obligated to “make effective provisions for securing the right to... public

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12. *Ibid.*

13. Article 25, UDHR, 1948.

14. Articles 24-25 of the Convention on the Rights of the Child lay down comprehensive provisions on the right to health of Children.

15. Article 25 of the Convention on Rights of Persons with Disabilities lays down comprehensive provisions on the right to health of persons with disabilities.

assistance in cases of ... old age, sickness and disablement". These provisions are to be made "within the limits of its economic capacity and development". State has also to make "just and humane conditions" for maternity relief.<sup>16</sup> Further, as a primary duty, the State is obligated to raise "the level of nutrition and ... the improvement of public health"<sup>17</sup>. The provisions of DPSP are guiding principles and should be taken into account by the State while making its laws and policies for the protection of public health.

As there is not direct provision in the Constitution of India on right to health, the Supreme Court in many cases has held that the same is covered under Article 21.<sup>18</sup> In *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, the Supreme Court stated that "the right to life enshrined in Article 21 can not be restricted to mere animal existence. It means something much more than just physical survival"<sup>19</sup>. In *Paschim Banga Khet Mazdoor Samity v. State of West Bengal & Anr.*,<sup>20</sup> the Supreme Court observed that an obligation is imposed on the State to "safeguard the right to life of every person". It is of paramount importance to preserve the human life. The Court further observed:

"The Government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21"<sup>21</sup>.

The aforesaid observations of Supreme Court in *Paschim Banga* case are very significant and ought to be followed by Governments in all the cases. Detailed guidelines were laid down in this case by the Supreme Court. The question is whether governments are following the rulings of this case in letter and spirits. The answer is a painful no.

Both Central Government and State Governments have miserably failed to protect the public health during pandemic Covid-19. In the initial phase of pandemic, lack of testing kits, beds, PPE kits and masks, refusal of admission in the hospitals, unhygienic conditions in many government hospitals are some of the examples where governments failed in their duties. It goes

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16. Article 42, Constitution of India.

17. *Id.*, Article 47.

18. See for example, *Bandhua Mukti Morcha v. Union of India & Others*, 1984 AIR 802; 1984 SCR (2) 67; *Paschim Banga Khet Mazdoor Samity v. State of West Bengal & Anr.*, 1996 SCC (4) 37, JT 1996 (6) 43.

19. 1981 AIR 746, 1981 SCR (2) 516.

20. 1996 SCC (4) 37.

21. *Id.*, para 9.

without saying that governments were not in a position to handle a pandemic of this magnitude. After initial lockdowns were lifted, the numbers of patients increased by leaps and bounds. The private hospitals did not show any mercy and charged the patients exorbitantly. The horrifying data of persons infected and dead shows that India's policies went wrong and resulted in wide scaled violation of right to health.

The Supreme Court took *suo moto* cognizance of the pathetic conditions of the patients and their relatives and passed an order on 12 June 2020 stating that “the State on whom the duty lies to take care of health of its citizens cannot abdicate its responsibility of ensuring that all hospitals including Government hospitals take care of the Covid-19 patients. ... The State and its officers are also duty bound to ensure that patients are taken care, attended, provided all medical facility, the hospitals have necessary infrastructure and staff”<sup>22</sup>. The Court also directed the States to increase the testing of Covid-19. The Court expressed its displeasure on the way the dead bodies were being handled. States were directed to take “appropriate notice of the status of patients’ management in the Government hospital” and take “remedial action”<sup>23</sup>.

Prior to this also, the Supreme Court took *suo moto* cognizance on 16 March 2020 with respect to spread of pandemic in prisons as social distancing was not being followed there due to excessive number of prisoners. The Court directed the States to start taking the appropriate steps to prevent the spread of pandemic among the prisoners.<sup>24</sup> These orders of Supreme Court were primarily the endorsement of its earlier decisions.

India, being a welfare society is responsible to provide health cover to all its citizens. The problem however is that with a population of 1.35 billion, India does not spend much of GDP on health and has “lowest densities of health workforce with 7 physicians and 17 nurses per 10,000 people as against the global average of 13.9 and 28.6 respectively”<sup>25</sup>. Being the highest medical research organization of India, the Indian Council of Medical Research (ICMR) was expected to take certain policy decisions for the country to contain the virus, but the decisions taken by it were not consistent. One thing is crystal clear that India was not prepared to handle this pandemic. This ultimately is to be seen as State's failure to protect the right to health as guaranteed by the Constitution under Article 21.

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22. In Re the Proper Treatment of Covid-19 Patients and Dignified Handling of Dead Bodies in the Hospitals etc., *Suo Motu Writ Petition (Civil) No(s). 7/2020* dated 12-06-2020.

23. *Ibid.*

24. In Re: Contagion of Covid-19 Virus in Prisons, *Suo Motu Writ Petition (Civil) No. 1/2020* dated 16-03-2020.

25. T. Jacob John and Zarir F. Udawadia, India's Covid-19 Unpreparedness, *TIMES OF INDIA*, August 4, 2020.

**PANDEMIC COVID-19 AND INDIA**

India took precautionary measures well in time for the prevention of the spread of Covid-19. The Central Government for the very first time announced “*Janata Curfew*” on 22 March 2020. The response of people was very good and they complied with it. Subsequently, Lockdown-I was announced on 25 March 2020 which was as good as curfew. There was a fear in the mind of public with respect to the pandemic. The lockdown was extended from time to time till 30 June 2020 with more relaxations and revised guidelines and advisories.<sup>26</sup>

There were mainly two fold purposes of lockdown – (i) to prevent the virus from spreading and infecting more people; and (ii) to make preparations with respect to medical facilities to handle the situation immediately after the lifting of lockdown. When the first lockdown was imposed, there were less than 500 cases of Covid-19 and 10 deaths reported. It was expected that the pandemic would be controlled, but unfortunately it turned out to be otherwise. Several reasons can be attributed to the spread of pandemic. All of sudden the labour became unemployed and started migrating to their native places defying the advisories issued by the Central Government. The Governments realized that economic activities were also essential as the lockdowns had badly hit the poor and marginalized sections of the society. Further, the Governments were losing revenue in absence of economic activities and the funds were going dry. In Delhi, the State Government was not in a position to pay salary to its employees including doctors who were working day and night. Therefore, lockdown was lifted at a time when the cases were not stabilizing but rising. The initial arrangements made by the government throughout the country turned out to be inadequate.

The Governments tried to improve upon the situations by adding more beds, hiring hotels and converting them to Covid Centers, providing PPE kits and mask in adequate numbers, increasing testing at a faster pace, providing ventilators, etc. However, the problem was that there was no vaccine for the treatment of Covid-19. It is easy to handle a pandemic for which treatment is available, but it is very difficult to deal with a pandemic in absence of a treatment. Therefore, in case of Covid-19 it became essential to rely on “non-pharmaceutical interventions” as already stated.

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26. Fahad Hasin and Ishaan Bansal, Of 5 Covid-19 Lockdowns in India, 1st Phase Most Effective, Shows Data, but Policy Changes have not Eased Public Movement, FIRST POST dated June 1, 2020 available at <https://www.firstpost.com/health/of-5-covid-19-lockdowns-in-india-1st-phase-most-effective-shows-data-but-policy-changes-have-not-eased-public-movement-8434601.html> last visited on Aug7, 2020.

The pharmaceutical companies in many countries are busy in R&D to find a treatment for Covid-19. Some of them got the breakthrough as claimed by them. The clinical trial is over in some countries and the vaccination has started. Vaccination is likely to start in most of the countries in the first quarter of 2021. Now once the vaccine is there, the role of Patent law comes into picture as the companies will apply for patents for their invention and claim a monopoly for 20 years. How the Indian Patents Act, 1970 maintains a balance between the rights of applicants for patent/patentees and the public interest has been discussed below.

### **PATENTS ACT, 1970 AND INBUILT SAFEGUARDS**

Senator Kefauver who headed the United States Senate Committee stated in 1961 that “India ranks amongst the highest priced nations of the world” as far as the drugs are concerned.<sup>27</sup> That unfortunate situation existed during the Patents Act, 1911 which continued till 1972. The Patents Act 1970, which replaced the Patents Act 1911, came into force in 1972. The drafting of Patents Act 1970 was a cool headed exercise focused on making the drugs and pharmaceuticals available to the masses at affordable prices.

Originally, the Patents Act, 1970 provided only “process patents” for drugs and pharmaceuticals<sup>28</sup> with a term of “7 years from the date of application or 5 years from the date of sealing”, whichever is shorter.<sup>29</sup> The impact of these provisions was that any patent for drugs and pharmaceuticals was to be given in process only and not in product, which meant that others could also reproduce the same drug with a different process. Further, such patent would last at the most for 7 years after which it had to fall in public domain. Once the patent in drug expired, its generic versions were launched in the market at substantially reduced prices. The original Patents Act, 1970 helped generic industry to grow in India at much faster pace and India was known as the “Pharmacy of the World”. The Patents Act, 1970 succeeded in its objective by making the drugs and pharmaceuticals available to masses at reasonably affordable prices. There was, however a negative side also of the original Patents Act, 1970. The new drugs were not launched in the Indian market in time because of the aforesaid provisions of the Patents Act. A twist came in 1995 when TRIPs Agreement was adopted as a part of “Final Act Embodying the Results of Multilateral Trade Negotiations of Uruguay Round” (popularly known as WTO

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27. N. Chandiramani, “GATT and India”, *Mainstream*, 16 April 1994, p. 9.

28. Section 5, Patents Act, 1970 as originally enacted.

29. *Id.*, section 53(1).

Treaty). The TRIPs Agreement made it mandatory for all Members to grant “product patents” in the area of drugs and pharmaceuticals and that too for “a period of 20 years from the date of application”. The developing countries had a “transition period” of 10 years to move from process patent to product patent. The Patents Act, 1970 was amended to bring it in conformity with the provisions of TRIPs Agreement. The legislature while amending the Patents Act ensured that there were certain inbuilt safeguarding provisions in the Patents Act which would take care of public health.

**(i) Use of Invention for Government Purposes**

Chapter XVII of the Patents Act, 1970 lays down provisions with respect to the use and acquisition of inventions for government purposes. The provisions in this Chapter give the Central Government wide powers to use an invention for its purposes.

According to section 100(1), where “an application for patent has been made” or where patent has been granted for an invention, the Central Government or any authorized person “may use the invention” for the Government. Further, “the right to make, use, exercise and vend an invention” for Government purposes shall also include the right to sell goods made on the basis of that invention on “non-commercial basis”. The purchaser of those goods shall deal with them as if the same were purchased from the patentee.<sup>30</sup>

Section 100(4) enables Central Government to authorize any person in a situation where “an application for patent has been made” for an invention or where the patent has been granted, “to make, use, exercise or vend the invention or import the machine, apparatus or other article or medicine or drug covered by such patent”.

In case of endemic or pandemic, compulsory licence may be granted under section 92 to address the “public health problems”, provided a patent has been granted for the invention. But in a situation where patent has not been granted but the application has been filed for patent, section 100(4) can be invoked and authorization may be given to any person to use that invention. Thus, if a pharmaceutical company files an application for patent for its vaccine in India, the Central Government can use section 100(4) in such a case and authorize any person to make that medicine without seeking permission from the company.

In addition to aforesaid provisions, the Central Government is also empowered to acquire the

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30. Section 100(6), Patents Act, 1970.

invention and patent for a “public purpose”. Where the Government takes such a decision, all rights related to invention or patent as the case may be, stands transferred to and vests in it. The Government is obligated to give a “notice of acquisition” to the applicant, patentee or the interested person and pay compensation which may be agreed upon between them or which is determined by the High Court as “just” taking certain relevant factors into account.<sup>31</sup> The Patents Act, 1970 therefore, has a very effective mechanism to deal with a situation like the Covid-19 by acquiring an invention or patent which may be required by the Central Government for protecting public health. The protection of public health during an unprecedented situation as the present one is very much covered under “public purpose” as envisaged by this section.

**(ii) Parallel Importation of Drugs and Pharmaceuticals**

The concept of parallel importation is extremely important in the field of drugs and pharmaceuticals. As the prices of patented drugs and pharmaceuticals are very expensive, the provision related to parallel importation enables a person to import the patented drugs from a country where it is cheaper than India. Ordinarily, the right to importation lies with the patentee.<sup>32</sup> However, the Patents Act, 1970 provides that it “shall not constitute an infringement” of patents, if any person imports patented products from “a person who is duly authorized under the law to produce and sell or distribute the product”<sup>33</sup>.

The concept of parallel importation is related on “the principle of exhaustion”. The principle of exhaustion means that the rights of IPR owner get exhausted on the first sale of the product. This means that once the IPR owner has sold his products in the market, he does not have any further control over the movement of the goods sold lawfully. Any person can buy or import those goods and sell them anywhere he likes provided if he exports those goods to a country, that country should also have adopted the principle of exhaustion. The TRIPs Agreement also lays down the provision with respect to exhaustion. It provides that “[N]othing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights” for the purpose of dispute settlement.<sup>34</sup> The TRIPs Agreement leaves it to Member Countries to adopt or not to adopt a law regarding exhaustion of rights. There can be three types of exhaustion: (i) “national exhaustion”; (ii) “regional exhaustion”; and (iii) “international exhaustion”. The language of section 107A(b)

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31. *Id.*, section 102.

32. Section 48(a), Patents Act, 1970.

33. *Id.*, section 107A(b).

34. Article 6, TRIPs Agreement.

makes it clear that India follows the principle of international exhaustion.

Parallel importation of drugs and pharmaceuticals result into the availability of drugs and pharmaceuticals at comparatively cheaper rates as these drugs may be imported from a country where the prices of such drugs are cheaper than the price in India. A pharmaceutical company may apply for patent for its vaccine in various countries may be under Patent Co-operation Treaty (PCT), provided its country is a Party to PCT. Since the vaccine is to treat a pandemic, almost all the nations may be requiring that vaccine. The price of the vaccine may vary significantly from country to country depending upon their economic development, currency valuation, affordability of people, etc. It is lawful for people in India to import that vaccine from a country where it is being sold at comparatively cheaper price and meet the demands in India without infringing the rights of patentee.<sup>35</sup>

### **(iii) Compulsory Licences**

Compulsory licence is a powerful tool in the hands of Government to address the public health issues. Compulsory licence may be issued in normal circumstances<sup>36</sup> as well as in special circumstances, such as “national emergency” or in “circumstances of extreme urgency” or in case of “public non-commercial use”<sup>37</sup>. According to section 92, where the Government is satisfied that aforesaid special circumstances exist and compulsory licence should be granted, it may make a declaration to that effect at any point of time after the sealing of patent. Thereafter, on the application of any person interested, the Controller may grant compulsory licence to the applicant on such terms and conditions as he thinks fit in order to ensure that the patented product is available to the public at the “lowest prices” and the patentee derives a “reasonable advantage”.

In (i) a “circumstance of national emergency”; or (ii) a “circumstance of extreme urgency”; or (iii) a “case of public non-commercial use”, which may arise including “public health crises” relating to “HIV/AIDS, tuberculosis, malaria or other epidemics”, the Controller is not to apply the provisions of section 87 while granting compulsory licence. However, the Controller is obligated to inform the patentee in this regard at the earliest.

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35. See also V.K. Ahuja, *Intellectual Property Rights In India* (2015), pp. 580-81.

36. Section 84, Patents Act, 1970.

37. *Id.*, section 92.

Section 92 was inserted by Patents Amendment Act 2002 which became effective from 20 May 2003. The genesis of section 92 may be traced to “Doha Declaration on the TRIPs Agreement and Public Health” which was adopted on 14 November, 2001. The Declaration recognized the “gravity of the public health problems” which were afflicting “developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics”. The Declaration also recognized the concern of prices of medicine due to IPRs. It was also agreed that Members were not prevented from taking measures to “protect public health”; and “access to medicines for all” should be promoted.

The right of members to grant “compulsory licences” and the “freedom to determine the grounds” for granting such licences were also recognized. The right of Members to decide “what constitutes a national emergency or other circumstances of extreme urgency” remains unfettered. Further, the “public health crises”, including those relating to “HIV/AIDS, tuberculosis, malaria and other epidemics”, could represent a “national emergency” or other “circumstances of extreme urgency”. The flexibilities in TRIPs Agreement recognized by Doha Declaration were adopted by the Legislature in the Patents Act, 1970 by the 2002 amendment.

The provisions laid down in the clauses of Doha Declaration are very useful to deal with the present situation of Covid-19. Though the word “pandemic” has not been used in the Doha Declaration, its provisions may be interpreted in such a manner as to include “pandemic”. India can also use section 92 to grant compulsory licence for any patented drug or pharmaceutical required for the treatment of disease caused by the pandemic.

It is noteworthy that an amendment to TRIPs Agreement was entered into force on January 23, 2017. The amendment is aimed at “improving poor countries’ access to affordable medicines”. A decision on “patents and public health” which was adopted originally in the year 2003 is made permanent by the amendment. The 2003 decision removed the obstacle to affordable drug imports for the developing and least-developed countries which did not have manufacturing capacity and were facing public health problems. They are allowed to seek generic version of the patented medicines from another country under “compulsory licensing” arrangements which would manufacture the same and export the entire consignment to the country making the request.<sup>38</sup>

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38. See also Amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), WTO, available at [https://www.wto.org/english/tratop\\_e/trips\\_e/tripsfacsheet\\_e.htm#:~:text=An%20amendment%20to%20the%20WTO's,health%20originally%20adopted%20in%202003](https://www.wto.org/english/tratop_e/trips_e/tripsfacsheet_e.htm#:~:text=An%20amendment%20to%20the%20WTO's,health%20originally%20adopted%20in%202003) last visited on Aug 15, 2020.

The purpose of this amendment was to address the issues of those developing or least-developed countries which do not have manufacturing capacity or have insufficient capacity. Such countries were not in a position to make use of the flexibilities recognized in TRIPs Agreement as no person would be able to work in those countries even if compulsory licence was granted. Therefore, it was essential to provide the assistance of the third country which could manufacture the generic version of the patented drugs for them. The generic drug manufacturing country cannot use those drugs for its internal consumption. The third country will only manufacture the medicines as per the order of such countries and export the entire consignment to them.

It was agreed on December 6, 2005 that 2003 waiver decision should be incorporated in TRIPs Agreement on permanent basis. That amendment finally came into force on January 23, 2017 after getting the acceptance of two thirds WTO members. The amendment is now a part and parcel of the TRIPs Agreement and will help the developing and least-developed countries to tackle the public health problems in their respective jurisdictions.

India had already incorporated section 92A in the Patents Act, 1970 by 2005 amendment which is in compliance with the 2003 decision. According to section 92A, the Controller shall grant compulsory licence subject to certain conditions to manufacture and export the “patented pharmaceutical products” to any country which does not have manufacturing capacity or has insufficient capacity to manufacture the pharmaceutical products. The term “*pharmaceutical products*” is defined to mean “any patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address public health problems and shall be inclusive of ingredients necessary for their manufacture and diagnostic kits required for their use”. Section 92A therefore gives wide powers to the Controller to grant compulsory licence to a person to “manufacture and export” the patented pharmaceutical products which may include diagnostic kits and other products which may be required by the aforesaid countries to address the public health problems.

In the normal circumstances, compulsory licence may be granted under section 84 after the expiry of three years from the grant of patent on the basis of any of the following three grounds – (i) “that the reasonable requirements of the public with respect to the patented invention have not been satisfied”; (ii) “that the patented invention is not available to the public at a reasonably

affordable price”; or (iii) “that the patented invention is not worked in the territory of India”. In the past 48 years, only one compulsory licence has been granted. In 2012, the Controller granted compulsory licence to NATCO Pharma against Bayer to manufacture a cancer drug Sorafenib Tosylate where Natco Pharma agreed to provide the same drug for 8,800 which was being sold for Rs. 2,80,428 by Bayer. In appeal, the Intellectual Property Appellate Board (IPAB) and thereafter Bombay High Court upheld the compulsory licence in *Bayer v. Union of India*.<sup>39</sup>

To deal with a pandemic situation like the present one, section 92 and 92A are relevant and not section 84. Again, under these provisions, compulsory licence may be granted only after the grant of patent. The grant of patent may take a couple of years which means that for a new pharmaceutical product, even these provisions may not be helpful. In such a situation, provisions of Chapter XVII, particularly section 100(4) may be very useful as the Government may authorize anyone to use invention for which the patent has been applied for. Apart from that under section 102, the Government can also acquire the invention for public purpose including public health.

#### **PHARMACEUTICAL COMPANIES: PROFIT-MAKING V. GREED**

To confer monopoly is not the primary objective of patent laws. The patent law is “to encourage scientific research, new technology and industrial progress”<sup>40</sup>. For this purpose, it confers certain exclusive rights on the patent holder to exploit his patent for 20 years. In *Bayer Corporation v. Union of India*,<sup>41</sup> the Bombay High Court observed that patent holder is obligated “to utilize the invention to meet the needs of the society” and not to keep the patented product in the attic. Further, the patented product is to “form the basis for further research and development”.

The objectives of the patent laws are good but unfortunately the things in practical terms are completely different. Patent holders see the angle of profits for themselves and for their stakeholders as far as exploitation of their patents are concerned. Similarly, the pharmaceutical companies are loyal to their stakeholders and not to patients. Patients are just a market for them to be exploited. Rex Nutting has rightly pointed out that “standard practice in the drug industry directly contradicts the Constitution’s reasons for granting intellectual property rights. Instead

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39. *Bayer Corporation v. Union of India*, Writ Petition No. 1323 of 2013 available at file:///C:/Users/lc2/Downloads/b/Bayer\_Corporation\_vs\_Union\_Of\_India\_Through\_The\_...\_on\_15\_July\_2014'.PDF

40. *Ibid.*

41. *Ibid.*

of promoting the Progress of Science and useful Arts, patents too often serve to retard the advancement of science and useful arts, such as medicine”<sup>42</sup>.

It is worth mentioning the statement made by the CEO of Bayer Marijn Dekkers after Bayer lost the appeal before Bombay High Court in *Bayer v. Union of India*<sup>43</sup> to cancel the compulsory licence which was granted to Natco Pharma. Bayer was charging Rs. 2,80,428/- for 120 tablets for the treatment of cancer which were meant to be consumed by the patient in one month. Natco Pharma agreed to provide the same medicine for Rs. 8,800/- which also included 7% royalty. Dekkers called the compulsory license as “essentially theft”. He further stated that “we did not develop this medicine for Indians, we developed it for western patients who can afford it.”<sup>44</sup> If the grant of compulsory licence was “essentially theft”, then charging Rs. 2,80,428/- for 120 tablets was nothing but “legalized robbery”. Dekkers was shamed for making these statements. Every person in the world has a right to health which is an important human rights recognized in many treaties. It is to be kept in mind that IPRs can not prevail over human rights. Dekkers statements show the mindsets of pharmaceutical companies which treat patients as a market without any consideration to humanity.

It is also noteworthy that the Ministry of Chemicals and Fertilisers adopted the Drugs (Prices Control) Amendment Order, 2019 which exempts from price control “a manufacturer producing a new drug patented under the Indian Patent Act, 1970, for a period of five years from the date of commencement of its commercial marketing by the manufacturer in the country”<sup>45</sup>. The impact of this Order is that if a new vaccine is patented in India to treat Covid-19, its price cannot be controlled for a period of 5 years.<sup>46</sup> There should be some mechanism by which prices of the newly marketed drugs are negotiated between the government and patentee and there should be some control on the price fixing.

Rex Nutting refers to the greed of Gilead pharmaceutical company by stating that how it may not

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42. Rex Nutting, Gilead is Protecting its Drug Patent instead of Protecting COVID-19 Patients, MARKET WATCH dated Aug 7, 20, available at <https://www.marketwatch.com/story/is-greed-holding-back-a-drug-that-could-treat-covid-19-patients-11596737727> last visited on Aug 9, 2020.

43. Writ Petition No. 1323 of 2013 decided by Bombay High Court on 15 July 2014.

44. See Glyn Moody, Bayer's CEO: We Develop Drugs For Rich Westerners, Not Poor Indians, TECCDIRT, Dated Jan 27, 2014 available at <https://www.techdirt.com/articles/20140124/09481025978/big-pharma-ceo-we-develop-drugs-rich-westerners-not-poor.shtml> visited on Aug 16, 2020.

45. See Internet Archive, Internet Archive available at <https://archive.org/details/in.gazette.central.e.2019-01-03.194703/page/n1/mode/2uplast> visited on Aug 25, 2020.

46. See also New patented drugs exempted from price control order for 5 years, THE HINDU BUSINESS LINE, Dated 4 January 2019, available at <https://www.thehindubusinessline.com/economy/new-patented-drugs-exempted-from-price-control-order-for-5-years/article25911440.ece#> last visited on Aug 20, 2020.

bring in market a compound called as GS-441524, which is comparatively cheap and very effective in treating COVID-19. The drug is in pipeline and may prove to be a better treatment for COVID-19<sup>47</sup> patients. The reason is that this drug is closely related to its another drug Remdesivir, which is effective in recovery of patients and shortening their hospitalizations. According to Nutting, the Public Citizen (a consumer watchdog group) alleged that Gilead “refuses to test and develop GS-441524 because selling the inferior drug remdesivir is more profitable”.<sup>48</sup>

It is noteworthy that a TRIPs waiver proposal was submitted to TRIPs Council by India and South Africa on October 2, 2020. In the proposal, both the countries proposed that TRIPs obligations should be waived on a temporary basis with respect to medicines, vaccines, kits, and other medicinal products which are meant to prevent, contain and treat Covid-19. The proposal got the support of developing countries. Unfortunately, US, UK, EU, Japan, Canada, Australia and Switzerland opposed the proposal. The proposal is to be taken up again at the Council. Mr. Antonio Guterres, the Secretary General of the UN has expressed his displeasure and warned the developed countries against their approach of “vaccine nationalism”.<sup>49</sup>

## CONCLUSION

Covid-19 turned out to be an unprecedented pandemic hitting the world very hard. Many countries have been worst affected with United States, Brazil and India on the top in terms of casualties. In the middle of August, the number of Covid-19 affected people per day in India was the highest in the world. Though India started taking actions well in time, and invoked the provisions of the National Disaster Management Act, 2005 for the first time while imposing various lockdowns,<sup>50</sup> still the situation went out of control. The situation has improved now and in most likelihood, the vaccination will start in India in the first quarter of 2021. However, in some of the developed countries, vaccination had already started.

Earlier it was suggested that the mechanism of “patent pools” could be very useful in the given

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47. Yan and Muller has also supported the use of GS-441524 over Remdesivir. See Victoria C. Yan and Florian L. Muller, Advantages of the Parent Nucleoside GS-441524 over Remdesivir for Covid-19 Treatment, ACS Medical Chemistry Letters 2020, 11, pp. 1361- 1366, at 1361.

48. *Supra* note 42.

49. Prabhaskar K Dutta, India’s TRIPs waiver proposal at WTO: It’s rich vs poor over Covid-19 vaccine, posted on December 10, 2020, available at <https://www.indiatoday.in/news-analysis/story/india-trips-waiver-proposal-wto-covid-19-vaccine-1748319-2020-12-10>, last visited on 14 December 2020.

50. Chetan Chauhan, Covid-19: Disaster Act invoked for the 1st time in India, Hindustan Times, dated March 25, 2020 available at <https://www.hindustantimes.com/india-news/covid-19-disaster-act-invoked-for-the-1st-time-in-india/story-EN3YGrEuxhnl6EzqrlreWM.html> last visited on Aug 26, 2020.

circumstances. “Patent pools” is basically an agreement where patent holders agree to license their patents to one another. This mechanism is ordinarily used where “complementary patents” are required for “efficient technical solutions”. By sharing IPRs, the companies could succeed in developing new vaccines/medicines in a cost effective manner.<sup>51</sup> Unfortunately, the pharmaceutical companies did not commit on the mechanism of patent pools.

It is hoped that good sense will prevail on the developed countries and they will support the TRIPs waiver proposal at TRIPs Council and their pharmaceutical companies will also think of humanity leaving behind their lust to earn money. It is noteworthy that in all those cases where the government provides funds to the pharmaceutical companies to develop a drug or medicine, the former should ensure that the later do not exploit their monopolistic nature to the detriment of the society.<sup>52</sup>

To conclude, it is suggested that as and when some vaccine is ready for use, the Government has to ensure that Patents Act, 1970 does not come in the way to protect public health rather it is used to make the medicine available to the masses at affordable prices by invoking all provisions of public interest as already discussed.

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51. See also Patent Pools and Antitrust - A Comparative Analysis, World Intellectual Property Organization available at [https://www.wipo.int/export/sites/www/ip-competition/en/studies/patent\\_pools\\_report.pdf](https://www.wipo.int/export/sites/www/ip-competition/en/studies/patent_pools_report.pdf) last visited on Aug25, 2020.

52. Public Citizen, Taxpayers Spent \$70,000,000 to Develop this Drug (Remdesivir), Politi Fact, dated June 29, 2020, available at <https://www.politifact.com/factchecks/2020/jul/23/public-citizen/yes-taxpayers-have-sunk-least-70-million-developin/> last visited on Aug 26, 2020.

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