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CONTENTS

ARTICLES

NOTES AND COMMENTS

BOOK REVIEW

JUDICIAL APPOINTMENTS MECHANISM IN INDIA AND INDEPENDENCE OF JUDICIARY - A CRITICAL ANALYSIS

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I. Introduction

Independent and impartial judiciary is the *sine qua non* of any democratic constitution. The judiciary, in order to effectively exercise the constitutional power of judicial review, must act without any fear and favor during administration of justice and interpretation of the Constitution and other laws. The appointment of judges, their tenure, and their relation with the other agencies of government, separation of judiciary from the interference and influence of the executive[1] and other similar considerations are important factors in maintaining the independence and integrity of the judiciary.[2] The appointment of the judges at the higher judiciary came for judicial scrutiny by the Supreme Court in various cases that resulted into the formation of 'Judges Collegium' to recommend judicial appointments in Higher Judiciary, which has been subsequently intended to be replaced by 'National Judicial Appointments Commission' through an amendment in the Constitution and also a separate enactment. This paper revisits and analyses the Constitutional framework, the two decade old system of the 'Judges' Collegium' for judicial appointments and also examines 'National Judicial Appointments Commission', which subsequently has been declared unconstitutional by the Supreme Court.

II. Independency of Judiciary

The doctrine of 'Independence of Judiciary' requires that judges must be able to decide a dispute before them, according to law without any fear, favor or influence of any other factor. Hence, Independence of Judiciary means and requires a complete independence of each and every judge in the state. The doctrine of 'Independence of Judiciary' is dependent upon the doctrine of

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[1] The Constitution of India, Article 50. It provides that, the State shall take steps to separate the judiciary from the executive in the public services of the State. *See* also *Indira Gandhi* v. *Raj Narain*, AIR 1975 SC 1590 (The Supreme Court asserted the *Kesavananda Bharati* ruling and upheld the separation of powers doctrine as the basic structure of the Constitution).

[2] Atin Kumar Das, *Independence of Judiciary In India: A Critical Analysis*, *available at* <http://mulnivasiorganiser.bamcef.org/?p=482>(last visited on October16, 2017) (suggesting that, the task given to the judiciary to supervise the doctrine of separation of powers cannot be carried on in true spirit if the judiciary is not independent in itself).

[3] *Kumar* v. *Union of India*, AIR 1997 SC 1125 (Holding that, the independence of the judiciary and judicial review are part of the basic structure or basic features of the Indian Constitution).

'Separation of Powers' between the Judiciary, the Executive and the Legislature.[3] It entails the independence of the judiciary from the other organs of the state. However, this meaning of independence indicates merely an institutional autonomy of the judiciary from the other two organs of the state without regard to the complete independence of judges in exercise of their judicial functions. Therefore, Independence of Judiciary requires a complete freedom of every individual judge from the personal, substantive and collective controls of all organs of the state, in addition to Separation of Powers.[4] Shimon Shetreet[5] advocates that, 'the independence of the individual judges and the collective independence of the judiciary as a body is distinct from each other and they together constitute Judicial Independence'. He observed that, 'the independence of the individual judge consists of the judge's substantive and personal independence.' Substantive independence refers to exclusive subjection of the judge to the law without any other influence in the exercise of judicial or official functions, whereas, personal independence refers to adequate security of the terms, tenure and other conditions of the service, and also includes independence from their judicial superiors and colleagues.

Shetreet's doctrine of independence of the judiciary lays down two principles, Firstly, the judiciary as an organ of the state should be independent of other two organs, and Secondly, the independence of each and every single judge in the performance of his role as judge should be maintained. These two principles are mutually dependent, and accomplishment of one is impossible without the accomplishment of the other. Therefore, although they are different, together they should be pursued so as to ensure a complete independence of the judiciary.[6]

To summarize, concept of independence of judiciary includes: *Firstly*, the institutional independence of the judiciary from other organs/branches of the state; *Secondly*, the organizational independence of the judiciary from politicians, political parties, political ideology, public pressure, ethnic or sectarian loyalties, etc.; and *Thirdly*, individual independence of the judge from internal influence (direct or indirect), including the influence of superior judges or equal colleagues, in the exercise of judicial function.[7]

[4] Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, in S. Shetreet & J.Deschenes (eds.), Judicial Independence: The Contemporary Debate (1985) pp. 590-681; M.P. Singh, *Securing the Independence of the Judiciary-The Indian Experience*, 10(2) INT'L & Comp L Rev 245, 247, 248 (2000).

[5] Shimon Shetreet (1985), *Ibid.*

[6] *Ibid.*

III. Judicial Appointments under the Indian Constitution

The Indian Constitution under Articles 124(2) and 217(1) provides for the President to appoint the Chief Justice of India and other Judges of the Supreme Court, after consultation with such of the Judges of the Supreme Court and High Courts in the States as the President may deem necessary for the purpose[8] and the Judges of the High Court, after consultation with the Chief Justice of India, the Governor of the State, and the Chief Justice of the High Court (except when the Chief Justice of the High Court himself is to be appointed).[9] Further, the President is always required to consult the Chief Justice of India in case of appointment of the Judges other than the Chief Justice.[10]

At this point, it is essential to note some of the observations and suggestions made by scholars and members of the Constituent Assembly while writing the above-mentioned provisions of the Constitution. Justice H. J. Kania, ex-Chief Justice of the Federal Court, emphasized that in the appointment of High Court judges, the Chief Justice of the High Court should be in direct contact with the Governor and the intercession of the provincial Home Ministry should be avoided in order to exclude the influence of local politics in the selection procedure and to secure the independence of the judiciary.[11] Further, the suggestions were made to the effect that, the President shall appoint a High Court judge in concurrence of the Chief Justice of India. A similar provision was suggested in case of the appointment of the judges of the Supreme Court. Many such suggestions were made at time of framing of the Constitution but the Drafting Committee adopted none.[12] Mehboob Ali Baig Sahib, a member of the assembly, wanted to move the amendment to the effect that, the appointment of the judge should always be made with the concurrence of the Chief Justice of India, which was rejected.[13]

While discussing on the issue of judicial appointments Dr. Babasaheb Ambedkar, the Chairman of Drafting Committee, referred to the executive

[7] *See*, United States Institute of Peace, Judicial Appointments and Judicial Independence (January 2009), *available at* http://www.usip.org/sites/default/files/Judicial-Appointments-EN.pdf (last visited on October 21, 2017).

[8] The Constitution of India, Article 124(2).

[9] The Constitution of India, Article 217(1)

[10] The Constitution of India, Article 124(2) and 217(1).

[11] Granville Austin, The Indian Constitution: Cornerstone of a Nation (Clarendon Press, Berkeley, 1966).

[12] *See* for detailed discussion, M.P. Singh (2000), *supra* n. 4, p. 263.

[13] Mehboob Ali Baig, Member, Constituent Assembly of India, The debate on the draft provisions of the Constitution on the Supreme Court (Tuesday, the 24th May, 1949) in, Constituent Assembly Debates-VIII *available at*<http://indiankanoon.org/doc/1538555/> (last visited on October 21, 2017).

controlled practice of appointments in England, and executive-legislative model of judicial appointments (appointment by the executive with the approval of the Senate) in the United States, concluded that:

> ….it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the legislature is also not a very suitable provision. Apart from its being cumbersome, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course.....[14]

The suggestions were rejected and the provision in the present form was retained, and placed in Articles 124 and 217 of the Constitution. Article 124 (2) of the Constitution provides that, every Judge of the Supreme Court shall be appointed by the President after consultation with such of the Judges of the Supreme Court and the High Courts in the States as the President may deem necessary for the purpose, provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. This indicates that, the President, which in effect the Central Government, is empowered by the Constitution to appoint Judges of the Supreme Court, provided Consultationis done as required.

Article 217 (1) of the Constitution provides that, every Judge of a High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. This indicates that, the power of appointment of Judges of High Courts also vests in the Central Government, but such power is exercisable only after consultation with the Chief Justice of India, the Governor of the State, and, the Chief Justice of the High Court.

The above constitutional provisions indicate that, the President has to appoint *puisne* Judges of the Supreme Court after consultation with the Chief Justice of India and other Judges of the Supreme Court and, at his discretion, with the Judges of High Courts in the States, asthe President may deem necessaryfor the purpose. It is because, the Chief Justice of India may be

[14] B. R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly, reply to the debate on the draft provisions of the Constitution on the Supreme Court, (May 24, 1949) in, Constituent Assembly Debates-VIII, *available at* <http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm>(last visited on October 21, 2017).

drawn from one of the provinces of the country and might not be able to suggest as to who should be appointed as Judges of the Supreme Court. The President would not be able to get the necessary advice from the Chief Justice alone and would have to consult the Judges of the various High Courts.[15] It further means that, the outgoing Chief Justice need not be consulted in case of the appointment of the Chief Justice who is to be his successor; on the contrary, the President is supposed to consult *puisne* judges, as there is no higher-grade person than the Chief Justice who may be consulted. But, there is no reason why the sitting Chief Justice should not be consulted while appointing the successor of the Chief Justice of India.[16] However, the new Memorandum of Procedure for appointment of Chief Justice of India and Supreme Court Judges drafted recently requires the senior-most Judge of the Supreme Court to be considered fit to hold the office and the Union Minister of Law, Justice and Company Affairs is required to seek the recommendation of the outgoing Chief Justice of India for the appointment of the next Chief Justice of India.[17] The Supreme Court in *S P Gupta* held that, the Chief Justice and the other Judges to whom the Central Government may deem it necessary to consult, 'are merely constitutional functionaries having a consultative role and the power of appointment resides solely and exclusively in the Central Government.'[18] However, this particular interpretation has been denied in subsequent judicial decisions.

IV. Controversy over the 'Consultation'

The Constitution of India provides for compulsory consultation by the President with the Chief Justice and other judges in the appointment of Chief Justice and other judges of the Supreme Court and High Courts. Accordingly, the judges of the higher judiciary were being appointed by the President who acted under Article 74 on the aid and advice of the Council of Ministers after mandatory consultation of and not in concurrence with the opinion of Chief Justice of India and any other judge. Although, the issue of whether the appointment of judges by the President should be in concurrence with the opinion of the Chief Justice and other judges was discussed in the Constituent Assembly and the view that the President shall appoint the judges in concurrence with the Chief Justice was rejected, the issue was further considered in various Supreme Court cases.

[15] *See*, Constituent Assembly Debates-VIII, *supra* n. 13.
[16] *Ibid*.
[17] Memorandum showing the procedure for Appointment of the Chief Justice of India and Judges of the supreme court of India, *available at* <http://doj.gov.in/appointment-of-judges/memorandum-procedure-appointment-supreme-court-judges>(last visited on November 15, 2017).
[18] *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149.

In *Samsher Singh* v. *State of Punjab*[19] the Supreme Court ruled that, the consultation with the Chief Justice of India under Articles 217 & 124 is obligatory and such consultation should be accepted by the Government of India. It further stressed that, the Chief Justice of India should have the last word (primacy), and the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order, empowers the court to examine whether any other extraneous circumstances had entered into the verdict of the executive.[20]

In *Union of India* v. *Sankalchand Himatlal Sheth*,[21] in the matter of transfer of High Court judges under Article 222 the Supreme Court held that, 'the consultation within the meaning of Art. 222(1) means full and effective, not formal or unproductive consultation.' The consultation, in order to be real, substantial and effective must be based on full and proper materials placed before the Chief Justice by the Government. It is a constitutional duty on the President to communicate to the Chief Justice all the materials he has and the course he proposes. On the other hand, it is also duty of the Chief Justice, 'to deliberate on the information he possesses and proceed in the interests of the administration of justice to give the President such counsel of action as he thinks will further the public interest, especially the cause of the justice system.' The court further held that, the advice given by the Chief Justice is not binding on the President because, the Constitution requires is consultation with the Chief Justice, not his concurrence. However, it was ruled that, 'although the opinion of the Chief Justice of India may not be binding on the Government, it is entitled to great weight and is normally to be accepted by the Government because the power under Art. 222 cannot be exercised whimsically or arbitrarily.'[22] It was further observed that, 'the Governmentmay differ from him and for cogent reasons may take a contrary view. In other words, the advice is not binding on the Government invariably and as a matter of compulsion in law.'[23]

A. First Judges Case –The Roots of 'Judicial Collegium'

The issue of appointment and transfer of judges again came for scrutiny before the five judges' bench of the Supreme Court in *S.P. Gupta* case popularly known as the First Judges Case. The Supreme Court reaffirmed the decision in *Sankalchand Himatlal Sheth Case*and held that the term 'consultation' must

[19] AIR 1974 SC 2192
[20] *Ibid*.
[21] AIR 1977 SC 2328.
[22] 1978 SCR (1) 423.
[23] 1978 SCR (1) 423, 506.

be full and effective 'consultation' and must precede the actual transfer of the Judge, failure to which, the transfer would be unconstitutional.[24]

The Supreme Court, while rejecting the contention of the petitioners that, in the consultative process, the Chief Justice of India should be given primacy, held that, each of the constitutional functionaries was entitled to equal weightage. The court concluded that, it is mandatory for the Central Government to consult the Chief Justice, but the Central Government is not bound to act in accordance with the opinion of the Chief Justice of India, even though, his opinion was entitled to great weight. It was therefore held, that the ultimate power of appointment, rested with the Central Government.[25]

In *Subhash Sharma* v. *Union of India,*[26] the Supreme Court while referring to the majority view in *S.P. Gupta* held that, the decision has not only denuded the primacy of the position of the Chief Justice of India in the consultative process but also whittled down the very significance of 'Consultation' as required to be understood in the Constitutional Scheme and context.[27] The Court held that, the recommendations finalised by the Chief Justice of India, barred in exceptional cases, should not be reopened except with the approval of the Chief Justice of India. It held that, this aspect dealt with in *Gupta's* case requires re-consideration by a larger bench. The judicial appointment is the result of collective, constitutional process and a participatory constitutional function and not merely an executive act. Bestowing the executive with the sole power of appointing judges would be subversive of the doctrine of judicial independence.[28] It further held that:

> …the word "consultation" is used in the constitutional provision in recognition of the status of the high constitutional dignitary who formally expresses the result of the institutional process leading to the appointment of judges. …The purpose of the `consultation' is to safeguard the independence of the judiciary and to ensure selection of proper persons. "Consultation" should have sinews to achieve the constitutional purpose and should not be rendered sterile by a literal interpretation.[29]

It is the above judgment of *Subhash Sharma* in which the Supreme Court has attempted to cut down the powers of the government in judicial appointments. As per the directions of Supreme Court in this case, the issues

[24] *Supra* n. 18, para 589.
[25] *Id.*, para 30.
[26] AIR 1991 SC 631.
[27] *Id.*, para 9.
[28] *Id.*, para 9,10 & 16.
[29] *Id.*, para 14.

relating to the appointment and transfer of judges including the position of the Chief Justice of India with reference to primacy in appointment of higher judiciary were referred to the bench of nine Judges of the Supreme Court in *Supreme Court Advocates-on-Record Assn.* v. *Union of India,*[30] popularly known as the Second Judges Case.

B. The Second Judges Case - Collegium of two senior-most Judges and Chief Justice

The Supreme Court in second judge's case, rejecting the majority view in *S.P. Gupta's case,* held that, 'in case there is conflict of opinions between the constitutional functionaries, the opinion of the judiciary 'symbolized' by the view of the Chief Justice of India and formed in the manner indicated, has primacy.'[31] It observed that, the judiciary being the best suited and having the best opportunity to adjudge performance, ability and traits of the candidates and assess true worth and fitness for appointment as judges, and also being responsible for the functioning of the courts and more accountable for any unsuitable appointment and its consequences arising out of criticism from the vigilant Bar, the constitutional purpose of selecting the superior Judges is best served by ascribing to the judiciary, as a consultee, a more significant role in the process of appointment.[32] Hence, the Chief Justice of India, in the process of consultation under the Constitution, must have the last word and the executive is bound by his opinion.[33] It went on to hold that, "the President's power under Articles 124(2) and 217(1) to appoint the Judges in accordance with the aid and advice of the Council of Ministers under Article 74(1) is not absolute and it is checked, circumscribed and conditioned by the requirement of prior consultation with the three Constitutional functionaries."[34] The Court recognized the established constitutional convention, holding that, the Chief Justice of India in the consultative process of judicial appointments, has to form the opinion after taking into account the views of the two senior-most judges of the Supreme Court before making his recommendation,[35] and such opinion of the Chief Justice of India is entitled to have the primacy.[36] The Supreme Court observed that, the Rule of Law is the basic feature of the Constitution and independence of the judiciary is an essential attribute of Rule of Law, and an integral part of the constitutional structure. It requires that, the influence of political considerations should be

[30] (1993) 4 SCC 441
[31] *Id.*, para 80.
[32] *Id.*, para 44, 53.
[33] *Id.*, para 483, 485.
[34] *Id.*, para 392.
[35] *Id.*, para 68.
[36] *Id.*, para 295.

prevented in making the appointments of the superior judiciary, in order to ensure independence of the Judges.

The court, while reversing the decision of *S P Gupta*, departed from the Constituent Assembly's decision to reject the primacy of Chief Justice of India in judicial appointments, based its findings on experience and the situations before it, calling it liberal and meaningful interpretation.[37]However, on the another instance in the same case, the Court, took a 'U' turn from its own logic and imposed limits on the power of executive in judicial appointments in order to secure 'Independence of Judiciary', relied on the views expressed bythe Constituent Assembly.[38]

Ahmedi J. in his dissent rightly observed that, the constitutional scheme does not warrant any hierarchy amongst the consultees,[39] 'the opinions of the consultees both under Article 124(2) and 217(1) are intended to act as checks on the exercise of discretion by the executive which will be accountable to the people.'[40] He pointed out that, a 'great weight should be attached to the opinion of the Chief Justice of India,' but it is difficult to say that, 'amongst the consultees his word will be final.' Any such attempt of interpretation of the constitutional provisions would tantamount to re-writing the Constitution under the guise of interpretation and such submission cannot be accepted unless the Constitution is amended. Although the views of Chief Justice of India may be entitled to great weight, the President is not bound to act according to his views.[41]

C. The Third Judges Case - Collegium of four senior-most Judges and Chief Justice

The controversies which arose in the appointments and transfer of judges leading to litigations,[42] led the President to refer the matter to the Supreme Court for its opinion under Article 143 of the Constitution on the nine issues relating to the appointments and transfer of judges and also to clarify the doubts raised about the Supreme Court's decision in *Second Judges Case*. The Supreme Court reiterated its majority decision in the *Second Judges Case* that, the opinion of the Chief Justice of India which is formed after taking into account the view of some other Judges who are traditionally associated with

[37] *Id.*, para 424, 426.

[38] *Id.*, para 485. The Supreme Court held that, 'The Framers of the Constitution placed a limitation on the power of Executive in the matter of appointment of Judges to the Supreme Court and the High Courts. The requirement of prior "consultation" with the superior Judiciary is a logical consequence of having an "independent Judiciary" as basic feature of the Constitution.'

[39] *Id*., para 404.

[40] *Ibid*.

[41] *Ibid*.

[42] M.P. Singh (2000), *supra* n. 4, p. 274.

this function is reflective of the opinion of the judiciary, as it has the element of plurality in its formation and has primacy in the matter of all higher judicial appointments. It being so, 'all judicial appointments have to be in conformity with the final opinion of the Chief Justice of India formed in the manner indicated.'[43] The Court held that, the Chief Justice of India must make a recommendation in consultation with the four senior-most *puisne* Judges of the Supreme Court, the views of the Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion. The opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy and the Government is not obliged to act thereon.[44] It also clarified that, if the final opinion of the Chief Justice of India is contrary to the opinion of the senior Judges consulted by him, that person should not be appointed.[45] It put some limitations on the judicial review of appointments, making it available only on the ground of failure to comply with the conditions of consultation and decision making as stated by the Court or for lack of eligibility.[46]

The court in both the cases failed to lay down the parameters for nominating, short-listing of and selection of candidates. It says that the judiciary is best suited for assessing the performance of a candidate but it is silent on how the performance shall be assessed, what are the considerations and parameters to be adopted while nominating a candidate for his appointment as judge of the Supreme Court/High Court. Lack of appropriate parameters for nomination and selection of a candidate gives scope for personal prejudices, manipulations or extraneous considerations *inter alia* political, communal or social factors, as rightly pointed out by Justice Krishna Iyer, 'the Judiciary is 'handpicked confidentially in dark room operations, secret bargains and mutual adjustments.'[47] Such a scenario violates Rule of Law and affects the democratic and secular fabric of the Constitution.

The Supreme Court has restricted the scope of judicial review only to the procedural requirements; *inter alia*, consultation, concurrence and eligibility. This particular view has diluted the effect of the most powerful weapon in the hands of sufferers and activists to enforce their rights and avoid their injustices. This decision itself affects the basic structure of the Constitution, as 'judicial

[43] *In re Presidential Reference*, AIR 1999 SC 1, para 15.

[44] *Ibid*.

[45] *Id.*, para 25.

[46] *Id.*, para 35.

[47] V R Krishna Iyer, *The Higher Judiciary: Appointments and Disappointments*, in V.R. Krishna Iyer (ed.), Rhetoric Versus Reality: Essays On HUman Rights, Justice and Democratic Values (Hope India, Gurgaon, 2004) p. 96, Ashutosh Hajela, *Transparency in Appointments to Higher Judiciary in India: Imperative of the Hour*, 2(2) CALQ 4-22 (2015).

review' is thinned out.[48] It indicates that the Court has conveniently avoided the review on the ground of extraneous considerations in making appointments, itmay be done by overlooking the performance, quality, experience, seniority, past record, etc. or even adverse records.[49] The lack of transparency in the short-listing of candidates, consultation procedures between the collegium and the Government and consultation within the collegium gives lot of scope for discriminations and favors. The power to select the judges of higher judiciary trapped in handful of persons facilitates enhanced scope for personal settlements between the consultees. The whole process of nominating, short-listing and recommending candidates is left for personal satisfaction of only a few persons, as the judicial review is possible only on the ground of non-consultation and not possible on wrongful consultation or unreasonableness. The instances of refusal to review the wrongful appointment of the judge[50] and also appointing judges ignoring the seniority and performance[51] shows that, the guidelines of the apex court in *Second Judges Case* and *Third Judges Case* are inappropriate, on the contrary, it permits arbitrary exercise of constitutional powers by the Judicial Collegium and also by the Executive. There is no reason why the judicial review of appointment judges' is not available on the grounds under Article 14 and 21 of the Constitution such as lack of just, fair and reasonable decision or arbitrary, fanciful or oppressive decision, laid down by the Supreme Court in various cases.[52] Consequently, the arbitrary exercise of power or extraneous considerations while nominating candidates will remain unchallenged giving a free hand to the Collegium. Such a blanket power conferred on Chief Justice of India and other senior judges and the intransparent and opaque process of nomination/recommending the names for judicial appointments is unreasonable, hence, unconstitutional. Further, challenging such a consultation process before the forum which itself is party to it i.e. Supreme Court, amounts to gross violation of the principles of natural justice, as there may existpersonal or official/ departmental bias.

In the S*econd* and *Third judges* cases the Supreme Court though seems to have safeguarded the institutional independence of judiciary, however, it has compromised with the individual independence of judges, ultimately affecting independence of judiciary. Under the guise of interpretation, they have established the judicial supremacy by adding words to the original

[48] See *Keshavanda Bharati* v. *State of Kerala,* AIR 1973 SC 1461 (Judicial Review has been held to be basic structure of the Constitution).

[49] *Shanti Bhushan* v. *Union of India,* (2009) 1 SCC 657.

[50] Ashutosh Hajela (2015), *supra* n. 47.

[51] *Ibid*.

[52] *Maneka Gandhi* v. *Union of India* 1978 SCC (1) 248. *See* also *Union of India* v. *M. Selvakumar,* AIR 2017 SC 740.

Constitution,whichin fact is the prerogative of the Parliament.

D. The Emergence of NJAC

The working of the new collegium could not go well and the President of India while appointing four judges expressed his concern for not having appropriate social representation.[53] It could neither prevent tainted additional judge Ashok Kumar from getting permanent judicial seat in High Court nor could it help Justice A.P. Shah to find a place in Supreme Court even after having good career record and seniority.[54] The process of appointment, after *Second Judges Case* and *Third Judges case* has been totally taken away by the judiciary in such a way that, the judiciary declined to give reasons to the Prime Minister Office (PMO) for its neglect to consider seniority of Justice Shah, Justice Patnaik and Justice Gupta while appointing Justice Dattu, Justice Ganguly and Justice Lodha to the Supreme Court.[55] The constitutional provision also provides for appointment of a distinguished jurist as Judge of the Supreme Court,[56] however, not a single such jurist has been appointed as a Judge of the Supreme Court till date. It doesn't mean that distinguished jurists do not exist in India. Rather it shows that, the Judiciary has categorically excluded the academicians from the Judicial Appointments and restricted the entry only for advocates and Judges, making the relevant constitutional provision a dead wood. Further, the complaints are coming about *the elevation as judges* who are relatives, children, friends, former colleagues and juniors *of Judges. It has been blamed that, such selections are based on considerations other than merit and integrity of the candidate*. A well-known activist-advocate Indira Jaising,[57] admitted that, *judicial dynasties* are being created by the collegiums by recommending names of their children or those who are close to them or have worked almost continuously with them.She opined that, 'a judiciary which claims independence from the executive must also be independent from vested interests and powerful caste and class lobbies.' Although, theoretically, the process of appointment seems to be just and fair, but, in fact it was suffering from opaqueness, arbitrariness and autocracy.[58]

The National Commission to Review the Working of the Indian Constitution recommended the establishment of the Judicial Appointments

[53] M.P. Singh (2000), *supra* n. 4, p. 278.

[54] Ashutosh Hajela, (2015), *supra* n. 47.

[55] Diwakar & Dhananjay Mahapatra, *PMO returns 3 names mooted for SC Judges*, The Times of India, New Delhi, November 11, 2008.

[56] The Constitution of India, Article 124(3)(c).

[57] Indira Jaising, *Supreme Court and Narendra Modi Govt's Latest Bone of Contention: Judicial Dynasties*, The First Post, New Delhi, August 01, 2016.

[58] Ashutosh Hajela, *supra* n. 47.

Commission for the appointment, transfer and removal of judges of higher courts, so as to restore equal and effective participation of both executive and judiciary in the appointment of judges.[59]

The Law Commission of India in its 214thReport severely criticized the three cases, *First, Second* and *Third judges cases* for rewriting the Constitution. The Law Commission rightly observed that, the Court has wrongly interpreted the Constitution while conferring primacy on the Chief Justice of India, in fact the Constitution has not conferred any primacy on the Chief Justice of India neither it mentions anything about 'Collegium' nor does it fixes the number of judges to be consulted, which, in fact is a sole discretion of the Executive i.e. President. It observed that, 'any addition of words in the Constitution would not be permissible under the interpretive jurisdiction of the Supreme Court.' It further commented that, under the Constitution, it is the President who can consult the Chief Justice of India and other judges at his discretion and not for the Chief Justice of India to consult other judges. The Supreme Court has to interpret the Constitution as it is and it cannot add any new words to the Constitution.It felt an immediate need to reconsider these three judgments in order to bring about clarity and consistency in the process of appointment of Supreme Court and High Court Judges.[60]

Dissatisfied with the ongoing mechanism and process of judicial appointments after the *Second Judges case* and with an objective to restore the 'check and balance' envisaged by the Constitution, the Constitutional (120th Amendment) Bill was introduced, which proposed to replace the existing collegium system with the Judicial Appointments Commission,[61] leaving it for the Parliament to provide for the functional and procedural aspects of the Commission. Unfortunately, the Constitution (120th Amendment) Bill lapsed with the conclusion of the term of Lok Sabha.[62] The lapsed bill again revived in 2014, resulting into the enactment of Constitution (Ninety Ninth Amendment) Act, 2014[63] and the National Judicial Appointments Commission Act, 2014 (NJAC Act). However, it is noteworthy to mention here that, the Ninety Ninth Constitution Amendment (which authorizes the Parliament to make law so as to

[59] National Commission, Review of the Working of the Indian Constitution (2002).

[60] Law Commission of India, 214TH Report on Proposal for Reconsideration of Judges Cases I, II and III – SP Gupta v. UOI (2002).

[61] *See*, The Constitution (120th Amendment) Bill, 2014.

[62] *Available at* http://www.prsindia.org/billtrack/constitutional-amendments/lapsed/ (last visited on October 21, 2017)

[63] The Constitution (121st Amendment) Bill, 2014 enacted as the Constitution (99th Amendment) Act, 2014.

establish NJAC) and the NJAC Act, both were passed simultaneously, as if the father and the son born on the same day.[64]

(i) The National Judicial Appointments Commission (NJAC)

The Constitution (Ninety Ninth Amendment) Act, 2014 amends Article 124 of the Constitution to provide for the National Judicial Appointments Commission (NJAC) to make recommendations to the President for appointments of judges at Supreme Court and High Courts and seeks to confer constitutional status to the Commission. The NJAC comprises of the Chief Justice of India as Chairperson; two other senior Judges of the Supreme Court, the Union Law Minister; two eminent persons (one of the eminent person shall be belonging to the SCs, the STs, OBCs, Minorities or Women) to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition. It also empowers the Parliament to regulate the procedure for the appointment of Judges and empowers the Commission to lay down the procedure for the discharge of its functions, the manner of selection of persons for appointment, etc.[65]

The National Judicial Appointments Commission Act, 2014 provides for the establishment of the NJAC to recommend appointments and transfer of Judges of Higher Judiciary. The NJAC Act provides for the senior-most Judge of theSupreme Court to be appointed as the Chief Justice of India. The Chief Justice of a High Court is to be appointed on the basis of *inter se* seniority of High Court Judges plusability, merit and other criteria of suitability as specified by regulations. And for the post of the Supreme Court Judge, the eligible[66] persons may be recommended on the basis of their ability, merit and other criteria specified by regulations framed by the NJAC under the NJAC Act.[67] It is further provided that, in case of appointment of the Judge of the High Court, apart from seniority, the ability and merit of such Judge shall be considered.[68] While appointing the judge of the High Court, the Commission has to seek nominations from the Chief Justice of the concerned High Court.[69] Furthermore, the Commission cannot recommend the appointment of judge, if two members of the Commission are not agreed with.[70] The Commission shall on the basis of ability, merit and other criteria of suitability as may be specified by regulations,

[64] H.G. Kulkarni, in his speech at State Level Conference on 'National Judicial Appointments Commission – Issues & Perspectives', held on 29th February – 1st March 2016, at N B Thakur Law College.

[65] The Constitution of India, Article 124C.

[66] The Constitution of India, Article 124.

[67] Section 5, NJAC Act, 2014.

[68] *Id.*, section 6(1).

[69] *Ibid.*

[70] *Id.*, section 5(2).

nominate names for appointment as a Judge of a High Court from amongst persons who are eligible to be appointed as such under clause (2) of Article 217 of the Constitution and forward such names to the Chief Justice of the concerned High Court for its views.[71] After receiving views and nominations as above, the Commission may recommend for appointment, the person who is found suitable on the basis of ability, merit and any other criteria of suitability as may be specified by regulations.[72] The Chief Justice of the concerned High Court, while making such nominations or giving its views should consult two senior-most Judges, such other Judges and eminent advocates of that High Court.[73] Further, the Commission is bound to draw in writing the views of the Governor and theChief Minister of the State concerned before making such recommendation.[74] The President, on the recommendations made by the Commission, may either act (appoint) or send it back for reconsideration, if he considers it necessary. However, once the NJAC makes a recommendation after reconsideration, the President is bound to make the appointment accordingly.[75] The Commission is also authorized to recommend for transfer of Chief Justices and other Judges of High Courts, according to the regulations and the procedure laid down by the NJAC.[76]

The Commission is empowered to make regulations in respect of the criteria of suitability with respect to appointment of a Judges of the Supreme Court and High court; the procedure and conditions for their selection and appointment; the procedure for transfer of Chief Justices and other Judges, etc.[77]

The Constitution (99th Amendment) Act, 2014 and the NJAC Act has introduced a new body (NJAC) to recommend to the President, the appointments of judges at the higher judiciary, in lieu of the previous judicial collegium. Some of the important aspects of the NJACAct need special attention. Firstly, the Commission contains an executive element, i.e. the Union Minister of Law and Justice, Secondly, the Commission comprises two eminent personsto be appointed by the Committee but the NJACAct does not describe the qualifications of the 'eminent persons', Thirdly, the Commission is not permitted to make any recommendation if two members are not agreeing with. The Law Minister and two eminent persons may perform a crucial role and may use veto. This particular

[71] *Id.,* section 6(3).
[72] *Ibid.*
[73] *Id.,* section 6(1).
[74] *Id.,* section 6(7).
[75] *Id.,* section 7.
[76] *Id.,* section 9.
[77] *Id.,* section 12.

aspect is absent in the 99th Amendment. Fourthly, the ability, merit and other criteria of suitability for appointment of the judges is not defined by Act and it is left for the Commission to provide for. The Actendows the Commission with blanket powers.

The presence of Law Minister and two eminent persons in the NJAC and power of veto for any two members raised various constitutional questions and the matter knocked the door of Supreme Court in the matter of *Fourth Judges*[78] case wherein a group of petitions challenged the validity of the Constitution (99thAmendment) Act, 2014 and the NJAC Act, on the ground of infringement of basic structure of the Constitution. The court concluded that, in the matter of selection, appointment and transfer of Judges to the higher judiciary, the primacy in the decision-making inevitably rests with the Chief Justice of India**.**The involvement of Law Minister and two outsiders (eminent persons) in the final process of appointments of judges is undesirable and it erodes the primacy of judiciary. The Court concludes that:

> without primacy to the opinion of Chief Justice of India the whole consultation process contemplated under Articles 124 and 217 would only become ornamental enabling the executive to make appointments in its absolute discretion, most likely based on considerations of political expediency. Such a process would be antithetical to the constitutional goal of establishing an independent judiciary.[79]

The Court held that, the primacy of judiciary is integral to the independence of judiciary, separation of powers, federalism and democracy, rule of law and supremacy of the Constitution. The Constitution (99th Amendment) Act 2014 and the NJAC Act, that would adversely impact primacy of the judiciary, is violative of the basic structure of the Constitution and liable to be set aside.

It is rightly held that, the NJAC Act confers a monarchical power on the eminent persons to veto a decision that is taken unanimously or otherwise by the Chief Justice of India in consultation with other judges.The (99th Constitution Amendment) Act, 2014 does not postulate a veto being conferred on any person in the NJAC; however such a provision exists in the NJAC Act.[80] This is certainly not what the Constitution, as framed, postulated or intended.[81]The entire scheme of appointment of judges postulated by the Constituent Assembly is made *topsy-turvy* by the (99th Constitution Amendment)

[78] (2016) 5 SCC 1.
[79] Per J. Chelameswar, *id.,* para 52.
[80] *Id.,* para 510.

Act, 2014 and the NJAC Act, destroying the basic structure of the Constitution.[82]

However, one of the arguments which later formed the bases for the decision of Supreme Court in *Fourth Judges Case* that the new regime denies the primacy to the opinion of the Chief Justice of India, as primacy of the judiciary is the basic structure of the Constitution, itself is not in consonance with the Constitutional mandate under the pre-amended Articles 124 & 217, although, it is in accordance with the previous Supreme Court judgments. This particular view of the Supreme Court is also contrary to intention of the framers of the Constitution.

The Supreme Court overturned the new law proposed to replace the Judicial Collegium and the tussle between the Judiciary and the Executive continued even further,[83] although, the court agreed to change the Memorandum of Procedure of Appointment of Judges to make it more transparent, however, the power to take final call has been retained by the Collegium.[84] As a major step towards transparency, the Collegium of Supreme Court started uploading on its website the decisions of its Collegium on appointments and transfers in the higher judiciary.

However, intwo recent matters, the working of Collegium and also the Supreme Court itself came in discussions. The objectionable behavior of Justice C. S.Karnan of Madras High Court[85]and subsequent action by Supreme Court, and the transfer of Justice Jayant Patel and his subsequent resignation.[86]Justice C.S.Karnan stayed his own transfer order and subsequently when matter reached the Supreme Court, he apologized for the same.[87] Later, he leveled allegations of corruption, atrocity and harassment against various sitting judges. The Supreme Court ignored the allegations and initiated *suomotu* contempt proceedings and punished him with six-months imprisonment.[88] In second matter,

[81] *Id.*, para 491.

[82] *Ibid*.

[83] Shishir Tripathi, *Supreme Court and Narendra Modi Govt's Latest Bone of Contention: Judicial Dynasties*, The First Post, New Delhi (August 01, 2016).

[84] *See, Collegium To Take Call On 61 Names For High Court Judges Elevation*, available at https://www.ndtv.com/india-news/collegium-to-take-call-on-61-names-for-high-court-judges-elevation-1751324(last visited onNovember21, 2017).

[85] Smita Chakraburtty, *The Curious Case of Justice Karnan*, 52(18) EPW (2017). *See* also BhairavAcharya, *A Legal Vacuum Enabled Justice Karnan's Bad Behaviour,* The Wire (May 04, 2017).

[86] *Justice Jayant Patel's Resignation Marks A Moment of Crisis for the Judiciary*, The Wire, September 27, 2017.

[87] Kian Ganz, *The System Wasn't Built For This: Justice C S Karnan Vows Criminal Complaint Vs. CJI, Wants Contempt Stayed, Doubles Down On Corruption Allegations, available at* <http://www.legallyindia.com/supreme-court/the-system-wasn-t-built-for-this-justice-cs-karnan-vows-criminal-complaint-vs-cji-wants-contempt-stayed-doubles-down-on-corruption-allegations-read-letter-20170211-8303>(last visited on November22, 2017).

Justice Jayant Patel, senior most judge of Karnataka High Court after Chief Justice, who was having a chance of being appointed as Chief Justice after retirement of sitting Chief Justice, has been transferred by the Collegium to the Allahabad High Court making him third in seniority. He resigned from the post in protest. It is perceived that he has been punished for CBI probe in Ishrat Jahan encounter case when he was acting Chief Justice of Gujarat High Court, which led to arrest of a large number of police officers from Gujarat for their involvement in a planned killing.

These matters revived the discussions on the way judges are selected, the behavior of a sitting judge and mechanism for action against such judges and principles of natural justice. It realized us the need for an independent mechanism not only for appointment but also to entertain and dispose the matters by and against sitting judges of the higher judiciary. The Supreme Court although empowered to decide the contempt cases including contempt of Supreme Court, the question comes how the Supreme Court (it being a party to it) can decide the matter specifically when allegations are leveled against the sitting judges of the Supreme Court and the High Courts? How a judge can be punished for contempt of court when he is holding the office of a High Court Judge? Whether the allegations made by Justice Karnan leveled against sitting judges will be inquired into by an impartial and independent way? This matter pours fuel to the demand for an independent mechanism to entertain and dispose of the complaints by and against the sitting judges. These issues being outside the scope of this paper, needs to be investigated separately.

V. Conclusion

The Constitution of India provides for 'check and balance' between the organs of the state and incorporates into it the principle of independence of judiciary. Accordingly, the Indian Constitution requires the President to consult the Chief Justice of India while appointing the judges at the higher judiciary. However, the controversy arose with respect to the meaning of the word 'consultation'. Although, the *First Judge's Case* denied the primacy to the judiciary in consultation process, the subsequent judgments accorded superior position to the judiciary as compared to the executive under the guise of maintaining the independence of judiciary and held that, the opinion of the Chief Justice of India should have primacy and is binding on the President. The Court evolved the 'Judicial Collegium' of Chief Justice of India and two senior most

[88] Livelaw News Network, *Breaking: SC Finds Justice Karnan Guilty of Contempt of Court, Awards Six Months Jail Term*, Livelaw May 09, 2017, *available at* http://www.livelaw.in/breaking-sc-finds-justice-karnan-guilty-contempt-court-gets-six-months-jail-term/ (last visited on November 22, 2017).

judges, which subsequently in *Third Judges Case* changed to four senior-most judges with Chief Justice of India, to recommend the President in matters of appointment and transfer. The 99th Amendment to the Constitution replaced this Collegium System with the NJAC, and the 'primacy of judiciary' in judicial appointments has been done away with. However, the Supreme Court in *Fourth Judges Case* struck down this new regime holding that, 'primacy of the judiciary' in judicial appointments and transfer is an integral part of the independence of the judiciary and denial of primacy to the opinion of Chief Justice of India under the new regime is violative of the basic structure of the Constitution. Further, the presence of Minister of Law and Justice and two outsiders, namely, the eminent persons, in NJAC affects the doctrine of Separation of Powers envisaged by the constitution.

However, the constitutional framers never intended to confer primacy on the Chief Justice of India, on the contrary, such a view has been out rightly rejected by the Constituent Assembly after a detailed discussion on this issue. Ahmedi J. has logic in his dissenting view that; 'to say that the Chief Justice of India has a primacy in the matter of judicial appointments is not possible unless the Constitution is amended.'[89]

Then the question arises, whether the present Judicial Collegium evolved by the Supreme Court ensures independence of judiciary, in the sense it is composed of four senior most judges who are subordinate to the Chief Justice of India. Are they sufficiently independent in decision making and expressing their views? Is this collegium able to prevent an unsuitable or tainted person from entering into the judiciary? If the Law Minister or two eminent persons can influence the Chief Justice of India and two senior most judges, on similar logic, what guarantee that the Chief Justice of India cannot influence his subordinate colleagues? The elevation of J. Ashok Kumar, J. Dinkaran, etc. and denial to elevate Justice A. P. Shah as a judge of Supreme Court ignoring his seniority, a good judicial carrier record and reputation as a judge, indicates that the present collegium system is not able to prevent the unsuitable person from entering the higher judiciary. The process of nomination, selection and appointment of higher judiciary are not regulated by any criteria or guidelines, leaving full discretion to the Chief Justice of India. The process of appointment and transfer has become opaque and leave scope for arbitrary and unreasonable exercise of powers. There is neither any logic in composition of collegium, i.e. Chief Justice of Indiaand four senior-most judges, nor in their selection based on seniority. This makes the present collegium system and its process of

[89] *Supra* n. 39, para 404.

consultation undemocratic and hence unconstitutional.

The judiciary and the executive are struggling to retain the power of judicial appointments. While doing so, the Supreme Court has imported the new words like 'Concurrence', 'Primacy', and installed into the Constitution in order to grasp the power; while the executive amended the Constitution to replace the 'Consultation' process with the Chief Justice of India including Collegium with the NJAC. One of the important aspects of independence of judiciary, i.e. decisional independence of individual judge from his superiors or other colleagues is conveniently ignored by the 'Protector of the Constitution', i.e. the judiciary. Further, the judiciary shows disregard to the views of Dr. BabasahebAmbedkar and other members of Constituent Assembly in the matter of judicial appointments. In this dichotomy between the executive and the judiciary, the cardinal principle of independence of judiciary has been lost. Neither the NJAC nor the Judicial Collegium proves sound on the principles of independence of judiciary and Rule of Law.

In order to have a rational and most democratic process of appointments without harming the 'independence of the judiciary' a comprehensive mechanism needs to be constituted. Care should be taken that the power of the appointment shall not vest only in few hands. It should also not be with the executive, legislature or the judicial collegium. A middle way may be adopted so as to ensure the 'check and balance' and 'Rule of Law' without compromising the independence of judiciary. A Judicial Council with a good number of members comprising seating judges in rotation, retired judges, renowned academicians and jurists in the legal field, having no connection with political parties or political activities, in equal proportion, to be appointed by the President, to nominate, select and recommend the names for appointments of judges, after evaluating their performance, background, ability, experience, and expertise, according to the criteria devised by the council. It is to be ensured that the nominations of advocates and jurists for elevation as judge of the High Court and the Supreme Court should not be restricted only for advocates and judges and it should be opened for academicians too.

Such Judicial Council should also be authorized to hear the complaints by and against the sitting judges, as the judges of Supreme Court or High Courts themselves cannot hear complaints by or against their fellow colleagues. Such Judicial Council should be empowered to draft Memorandum of Procedure for appointments of judges at higher judiciary and also procedure for hearing complaints by and against sitting judges.

DECRIMINALIZING ATTEMPTED SUICIDE IN INDIA: A PARADIGM SHIFT IN APPROACH

*G.K. Goswami**

I. Introduction

Suicide is an anti-thesis to self-preservation symbolising man's great retreat from life, attracting either condemnation or commendation since the dawn of civilisation. Suicide knows no barrier of race, caste, religion, community, age, sex, time or space. Historically, suicide suffers from conceptual ambiguity, lack of uniform nomenclature and standardized assessment methods. Suicidal behaviour is culmination of adaptive failure to cope with mental and social disabilities, resulting in ultimate regression from reality. Since long several jurisdictions contemplated deterrent criminal proceedings for unsuccessful attempt to commit suicide but right based jurisprudence demands for humanistic state response towards suicide. Evolving concepts of individual's liberty and life with dignity have recognized 'choice death' and physician assisted death but suicide as a matter of right finds no recognition in any of the instruments of human rights at international, regional or national level. Justice demands that instead of hand cuffs and prison cells, the survivors of attempted suicide need sympathy, medical care and rehabilitation. In changing percept, recognizing suicidal behaviour a result of social and mental disabilities, anti-suicide laws have been repealed by many countries and India is on way forward.

At global level, suicides accounted for 1.4% of all deaths.[1] The risk of suicide increases with age; the risk in men peaks at the age of 45 and in women at the age of 55.[2] Pesticide poisoning, hanging and firearms are among the most common methods of committing suicide globally.[3] Among 0.8 million suicides annually reported worldwide,[4] India contributed 0.13 million suicides, highest number in the world,[5] due to several causative factors ranging from hopelessness,

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1 World Health Organisation, Suicide Data – 2016, *available at* http://www.who.int/mental_health/prevention/suicide/suicideprevent/en/ (last visited on June 30, 2017).

2 Benjamin J. Sadock, Virginia A. Sadock, Harold I. Kaplan, Synopsis of Psychiatry Behavioural Sciences/Clinical Psychiatry (Lippincott Williams and Wilkins, New York, 2003).

3 Vladeta Ajdacic-Gross, Mitchell G. Weiss, Mariann Ring (*et al.*), *Methods of Suicide: International Suicide Patterns Derived from the WHO Mortality Database*, 86(9) Bulletin of the World Health Organisation 657-736 (2008).

4 World Health Organisation, Preventive Suicide: A Global Imperative (2014).

5 *India has highest number of suicides in the world* : *WHO*, The Times of India, New Delhi, September 4, 2014.

psychosis, prolonged illness, domestic violence to jilted lovers and a cute depression due to various reasons.[6] Every day, India witnesses nearly 274 persons committing suicide and persons of average age below 44 years including teenagers are more susceptible to ending their lives. Attempted suicides are nearly twenty times higher than the succeeded suicides.[7] Scientific evidence shows that for every ten people who attempt suicide or commit suicide, nine of them have mental health problems. Additionally, the social structure, cultural ethos and life style also impact suicides due to hopelessness in life.[8] The incidents of suicide adversely reflect on the socio-economic dynamics, cultural ethos and public policies for social security.

In fact, attempted suicide faces challenge of being under reported due to strictness of penal provisions, cultural shame of frequent follow-up visits by police and stigma attached to the family. Suicide needs holistic review under the lens of mental health as well as accounting for social inequities causing inner state of turmoil responsible for marginalization.[9] Indeed, if suicide is a wrong, punishing failed suicide is another wrong committed by the state putting the carriage before the horse. Decriminalising attempted suicide may reduce under reporting and ensure social justice by improving state response towards vulnerable targets.

Several countries like United States and United Kingdom have relaxed penal rigor by decriminalizing attempted suicide. In India, the constitutional validity of anti suicide laws has been discussed several times but without accomplishing final conclusion. The Law Commission of India and the judiciary had argued both for retaining and annulling suicide laws thus making the debate complex but interesting. The Mental Health Care Act, 2017, recently been enacted in India has not only set the tone for decriminalising attempted suicide but also imposed a duty on the government to provide care, treatment and rehabilitation of suicide survivor to reduce the risk of recurrence. The approach under the recent law integrates jurisprudence on suicide with global approach of extending medical care and rehabilitation. This article deliberates upon the nuances of abrogating anti-suicide laws and the relevant concepts involved therein.

6 National Crime Records Bureau, Ministry of Home Affairs, Accidental Deaths and Suicides in India – 2014. In 2014, reported suicides were 1,31,666 having rate of 10.6 per million population.

7 *Ibid*.

8 D. Lester, K. Agarwal and M. Natarajan, *Suicide in India*, 5 Archives of Suicide Research 91-96(1999).

9 Thomas Joiner & M. David Rudd (eds.), Suicide Science : Expanding the Boundaries (Kluer Academic Publishers, New York, 2002).

II. Tenets of Suicide

Suicide is a multi-dimensional human act involving several facets ranging from individual to community, biology to sociology, psychiatry to psychology, and offender to victim. Jurisprudence of suicide mainly underlines three legal issues: firstly whether attempted suicide constitutes a crime; secondly whether one can be held guilty of a crime, if he/she while attempting suicide, without culpable negligence, kills another person; and thirdly does it constitute a crime to aid, advise, abet or encourage another person to commit suicide?[10] In the existing global legal panorama, these questions by no means are free from complexities and have broadly been discussed here for holistic understanding.

A. Various modes of terminating human life

If life begins, end is inevitable either by natural or unnatural death. Suicide falls under unnatural death commissioned either by self-killing or through assisted suicide. The unnatural means for exterminating one's own life may vary from starvation to strangulation. Since homicide involves killing of a person by another person, suicide may not attract penal provisions for homicide. In case death of a person becomes confusing between accident and suicide, a medical tool called 'suicide psychological autopsy' (SPA)[11] helps in determining the circumstances of death.[12]

B. Suicide defined

Historically, the first use of word suicide, as claimed by some, is traced back to Sir Thomas Brown in the 1635 edition of *Relogio Medici*,[13] but others credit Charleton for using it in 1651. Some French historians found its use either in the Abbe Prevot in 1734 or the Abbe Desfontaines in 1737.[14] The word 'suicide' (*felo de de*) is etiologically derived from '*sui'* means oneself and '*çaedre'* means to kill.[15] The Oxford dictionary defines suicide, "the action of killing oneself intentionally."[16] The scientific study of suicidal behaviour and

[10] R.W. Withers, *Statute of Suicide as a Crime*, 19(9) The Virginia Law Register 641-747 (1914).

[11] Suicide psychological autopsy (SPA) entails a collaborative investigation involving mental health experts and law enforcement agencies to determine the state of mind of a person prior to the fatal act.

[12] E.T. Isometsa, *Psychological Autopsy Studies – A Review*, 16(7) Eur.J. Psychiatry 379-395 (2001).

[13] G Minois, History of Suicide Voluntary Death in Western Culture (The Johns Hopkins University Press: Maryland, USA, 1999).

[14] Lucas Giner, et. al., *Nomenclature and Definitions of Suicidal Behaviour*, in Philippe Courtet (ed.), Understanding Suicide from Diagnosis to Personalized Treatment (Springer: London, 2016) p. 4.

[15] Kelly Posner *et. al*., *The Classification of Suicidal Behaviour*, in Peter E. Nathan *et. al.* (eds) The Oxford Handbook of Suicide and Self-Injury (Oxford University Press: New York, 2014) p. 8.

[16] Suicide, *Oxford Dictionaries*, *available at*<https://en.oxforddictionaries.com/definition/suicide>(last visited on April 15, 2017).

prevention strategies constitute the subject matter of Suicidology integrating both sociology and psychology of suicide.[17]

Shneidman has defined, "Suicide is an intended act of self-inflicted cessation"[18] but Motto observed, "Suicide is self-inflicted, self-intentioned death."[19] Freud, under his psychoanalysis theory, understood suicide as a murder in reverse.[20] According to Lacan, suicide represents displacement of the object of aggression; before the impossibility of releasing it upon the other, it is released upon oneself. The World Health Organisation, in 1968, defined suicidal act as "The injury with varying degree of lethal intent" and suicide as "A suicidal act with fatal outcome".[21] In 1986, WHO preferred term 'suicidal acts' instead of 'suicide' or 'suicidal attempt'[22] and in 2014 defined suicidal behaviour as "a range of behaviour that include thinking about suicide (or ideation), planning for suicide, attempting suicide and suicide itself.[23] Intentional self inflicted harm resulting in death has three components: death by harm, intentional act, and against oneself.[24] An attempted suicide may or may not lead to death. Suicide attempt, also known as parasuicide,[25] pseudosuicide,[26] and deliberate self-harm[27]; may be defined as a non-fatal self-indicted potentially injurious behaviour with some intent to die.[28] Vulnerability mapping helps for evaluating suicidal risk in a patient to design preventive strategies.[29]

[17] James R. Rogers & Sharon Apel, *Revisiting Suicidology: A Call for Mixed Method Designs*, 1 Suicidology Online 92-94 (2010).

[18] Edwin S. Shneidman, Definition of Suicide (Rowman & Littlefield Publishers Inc., Maryland, USA, 2004).

[19] J.A. Motto, *Suicide and Suggestibility*, 124 Am. J. Psychiatry 252-256(1967).

[20] Susan Kahn and Andreas Liefooghe, *Thanatos: Freudian Manifestations of Death at Work*, 20(1) Culture and Organization 53-67 (2014).

[21] K.E.S. Unni, *Human Self Destructive Behaviour*, in J.N. Vyas and N. Ahuja (eds.) Textbook of Postgraduatge Psychiatry (Jaypee Bros: New Delhi, 2003) pp. 526-556; Hareesh S. Gouda and B.S. Yadwad, *Is Attempted Suicide an Offence*, 29(2) JIAFM 44-46 (2007).

[22] World Health Organization, Summary Report, Working Group in Preventative Practices in Suicide and Attempted Suicide (WHO Regional Office for Europe: Copenhagen, 1986).

[23] World Health Organization, Preventing Suicide: A Global Imperative (WHO Press: Geneva, 2014).

[24] Operational Criteria for Determination of Suicide Working Group, Division of Injury Epidemiology and Control, Centre for Environmental Health and Injury Control, CDC (1988) 37(50) MMWR 773–780.

[25] N. Kreitman, A.E. Philip, S. Greer, C.R. Bagley, *Parasuicide*, 115(523) Br. J. Psychiatry 746–747 (1969).

[26] N .Kessel, *Suicide by Poisoning 1: Suicide and the Survivor*, 61 Nursing Times 960–961 (1965).

[27] H.G. Morgan, Death Wishes? The Understanding and Management of Deliberate Self-Harm (John Wiley & Sons: Chichester, 1979).

[28] E. King, World Report on Violence and Health-I (Geneva World Health Organization: 2002) p. 185.

[29] J.Lopez-Castroman, E.Olie, P. Courtet, *Stress and Vulnerability: a Developing Model for Suicidal Risk*, in T.J. Hudzik, K.E. Cannon (eds), Suicide: Phenomenology and Neurobiology (Springer, Switzerland, 2014) pp. 87-100.

C. Religious response to suicide

Religions generally denounce the act of suicide and endorse that life and death are creation of God and hence self-annihilation is proscribed by religions and punished under various legal systems. Survivors of the attempted suicide are viewed as tainted members of the society.[30] Ethics and religions generally tag suicide as cowardly act but as an exception, sacrificing one's life also rewards commendation and earn praise in the society like the custom of *Sati*[31] and *Jal-samadhi*[32] in Hinduism;[33] and the 'self-martyrdom' in battlefield under the *Shariat*.[34] Islam considers suicide worse than homicide, as the Prophet said, "He who commits *suicide* by throttling shall keep on throttling himself in the Hell Fire (forever) and he who commits *suicide* by stabbing himself shall keep on stabbing himself in the Hell-Fire".[35]

Christianity proscribes acts of suicide and abortion being sinful attracting blasphemy and as a deterrent to it, social denial of decent burial was prescribed.[36] In the sixth century AD, suicide became a secular crime and in thirteenth century, Thomas Aquinas denounced suicide as an act against God. Saint Augustine says, "Hence, it follows that the words 'Thou shalt not kill' refer to the killing of a man – not another man; therefore, not even thyself. For he who kills himself, kills nothing else than a man."[37] Attempted suicide in 1693, under Christianity became an ecclesiastical crime punishable by excommunication.

Many of the legal systems, under the influence of religion, criminalized the act of self-destruction but last century witnessed changing legal percepts by relaxing anti-suicide laws. There are ensued a debate whether suicidal tendency reflects an imbalanced mental state deserving sympathy and medical care or it

[30] S. Mojica and D. Murrell, *The Right to Choose: When Should Death be in the Individual's Hands?*, 12 Whittier L. Rev. 471-504 (1991).

[31] *Sati* is a social practice among some Hindu communities whereby a recently widowed woman either voluntarily or by use of force or coercion commits suicide preferably by putting herself on her husband's funeral pyre. On a petition filed by Raja Ram Mohan Roy, Lord William Bentick, the then Governor General of India, banned this practice by introducing the Sati Regulation (XVII), 1929.

[32] Drowning in water for achieving salvation.

[33] Hinduism approves three methods of self-sacrifice; firstly *agnipravesa* (offering the body to fire); secondly *prayopavesa* (offering the body to Air); and *samadhi* (self-aborption- offering body to earth).

[34] Bernard K Freamon, *Martyrdom, Suicide and the Islamic Law of War: A Short Legal History*, 27(1) Fordham Int'L L. J.299-369 (2003).

[35] Hadith narrated by Abu Huraira (Sahih Al-Bukhari – Book 2/23/446).

[36] Plato, 'Laws' 360 B.C.E. The dead body of a person committing suicide would be buried alone, on the outskirts of the city, without a headstone or marker.

[37] St. Augustine, De Civitate, Book 1, Chapter XX' translation by GE McCracken in the LOEB Classical Library series Augustine City of God I Books I-III (Cambridge, Mass : Harvard University Press, 1981) p. 91.

amounts to a behavioral aberration setting legal machinery into motion to instill deterrence in the social system. Indeed life is a complex phenomenon lived differently by different person under varied circumstances. Individual is the best master to understand the dynamics of one's own life. The debate on right to end one's life in light of quality of life reflects upon the growth of physician assisted death being legally approved under several jurisdictions. Before delving upon the issue of delisting anti-suicide laws, the linkages between right to life and right to die need to be understood.

D. Suicide: Whether an Offence or Psychological disability

Historically, suicide has been condemned under religious ethos which influenced legal system to criminalize suicidal attempts. Indeed, act of suicide is a purely personal decision without undermining religion, morality or public policy, having no baneful effect on society. Suicide is a cry for help in helplessness. The psychology of suicide is deeply rooted in depression reflecting upon the abnormally exaggerated feeling of despair, sadness, hopelessness and alienation from society. Mental stress (transient or prolonged) collectively impairs mental balance, incapacitates rational thinking and stimulates thoughts, provoking suicide as recourse to ending all despair.[38] The motives of suicide may be physical pain, including frustration of instinctive demands, social sufferings and fears, or doubts and dreads pertaining to the hereafter.[39]

De-stigmatization of the act of suicide started with the pioneering work of Durkheim who propounded that societal stressors mainly contribute in suicidal behaviour.[40] Durkheim defined suicide as "all types of death that results, directly or indirectly, from an act, positive or negative, committed by the victim himself, knowing full well the intended results".[41] Reflecting on cause effect relationship, he classified suicide as egoistic, altruistic and anomic suicide.[42] Sigmund Freud contemplated the concept of psychosis projecting suicide as resultant of mental disorder needing medical attention and intervention.[43] The emotional and mental stressors having biological or environmental origin are the root cause of the suicidal conduct and warrants sympathetic attitude towards victim rather than

[38] Vernon J. Geberth, *The Psychology of Suicide: An Investigative Assessment*, 5(1) J. Legal Medicine 72-77 (1997).

[39] H.Crichton-Miller, *The Psychology of Suicide*, 2(3683) The British Medical Journal 239-241 (1931).

[40] Prakash B Behere *et.al., Decriminalisation of Attempted Suicide Law: Journey of Fifteen Decades*, 57(2) Indian J. Psychiatry 122-124(2015).

[41] E Durkheim, Elsuicide (Alal Universitaria: Madrid, 1982).

[42] Egoistic suicide results when abnormal individualism weakens social control and he lacks concern for community; altruistic suicide results due to excessive sense of duty to community and anomic suicide culminates due to failure of social control for regulating individual's behaviour.

[43] Sigmund Freud, Introductory Lectures on Psychoanalysis - Complete Psycho-Logical Works of Sigmund Freud (Hogarth Press: London, 1927).

criminalising the act.

Currently, World Health Organization identified 59 countries across the world that have decriminalized suicide considering suicidal behaviour typically as a symptom of psychiatric illness or act of psychological distress, indicating that the person requires assistance in his personal and psychological life. Penal sanctions may exacerbate risks of anxiety, depression, and repetitive suicidal behaviour. In fact decriminalisation of attempted suicide acknowledges and enables the right of health care of a person suffering from impaired mental health.

E. Suicide, Assisted Suicide and Euthanasia

Suicide deals with extinguishing one's own life, but if facilitated by other person, it constitutes assisted or aided suicide. In general, assisted suicide is discouraged by all jurisdictions by initiating penal action against the aider except in case of medical advice. Euthanasia, also known as mercy killing, is a hospital procedure of ending life (either by omission or commission) on the advice of health experts certifying no ray of hope to improve health of critically ill person suffering from tremendous pain and agony. Involvement of single party with intent of causing death of self, differentiates suicide from euthanasia where another party, normally a medical expert, is mandatory to facilitate death of a terminally ill person.

The first recorded use of the word 'euthanasia' was by Suetonius, a Roman historian in his treatise "De Vita Caesarum-Divus Augustus" (The Lives of the Caesars - The Deified Augustus).[44] The word 'Euthanasia' is derived from the Greek words '*Eu*' means good and '*Thanatosis*' meaning death. The Oxford dictionary defines euthanasia as the painless killing of a patient suffering from an incurable and painful disease or in irreversible coma. Euthanasia, is the intentional premature termination of another person's life either by direct medical intervention (active euthanasia) or by withholding life-prolonging measures and resources (passive euthanasia), either at the express or implied request of the subject (voluntary euthanasia), or in absence of such approval (non-voluntary euthanasia).[45] If performed against patient's wishes, euthanasia becomes involuntary.[46]

[44] Suetonius describes the death of Augustus Caesar, "...while he was asking some newcomers from the city about the daughter of Drusus, who was ill, he suddenly passed away as he was kissing Livia, uttering these last words: "Live mindful of our wedlock, Livia, and farewell, thus blessed with an easy death and such a one as he had always longed for. For almost always, on hearing that anyone had died swiftly and painlessly, he prayed that he and his might have a like euthanasia, for that was the term he was wont to use."

Indeed, euthanasia and physician assisted suicide (PAS) are used interchangeably but both have subtle difference. In fact euthanasia is an act whereby a physician intentionally causes the death of a terminally ill patient but PAS represents an act of self-destruction committed by the patient himself by consuming a lethal dose of medical prescription advised by the physician. A physician 'acts' for performing euthanasia but under PAS he only 'advice' a patient as to how to terminate his life. In *Washington* v. *Glucksberg*[47] and *Vacco* v. *Quill*,[48] the US Supreme Court made the distinction explicit by observing that, "when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by the medication". Despite benevolent purpose, the intentional act of physician of euthanasia technically constitutes a homicide and hence proscribed under various jurisdictions.

F. Suicide Tourism

The limited legal choice to end one's life led to suicide tourism to jurisdictions like Switzerland, Netherland, Belgium, Luxemburg and Oregon where laws are liberal for altruistic motive.[49] Under Swiss law the assistance of suicide is criminalized only if motive for assistance is selfish.[50] Motives provide legal basis to operate assisted suicide clinics like Dignit as in Switzerland where several people have availed services for committing suicide.[51] In UK touring Switzerland has become a euphemism for assisted suicide. Several Britons such as Reginald Crew (April, 2003) and John Close (May, 2003) travelled with family to Dignitas in public glare for suicide tourism but the prosecution of family members was not deemed to be in public interest because the act of suicide was contemplated outside UK.[52] Ms. Brittany Maynard, a resident of

[45] D.Chao, N. Chan and W. Chan, *Euthanasia Revisited*, 19 Family Practice 128-34(2002); A.F.Rashid, B. Kaur and O. Aggarwal, *Euthanasia Revisited: The Aruna Shanbaug Verdict*, 34(2) J. Indian Acd. Forensic Med.165-169 (2012).

[46] Robert M. Walker, *Physician-Assisted Suicide: The Legal Slippery Slope*, 8(1) Cancer Control 25-31 (2001).

[47] 117 S Ct 2258 (1997).

[48] 117 S Ct 2293 (1197).

[49] Switzerland permitted assisted suicide in 1942 while Oregon, Netherland, Belgium and Luxemburg permitted in 1997, 2002, 2002 and 2009 respectively. Belgium became most liberal on assisted suicide law in 2015 by lifting age restrictions. In June 2015, Ms. Laura, aged 24 years, suffering from depression was allowed to exercise her right to die.

[50] Article 115 of the Swiss Criminal Code, 1937: Any person who for selfish motives incites or assists another to commit or attempt to commit suicide is, if that other person thereafter commits or attempts to commit suicide, liable to a custodial sentence not exceeding five years or to a monetary penalty.

[51] Stella Hambly, *The Choice to give up living: Compassionate Assistance and the Suicide Act*, 3(2) Uclan J. Undergraduate Research 1-15 (2010).

[52] The World Federation of Right to Die Societies, Death Tourism, *available at* http://www.worldrtd.net/news/%E2%80%9Cdeath-tourism%E2%80%9D (accessed 30 June, 2017)

California, also planned death tourism to Portland and 'died with dignity' on 01 November, 2014.[53] Indeed 'not in our back yard' approach may bring ambiguity in suicide jurisprudence and such legal lacunas promoting suicide tourism must suitably be addressed.

III. Legal Perspective on Suicide: Global Landscape

In ancient Athens, a person who died by suicide was denied the honours of normal burial and was buried alone on the outskirts of the city, without a headstone or marker. The Middle Ages, marked the beginning of criminalizing the act of suicide. According to Bracton (in the 13th century) suicide was not a felony *per se* but if committed by a criminal it indicated confession of the crime and attracted forfeiture of his goods.[54]In 1562, the court in *Hales* v. *Petit,*[55] ruled that suicide was a felony punishable by confiscation of assets irrespective of whether committed by a criminal or other person.[56] In 1670, Louis XIV of United Kingdom issued a criminal ordinance under which the body of suicide doer was drawn through streets, face down, and then thrown on garbage heap and his property was confiscated.

The Burial of Suicide Act of 1823 abolished the legal requirement in England of burying suicides at crossroads. The Coroners Act, 1887 enabled the forfeiture of the suicide victim's assets to the King's treasury based on coroner's investigation and suicide certification.[57] Attempted suicide was dealt as misdemeanour by the courts in *R.*v. *Doody*[58] (1854) and *R* v. *Burgess*[59] and less serious than murder. English law, by 1879, had begun to distinguish between homicide and suicide but forfeiture of property still continued. In *R* v. *Mann*[60] (1914) the court finally held that suicide was a felony but attempted suicide was a misdemeanour. The Magistrate in *R* v. *Trench* (1955) had observed, "... to say attempted suicide is to be regarded as a very serious crime show as entire lack of proportion". A person who aids, abets, counsels or procures the commission of any misdemeanour is liable to be tried, indicted and punished as

[53] *End of Life Ethics: Application to the Case of Brittany Maynard,* Bioethics Blog 28 February, 2015, *availableat*https://scholarblogs.emory.edu/phil116bioethics/2015/02/28/end-of-life-ethics-application-to-the-case-of-brittany-maynard/(last visited onJune 30, 2017).

[54] East W. Norwood, *Suicide from the Medico-Legal Standpoint*, 2 Br. Med. J. 241-244 (1931).

[55] 438 A.2d 226 (1981).

[56] J. Neeleman, *Suicide as a Crime in the UK: Legal History, International Comparisons and Present Implications*, 94 Acta Psychiatra Scand. 252-257 (1996).

[57] Under the Coroner's Act, 1887 the prime function of the coroner (since 1927, legally or medically qualified person) was to investigate the causes and circumstances of the violent and unnatural death and to decide the legal ownership of his assets.

[58] (1854) 6 Cox 463.

[59] (1862) 2 L and C 258.

[60] (1914) 10 Cr.App.R.

principal offender.[61] However, in 1983, the Roman Catholic Church reversed the canon law that prohibited proper funeral rites and burial in church cemeteries for persons committing suicide.[62]

A. Decriminalizing Attempted Suicide

No country in the world explicitly recognises the right to die or to commit suicide but gradually legal rigour for attempted suicide got relaxed.[63] Scotland had never criminalised attempted suicide. Germany became the first country to repeal anti-suicide laws in 1751.[64]Aid and abetment for suicide have legal approval under German laws. After French Revolution, various countries of Europe and North America witnessed decriminalisation of self-killing. Except Cyprus, all European countries have legalised the act of suicide. Gradually, worldwide attempted suicide got recognition having linkages with mental health and psychological instability of the attempter rather than criminal intent liable for punishment. Legal intent for defacing laws on attempted suicide in some countries has been discussed below.

(i) United Kingdom

Till 1961, English law perceived suicide as an immoral criminal act both against the God and the Crown.[65]Steered by the views of judiciary, clergy and the British Medical Association,[66] the British Parliament enacted the Suicide Act, 1961, applicable to England and Wales, under which attempted suicide ceased to be an offence,[67]but criminalised aiding and abetting suicide.[68] The House of Lords refused to permit assisted suicide in the *Pretty* case[69] by observing, "Article 2 (of the European Convention on Human Rights, 1950) cannot without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life."[70]

[61] K.S. Latha and N. Geetha, *Criminalizing Suicide Attempts: Can it be a deterrent?*, 44(4) Med. Sci. Law 343-347 (2004).

[62] Jacob Crouch Foundation, The History of Suicide (2011)

[63] M. Ariens, *Suicidal Rights*, 20 Rutgers Law J.79-123 (1988).

[64] S.H. Kazarian & D.R. Evans, Handbook of Cultural Health Psychology (Academic Press: San Diego, CA; 2001).

[65] S. Annies Mararet, Fara Azida Binti Ahmad Bakri and Lee Mah Ngee, *Suicide Prevention Using Jurisdiction*, 1 Int. J. Business & Law 98-103 (2012).

[66] Second Report (Suicide) By Criminal Law Review Committee (HMSO: London, 1960).

[67] The Suicide Act, 1961 (9 and 10 Eliz 2 c 60).

[68] Section 2 of the Suicide Act, 1961 determines criminal liability for complicity in another's suicide. Section 2(1) criminalizes for aiding and abetting of suicide.

[69] *The Queen on the Application of Mrs. Dianne Pretty* v. *Director of Prosecution* [2001] UKHL 61, para 35.

[70] *Id.,* para 39.

In R *(Purdy)* v. *DPP*,[71] the petitioner claimed review of specific offence of assisted suicide policy of UK under section 2(1) of the Suicide Act as contravening Article 8 of the European Convention on Human Rights, 1950. Since her claim failed in the High Court and Court of Appeal, she approached the House of Lords. Deviating from the *Pretty* case, the House held that requirement of accessibility and foreseeability must be satisfied while dealing with Article 8(2) of the European Convention and the Public Prosecutor is expected to exercise his discretion of 'compassionate assistance' in such cases.[72]Accordingly, section 2(1) of the Suicide Act was amended by replacing 'aid, abet, counsel and procure', to 'acts capable of encouraging or assisting' the suicide of another.[73] However, euthanasia continues to be illegal in UK.

(ii) United States

Various States of USA have decriminalized suicide since 1960s. The Oregon's Death with Dignity Act, 1994 and the Washington Death with Dignity Act, 2009 enabled physician assisted suicide but patient having sound mind, must be diagnosed with less than six months remainder life and must make oral or written request. Two doctors must approve and after 15 days the patient needs to reaffirm the request. A doctor may prescribe a lethal dose of a medication but may not administer it. In California, the End of Life Option Act, 2016 enables the terminally ill patients to take decision of taking aid-in-dying medication under certain conditions.[74] Thus, active euthanasia, with certain riders, got partial recognition under US legal system.

In the *Glucksberg's* case,[75] the US Supreme Court held that the right to assistance in committing suicide does not attract fundamental liberty protected by the due process clause under the Fourteenth Amendment.[76] The court held that the decision to commit suicide with the assistance of another person may be a personal matter similar to a decision of refusing unwanted medical treatment and may not attract legal protection. The nine judges Bench of the US Supreme Court in 1990 except Justice Scalia in the *Cruzan* case[77] have acknowledged that the right to die is a federal constitutional right. The court emphasised on the consent of person for withdrawing artificial medical support to the patient

[71] [2009] UKHL 45.

[72] *Ibid*.

[73] Section 2(1) of the Act, 1961 was amended by the Coroners and Justice Act, 2009.

[74] The Act, 2016 came into force on 9 June, 2016.

[75] *Washington* v. *Glucksberg* 521 U.S.702 (1997).

[76] Philip King, *Washington* v. *Glucksberg: Influence of the Court in Care of the Terminally Ill and Physician Assisted Suicide*,15 J Law And Health 271-301 (2001).

[77] Amy Zelaya, *Cruzan* v. *Director, Missouri Department of Health 497 U.S.261*, 14 J. Contemp. Legal Issues 313 (2004).

suffering from vegetative state. The court held that bodily integrity embodied informed consent in medical treatment and law proscribe touching a person by another without consent which amounts to committing a battery.The Court observed, "An erroneous decision not to terminate results in maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment, at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction."

In case of permanent vegetative state (PVS),[78] enabling the right to privacy *In re Karen Quinlan*,[79]the US Supreme Court approved disconnecting the ventilator on the request of the parents even in absence of consent of the patient.[80] In *Conroy* case[81] the U.S. Supreme Court, contrary to *re Quinlan*, emphasized on informed consent and the best interest standards.[82] *Conroy case* upholds the right of refusal by mentally impaired and competent patients on grounds that their rights of free choice, self-determination and privacy outweigh medicine's and state interests in prolonging life and preventing suicide. This case culled out two "best standards tests" for withholding life sustaining treatment from a patient: a limited-objective test and pure-objective test. In limited-objective test, life sustaining treatment may be withdrew from a patient alike Claire Corony's situation based on some trustworthy evidence proving refusal by the patient to continue treatment. But the decision maker must satisfied that the burdens of treatment outweigh the benefits of life. Under pure-objective test, the net burden of the patient life with the treatment should clearly and markedly outweigh the benefits that the patient derives from life. However, assisted suicide by aiding and abating is illegal in USA.

[78] Persistent vegetative state (PVS) is a diagnostic term coined by the American Academy of Neurology. PVS is clinical disorder of consciousness in which patient with severe brain damage remains in a state of partial arousal rather than true awareness. After four weeks in a vegetative state (VS), the patient is classified as in a PVS.

[79] In *re Karen Quinlan* (70 N.J. 10, 355 A.2d 647 1976). In this landmark case the parents of Ms. Karen Ann Quinlan (she suffered from persistent vegetative state (PVS) but kept alive by artificial means) were allowed by the court to remove her artificial ventilation. The case paved the way for legislation on Euthanasia in California. However, the End of Life Option Act was signed by the Governor Brown of California in October 2015 and came into effect on 09 June, 2016.

[80] H.L. Hirsch and R.E. Donovan, *Right to Die: Medico-Legal Implications of in re Quinlan*, 30 Rutgers L Rev.267 (1976).

[81] In *re Claire C. Conroy*, the Supreme Court of New Jersey (1985) 98 N.J. 321 486 A.2d 1209.

[82] R.Dresser, *Relitigating life and death*, 51 Ohio St. L. J. (1990)1425-1447; Harold Y. Vanderpool, *Doctors and the Dying of Patients in American History*, in Robert F. Weir (ed.) Assisted Suicide (Indiana University Press, Bloomington, Indiana, USA, 1997) pp. 33-68.

(iii) Canada

Canada repealed penal provisions for suicide in 1972 but physician assisted death is illegal under section 241(b) of the Criminal Code of Canada. However, anyone found guilty of counselling another to take one's life or of aiding suicide is liable to imprisonment up to 14 years whether or not the suicide attempt is successful.[83] In *Rodriguez* v. *Attorney General of Canada*,[84] court has refused to permit physician assisted suicide whereby Justice John Sopinka observed, "Given the concerns about abuse that have been expressed and the great difficulty in creating appropriate safeguards to prevent these, it cannot be said that the blanket prohibition on assisted suicide is arbitrary or unfair, or that it is not reflective of fundamental values at play in our society".[85] Recently the Supreme Court of Canada, in *Carter* v. *Canada (Attorney General)*,[86] held criminal prohibition on physician-assisted suicide and euthanasia under section 141 and 14 of the Criminal Code, under certain circumstances,[87] as unconstitutional since it violates the right to life, liberty and security of person provided under section 7 of the Canadian Charter of Rights.[88] Thus at present, in Canada euthanasia is permitted but aid or abetment to suicide is illegal.

(iv) Other Jurisdictions

Netherlands is the only country permitting euthanasia and doctor assisted suicide under the Termination of Life on Request and Assisted Suicide (Review Procedure) Act, 2002. Progressively, euthanasia was permitted only for terminally ill patients, then to chronically ill, and subsequently for psychological sufferings and incompetent patients including children.[89] However, criminal proceedings get contemplated in Netherland, if one participates in execution for or execution of a suicide including lethal means. In 1993, Ireland decriminalised attempted suicide but assisted suicide and euthanasia still continued to be illegal. Singapore enacted the Advanced Directive Act, 1997 under which Singaporeans, in order to minimise sufferings and to honour dignity, may sign an advanced

[83] Section 241(b) of the Criminal Code, Canada 1985; similar to section 2(1) of the Suicide Act, 1961; S. Annie Margaret, Fara Azida Binti Ahmad Bakri, and Lee Mah Ngee, *Suicidal Prevention using Jurisdiction*, 1 INT. J.BUSINESS, ECONOMICS AND LAW 98-193 (2012).

[84] [1994] 2 LRC 136.

[85] *Id.*, para 189.

[86] (2015) SCC 5.

[87] *Id.*, para 147. Three conditions to permit physician assisted death: (1) a person is a competent adult, (2) clearly consents to the termination of life and (3) has a grievous and irremediable condition (including an illness, disease or disability) that causes enduring suffering that is intolerable.

[88] Benny Chan & Margaret Somerville, *Converting the 'Right to Life' to the 'Right to Physician-assisted suicide and Euthanasia': An analysis of Carter* v. *Canada (Attorney General), Supreme Court of Canada*, 24(2) MEDICAL L. REV. (2016)143-175.

[89] D. Benatar, *A Legal Right to Die: Responding to Slippery Slope and Abuse Arguments*, 18(5) CURR. ONCOL.206-207 (2011).

medical directive (AMD) declaring that one does not wish to receive extraordinary life-sustaining devices in case of prolonged illness. However, Singapore has humanized enforcement practice of suicide laws which gets operational, firstly, if the person repeatedly tries to kill oneself; secondly, when resources are wasted in preventing from suicide; and thirdly, when the person while attempting suicide has committed other offence such as injuring other person.

In Asian continent, suicide is permissible in various jurisdictions like Bhutan, Sri Lanka, Thailand, China, Cambodia, Indonesia, Israel, South Korea, Iran, Japan, Qatar and Vietnam. But jurisdictions including Pakistan, Bangladesh, UAE, Saudi Arabia, North Korea, Malaysia, Jordan, Singapore and Yemen continued to criminalise attempted suicide like in India. In Europe majority countries have legalised suicide except Cyprus. In African jurisdictions like South Africa, Angola, Botswana, Cameroon, Egypt, Zambia and Zimbabwe attempted suicide is legal.

B. Global Response to Assisted Suicide

All jurisdictions criminalize and punish assisted suicide considering it a form of intentional homicide despite being assisted on victim's request. While the proscription of assisted suicide and euthanasia virtually remain absolute in US, a notable exception existed for a short time.[90] In 1902, the Texas Court of Criminal Appeals on assisted suicide held, "It is not a violation of any law in Texas for a person to take his own life...So far as the law is concerned the suicide is innocent; therefore the party who furnishes the means to the suicide must also be innocent of violating the law.[91]In *State of Missouri* v. *Webb*[92] the court held, "Every person deliberately assisting another in the commission of self-murder shall be deemed guilty of manslaughter in the first degree." Unlike Germany[93] and Switzerland[94] where outcome of assisted suicide attracts more significance, English law emphasize upon intent irrespective of outcome of the attempt. In Netherlands, if the outcome is not fatal, assisted suicide is not punishable.[95]

[90] Neil M. Gorsuch, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA (Princeton University Press, New Jersey, 2006) p. 44.

[91] *Grace* v. *State* (Tex.) 69 S.W. 529.

[92] 216 Mo. 378, 115 S. W. 998.

[93] A.Bridgae, *Germany's Seller of Death Arrested*, 306 BR. MED. J. 351-352 (1993).

[94] N. Spfijer, HET ZELFMOORDVRAAGSTUK; CEN SAMENVATTEND OVERZICHT VAN DC VERSCHILLENDE ASPECTEN VAN ZELFMOORD (Arnhem: Van Loghum Slaterus, 1969).

[95] J.A. Fruin, NEDERLANDSE WETBOEKEN (Wetboeken Zwolle, Tjeenk Willin, 1994).

In 1983 while deciding an appeal from an English citizen against the law of assisted suicide, the European Court of Human Rights (ECtHR) in *R* v. *United Kingdom*[96] had observed, "It recognizes the right of the State under the Convention to guard against the inevitable criminal abuses that would occur in the absence of legislation against the aiding and abetting suicide".[97] As discussed earlier the *Pretty*[98] and the *Prudy*[99] laid down the foundation of the right to assisted suicide. This right was further strengthened in *Haas* v. *Switzerland*[100] and the verdict has been recognized as proclaiming "a real conventional right to suicide' establishing indeed a right to decide one's own death, and even outlines at the expense of the State, a positive obligation"[101] to provide anyone endowed with discernment means to cause their own death. In the *Haas*, the court stepping ahead, from the 'choice' recognised in the *Pretty*, to a right to commit suicide by observing, "An individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention".[102] Thus assisted suicide is no longer limited only to liberty but is gradually evolving as a right.

The *locus standi* was refused to the husband by the German administrative court in *Koch* v. *Germany*[103] since the Petitioner went to Dignitas[104] in Switzerland and committed assisted suicide when the case was pending in the court. Later the husband applied to the ECHR but faced challenge on admissibility since under Article 34 of the Convention, only a person who is victim of a violation of the convention may apply to the court. Under the similar facts in *Sanles Sanels* v. *Spain (dec.)*,[105] the court held that 'the applicant has no standing to assert the rights to his wife by Article 8 of the Convention, due to the non-transferable nature of these rights.' In the *Koch*, given the exceptionally close relationship of her wish to end her life, the court considers that 'the applicant can claim to have been directly affected by the Federal Institute's

96 *R* v. *United Kingdom* (1983) 33 DR 270.
97 *Id*., para 17.
98 [2001] UKHL 61. In the *Pretty* case, the court held that being prevented by law 'to exercise one's choice' to end one's life could constitute a violation of the right to respect for one's private life.
99 *Supra* n. 72.
100 (2011) 53 EHRR 33.
101 *Id*., para 61.
102 *Supra* n. 100, para 51.
103 (2013] 56 EHRR 6.
104 Dignitas, a Swiss non-profit organisation - founded by Ludwig Minelli on 17th May 1998, advice on palliative care and assisted/accompanied suicide, to sufferers of terminal illness or severe physical/mental sickness, with the support of qualified medical aid.
105 No. 48335/99 ECHR 2000-XI, as quoted in Alastair R. Mowbray, Cases and Materials on the European Convention on Human Rights (Oxford University Press, New York, 2007) p. 23.

refusal to grant authorization to acquire a lethal dose of pentobarbital of sodium'.[106] Indeed by this ruling, the court considerably expanded the concept of a victim being more obedient to emotions rather than to strict rationality by reversing the ratio in *R* v. *United Kingdom*,[107] where the court observed that "the acts aiding, abetting, counselling or procuring suicide are excluded from the concept of privacy by virtue of their trespass on the public interest of protecting life, as reflected in the criminal provisions of the 1961 Act".[108]

In *Haas* v. *Switzerland*, the Court held that Switzerland had the obligation 'to establish a procedure capable of ensuring that a decision to end one's life does indeed correspond to the free will of the individual concerned'[109] in order to prevent the 'the individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved'.[110] After the *Hass* case, it is no longer safe to say that right to life constitutes an inalienable attribute of the human person and that it forms the supreme value in the scale of human rights. In fact individual's liberty symbolizes the 'supreme value'. In *Gross* v. *Switzerland*,[111] the court held that Switzerland had an obligation to create a legal framework allowing each person to claim right to assisted suicide. This case transferred the practice of assisted suicide from medical domain to civil liberties. Indeed the ECtHR gradually adopted a liberal position on assisted suicide underlining the evolving percept of human dignity.

In *R (Nicklinson)* v. *Ministry of Justice*,[112] an irreversibly paralysed petitioner requested to permit assisted suicide arguing that provisions for punishing a person assisting in suicide under section 2 of the Suicide Act, 1961 contravene Article 8 of the European Convention, 1950. The Supreme Court of United Kingdom held that the judiciary has authority to make declaration of incompatibility as regards to the general prohibition of assisted suicide but the Parliament must resolve the sensitive issue by enacting apt legislation. The ECtHR, in this case, held that "If the domestic courts were to be required to give a judgment on the merits of such a complaint this could have the effect of forcing upon them an institutional role not envisaged by the domestic constitutional order. Further, it would be odd to deny domestic courts charged with examining the compatibility of primary legislation with the Convention the possibility of

106 *Supra* n. 103, para 50.
107 (1983) 6 EHRR 140.
108 *Id*., para 13.
109 *Supra* n.100, para 58.
110 *Id*., para 54.
111 No. 67810 EctHR 2014.
112 [2014] UKSC 38.

concluding, like this Court, that Parliament is best placed to take a decision on the issue in question in light of the sensitive issues, notably ethical, philosophical and social, which arise."[113]

In last five decades, suicide and the assisted death have emerged as socio-psychological notion facing multifaceted challenges in the evolving legal panorama. India, facing high prevalence of suicides,[114] is also processing for defacing anti-suicide laws to integrate with emerging global neo-jurisprudence of suicide.

C. Legal Perspective in India on Suicide

India has attempted several times to deface anti-suicide laws based on humanitarian discourse. Recently the Mental Health Care Act, 2017 has acknowledged that a person attempting suicide must be assumed to be suffering from mental illness and has imposed duty upon the government to provide adequate care, treatment or rehabilitation to the victim. The proposed legislative intent has started a debate to understand the legal nuances of suicide attempts and judicial response thereof. Before entering into the discourse of defacing these laws, snapshot on the existing laws has been presented below.

(i) Section - 309 and 306 of the Indian Penal Code, 1860

Since 1860, the Indian Penal Code criminalizes attempted suicide under section309,[115]but the language of section is sweeping in nature and does not define suicide.[116]Ratanlal and Dhirajlal on section 309had commented, "It is a unique legal phenomenon in the Indian Penal Code that the only act, the attempt of which alone will become an offence."[117] Section 306 of the Penal Code criminalizes the abatement of suicide with condition precedent of successful commission of suicide.[118] In fact abatement of failed suicide remains unpunished in India.

(ii) Response of the Law Commission and the Legislature

The back and forth approach of the Law Commission of India in last

[113] *Nicklinson and Lamb* v. *The United Kingdom* [2015] ECHR 783, para 84.

[114] *Supra* n. 5.

[115] Sec. 309 IPC: "Whoever attempts to commit suicide and does any act towards the commission of such offence shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both."

[116] The Law Commission of India, 210TH Report on Humanization and Decriminalization of Attempt to Suicide (October, 2008), p. 14.

[117] Ratanlal and Dhirajlal, Indian Penal code (LexisNexis, 2017) p. 740.

[118] Section 306: Abetment of suicide – 'If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine'.

four decades is a tale of criminalising and decriminalising attempted suicide. In response to the 42nd Report of the Law Commission of India to decriminalize the attempted suicide,[119] the Indian Penal Code (Amendment) Bill, 1978 was passed in Rajya Sabha on November 23, 1978 but lapsed since Lok Sabha was dissolved in 1979. In *P. Rathnam* v.*Union of India,*[120] the Apex Court decriminalized attempted suicide considering right to die *sine quo non* to right to life under Article 21, but in *Gian Kaur* case of 1996 revived section 309. This was echoed in the 156th Report of the Law Commission of India.[121]

In 2008, Justice AP Lakshmanan, the Chairman of the Law Commission of India has recommended for effacing section 309 by observing "It is felt that attempt to suicide may be regarded as a manifestation of diseased condition of mind deserving treatment and care rather than an offence to be visited with punishment."[122] The Law Commission hold the view that "assisting or encouraging another person to (attempt to) commit suicide must not go unpunished, the offence of attempt to commit suicide under section 309 needs to be omitted from the Indian Penal Code".[123]

(iii) Observations by Higher Judiciary in India

Suicide contradicts the monopolistic power of the State to take away life as mentioned under Article 21 of the Indian Constitution.[124] A socio-legal dilemma is that in case the State is incapable of providing enabling environment to enjoy dignified life, does it compel an individual to live 'undignified life' or he has the option to end his life. The constitutionality of section 309 has been challenged time and again before the Supreme Court and different High Courts. In *State (Delhi Administration)* v. *Sanjay Kumar Bhatia*,[125] the Delhi High Court had observed, "The continuance of section 309 of Indian Penal Code is an anachronism unworthy of a human society like ours."[126] This case indeed set the tone for decriminalising the act of attempted suicide.[127]

[119] The Law Commission of India, 42ND Report on Indian Penal Code (June 1971) recommended to repeal section 309 of the Code, p. 244.

[120] (1994) SCC 394.

[121] The Law Commission of India, 156TH Report on 'Indian Penal Code VOL. II (1997) recommended to continue sec. 309 of the Code, p. 133.

[122] *Supra* n.116, p.7.

[123] *Id. at* 39.

[124] Article 21 – Right to life: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

[125] 1986 (10) DRJ 31.

[126] *Id.*, para1.

[127] K. Latha and N. Geetha, *Criminalising Suicide Attempts: Can it be deterrent?*, 44 Medicine, Science and the Law 343-347 (2004).

The Bombay High Court in *Maruti Shripati Dubal* v. *State of Maharashtra*[128] held section 309 *ultra vires* the Constitution being in violation of Articles 14 and 21 thereof and must be repealed.[129] Contrarily, the High Court of Andhra Pradesh, by upholding the constitutional validity of section 309, has observed that "unwarranted harsh treatment or prejudice is not meted out to those who need care and attention".[130] In fact various High Courts have interpreted constitutional validity of anti-suicide laws in contradictory manner.

In 1994, the Supreme Court in *P. Rathinam* v. *Union of India*[131] decriminalized section 309 on the argument that scope of Article 21 of the Indian Constitution, 1950 incorporates the 'right to die'. By drawing analogy from Article 19, the court observed that freedom of speech and expression also include right to silenceand to move anywhere and right to carry business incorporate not to do business. The Apex Court argued that section 309 does not violate Article 14 but abridges right to life under Article 21 and held section 309 void, being cruel and irrational. The Constitutional Bench of the Apex Court in *Gian Kaur* v. *State of Punjab*,[132] in 1996, overruled the judgment of the *Rathinam*, giving life back to section 309 construing that right to die violates Article 21 and 14 of the Indian Constitution and upheld the constitutional validity of both sections 306 and 309 of the Penal Code. Justice J.S. Verma observed that the 'right to die', if any, is inherently inconsistent with the 'right to life'. The court cited the decision of the United States Court of Appeals for the Ninth Circuit in *Compassion in Dying* v. *State of Washington*,[133] which reversed the decision of United State District Court W.D. Washington,[134] whereby the District Court held the provisions of punishing for promoting suicide attempt as unconstitutional. Thus section 309 was revived in India by the *Gian Kaur* case.

Euthanasia, in *sensu stricto*, does not fall under section 309. The Kerala High Court in *C.A. Thomas Master* v. *Union of India*[135] held that voluntary termination of life for whatever reason would amount to suicide within the

[128] 1987 Cr.LJ 743.

[129] B.R.Sharma, A. Sharma and D. Harish, *Abolition and restoration of Section 309 IPC - An overview*, 7(1) ANIL AGGRAWAL'S INTERNET JOURNAL FORENSIC MEDICINE & TOXICOLOGY (2006), *available at* http://www.anilaggrawal.com/ij/vol_007_no_001/papers/paper003.html (last visited on June 30, 2017).

[130] *Chenna Jagadeeswar* v. *State of Andhra Pradesh*, 1988 Cr.LJ 549. The court raised doubt as to whether sec. 306 IPC could survive, if sec. 309 IPC held illegal.

[131] *Supra* n. 123.

[132] AIR 1996 SC 1257.

[133] 49 F.3d 586.

[134] 850 Federal Supplement 1454.

[135] 2000 CriLJ 3729. In this case, a retired teacher of 80 years demanding for voluntarily put an end to his life since arguing that he has had a successful and contended life and his mission of life has ended.

meaning of section 306 and 309. In the *Gian Kaur*, the Apex Court held that euthanasia could be made lawful only by legislation. However, the writ petition in *Aruna Ramchandra Shanbaug* v. *Union of India*[136] raised perplexing issue of mercy killing.[137] In this land mark judgment, the Apex Court legitimized 'passive euthanasia'[138] by way of removing life saving devices or treatment on recommendation of medical board. However, the Court refused to permit 'active euthanasia', by administering life ending prescriptions. The Court recommended for legislature to delete section 309 since it appears "anachronistic though constitutionally valid".[139]

In *Gian Kaur* v. *State of Punjab*,[140] the Apex Court held that abetment to attempt of suicide is beyond the purview of section 306 and punishable only under section 309 read with section 107 of the *Penal Code*. In *Satbir Singh* v. *State of Punjab*,[141] Court observed that "It is possible to abet the commission of suicide. But nobody would abet a mere attempt to commit suicide. It would be preposterous if law could afford to penalise an abetment to the offence of mere attempt to commit suicide." In *Berlin P. Thomas* v. *State of Kerala*,[142] the High Court of Kerala has opined that a person can go on abetting commission of suicide, but his conduct will not be culpable if the offence of suicide is not committed, would certainly defeat the purpose of the law. Thus abatement of suicide even if suicide fails must be punished."

(iv) The Mental Health Care Act, 2017

Recently India has enacted the Mental Health Care Act, 2017 which is a paradigm shift in legal approach enabling presumption of severe stress in case of attempt to commit suicide.[143] Further legislature has casted a duty upon the appropriate government to plan, design and implement programme for

[136] (2011) 4 SCC 454.

[137] M.K. Jha, P. Bhattacharrya & A. Garg, *Euthanasia: Indian Scenario*, 12(1) J. PUNJAB ACADEMY OF FORENSIC MEDICINE & TOXICOLOGY 43-47 (2012).

[138] Passive death (Orthothanasia) has been observed in history by with-holding treatment to made death easy in passive form.

[139] *Supra* n. 138, para 100.

[140] *Supra* n. 134.

[141] (2001) 8 SCC 633.

[142] (2008 CrLJ 1759).

[143] The Mental Health Care Act, 2017: Presumption of mental illness in case of attempt to commit suicide by person:
Section 115. (1) Notwithstanding anything contained in section 309 of the Indian Penal Code, any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and not be tried under the said section.
(2) The appropriate Government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit suicide.

promotion of mental health and prevention of mental health illness to reduce incidents of suicide and attempted suicide in the country.[144]The Act, 2017 is a great leap to promote mental health care along with decriminalise attempted suicide.

IV. Conclusion

Self-killing cannot be a blissful event rather it symbolises abnormal behaviour in despair as a result of either mental disorder or social incompatibility silently yearning for help from various quarters like family, society and the state. Suicide has been denounced as a great sin by some and eloquently defended as a natural right of man by others.[145]H. Romilly Fedden, an English writer has observed on attempted suicide, "It seems a monstrous procedure to inflict further suffering on even a single individual who has already found life so unbearable, his chances of happiness so slender, that he has been willing to face pain and death in order to cease living. That those whom life is altogether bitter should be subjected to further bitterness and degradation seems perverse legislation."[146]

Suicide laws virtually countermand the strategies for suicide prevention. Lodging the attempter of suicide in prison cell may aggravate the mental derangement inciting further attempt. Decriminalisation of abortive suicide attempt is justified on insanity defence under section 84 of the Indian Penal Code augmented by M' Naughten,[147] exempting the survivor from criminal liability being incapable of framing guilty mind to cause injury to other person; incriminating for causing injury to self under distress amounts to double punishment without legal justification.[148]

Considering suicide as consequence of circumstances, state must arrange counselling, mental health care and rehabilitation for implementing effective prevention strategies.[149] Besides repealing suicide laws, cultural values towards suicidal behaviour must also be addressed through educating people

[144] The Act, 2017: Section 29(1).

[145] D.M. Wright, *Criminal aspects of suicide in the United States*, 7 North Carolina Central Law J. 156-163 (1975).

[146] H. Romilly Fedden, Suicide: A Social and Historical Study (Peter Davies Ltd.: London, 1938) p. 42.

[147] *R* v. *M' Naughten* (1843) 8 E.R. 718. M' Naghten Rule was formulated as a reaction to the acquittal of Daniel M' Naghten in 1843 for murdering Edward Drummond mistakenly considering him Robert Peel, the then British Prime Minister. The M'Naghten Rule is a defence of insanity, which demand to prove that, at the time of the committing of the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing.

[148] P.C. Ellsworth, R.M. Bukaty, C.L. Cowan & W.C. Thompson, *The death-qualified jury and the defense of insanity*, 8 Law and Human Behaviour 81 (1984).

[149] Jacinta Hawqood & Diego De Leo, *Suicide Prediction – A Shift in Paradigm Is Needed*, 37 Crisis 251-255 (2016).

viewing suicide as a public health issue.[150] Suicide prevention help lines and assistance must be in place with wide publicity having active role of media and NGOs. Suicide prevention must be integral component of public health care and vulnerability mapping for suicidal behaviour needs policy intervention. Systematic epidemiological studies of suicide may help to understand complexity of self killing behaviour in diversified Indian society. India must design well researched customized anti-suicide strategies befitting cultural and social diversities. India is far from legalizing assisted suicide, and demand for euthanasia warrants revisiting constitutionality of the right to die.

The Mental Health Care Act, 2017 has rightly attempted treating suicidal behaviour as mental stress, in need of psychiatric treatment, social support and rehabilitation to live life with dignity and compassion rather than handcuffs and jail cell. Like decriminalising homosexuality in various countries, revoking anti-suicide laws, from a social perspective, by helping the 'helpless' may be a step forward for humanising the state response towards suicide survivors which in turn may boost the reporting of suicidal behaviour. The suicidal behaviour poses a major public health and mental health problem symbolizing – 'a cry for help' to provide psycho-socio-medical support.[151] Effacing section 309 of the Penal Code may be accentuated to synchronise Indian criminal law with global jurisprudence but it must not extinguish the onus of the state to provide the basic needs of common people. In fact repealing draconian anti suicide law may not grant a licence to die, but offer an opportunity for the state and the society to help, support and care for those suffering from distress. Defacing anti-suicide laws may symbolize the progressive jurisprudential approach towards freedom and from there to a right, a right to commit suicide, a progressive legal journey deliberated in the *Pretty* to the *Haas* cases.

[150] I.R.H. Rockett, *Counting Suicides and Making Suicide a Public Health Problem*, 31 Crisis 227-230 (2010).

[151] Deborah L. Kahn & David Lester, *Efforts to Decriminalize Suicide in Ghana, India and Singapore*, Suicidology Online (2013).

LAWS REGARDING DOWRY AND MAINTENANCE TO WOMEN: THE INTERPRETATIONAL DILEMMA*

*Anurag deep**

I. Introduction

Penal statutes are those which provide punishment for a conduct. Unlike other statutes penal statutes are given strict interpretation because accused must be afforded a level playing field *vis a vis* all powerful State. It will be seemly to quote a passage from Maxwell:[1]

> The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction.

Should all criminal laws be given strict interpretation? There are certain enactments which though penal are indeed remedial in nature. A remedial statute according to *Corpus Juris Secundum*, "is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good."[2] *Hooghly Mills*[3] is also useful to understand the concept of penal *vis a vis* remedial statutes. It is explained as:[4]

> The *normal canon of interpretation is that a remedial statute receives liberal construction whereas a penal statute calls for strict construction.* In the cases of remedial statutes, if there is any doubt, the same is resolved in favour of the class of persons for whose benefit the statute is enacted, but in cases of penal statutes if there is any doubt the same is normally resolved in favour of the alleged offender.

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1 Maxwell, The Interpretation of Statutes (12th Edn.), as quoted in *Aneeta Hada* v. *M/S Godfather Travels & Tours*, AIR 2012 SC 2795 at 2812.

2 Rudolph H. Heimanson, *Remedial Legislation*, *available at* http://scholarship.law.marquette.edu/cgi/ viewcontent.cgi?article=2717&context=mulr.

3 *Regional Provident Fund Commissioner* v. *Hooghly Mills Co. Ltd*, 2012(1) SCALE 422, decided on 18.01.2012, (hereinafter referred as *Hooghly Mills*), The case has been unanimously decided by A.K. Ganguly and T.S. Thakur, JJ. The judgment was delivered by Justice A.K. Ganguly.

4 *Id.* at 429, para 24.

The criminal laws are known for their strict interpretation. However, provisions relating to female are more welfare and remedial in nature. Provision of maintenance under section 125 of Code of Criminal Procedure, 1973; section 304B of Indian Penal Code, 1860; section 113B of Indian Evidence Act, 1872; and section 2 of Dowry Prohibition Act, 1961—are a few of them. Should the word 'dowry' be widely constructed to include demands for commercial purposes? Should the words 'relatives of husband' be given a liberal or a literal interpretation? Should the word 'wife' be interpreted to include second wife for maintenance purposes? Can a living in partner be presumed to be wife in certain cases? The conflict of words and purpose has created troubles in judicial interpretation. Can the established rule of strict interpretation of penal law be compromised to give such beneficial provisions a purposive construction? This paper highlights the dilemma of interpretation in dowry as well as maintenance cases.

II. Dowry Cases

Provisions regarding dowry are those provisions where contentions of penal *vis a vis* remedial has been raised in Indian courts. Dowry is one of the species of cruelty against women. In the last few years the 'cruelty against women' cases are on the priority radar of all the wings of governance. Interpretations in this respect revolve round the diverse and inconsistent meaning of dowry, relative of husband, wife *etc*. The inconsistency owes its origin to the use of different interpretative rules and tools by apex judiciary. Though there are various provisions which may be relevant in context of dowry, only three provisions are reproduced here as the discussion centers around these provisions. They are as under-

> **Section 304B.** Dowry death (Indian Penal Code 1860)[5]
>
> (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.
>
> Explanation - For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961.
>
> (2) Whoever commits dowry death shall be punished with imprisonment

5 Ins. by Act 43 of 1986, s.10 (w.e.f. 19-11-1986).

for a term which shall not be less than seven years but which may extend to imprisonment for life.

Section 113B. Presumption as to dowry death (Indian Evidence Act 1872)[6]

When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation: For the purposes of this section, "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860).]

Section 2. Definition of 'dowry' (Dowry Prohibition Act, 1961)[7]

In this act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly:

a. by one party to a marriage to the other party to the marriage; or
b. by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

at or before or any time after the marriage in connection with the marriage of said parties but does not include dower or *mahr* in the case of persons to whom the Muslim Personal Law (Shariat) applies.

Explanation II-The expression 'valuable security' has the same meaning as in section 30 of the Indian Penal Code (45 of 1860).

The interpretation of word 'dowry' and its distinction from demand for business has developed serious disputes. The Court in certain cases hold that Indian Penal Code and Dowry Prohibition Act 1961 being penal legislation, have to be strictly interpreted while in others the Court feel that strict interpretation is too lexican to serve the purpose.

Criminal laws regarding women have witnessed diverse interpretation. A Court in certain decisions tried to stick to the strict interpretation of penal laws while dowry laws being social welfare provision have also witnessed purposive interpretation. Should the word 'dowry' be given wide interpretation to incorporate every material demand by husband and his relative to provide space to the argument of 'demand made for business' or should 'dowry' be limited to literal/strict meaning?

[6] Ins. by Act 43 of 1986, s.12 (w.e.f. 5-1-1986).
[7] Act 28 of 1961 (w.e.f. 20-5-1961).

A. Dowry: Non purposive interpretation

In a case of 2007, *Appasaheb* v. *State of Maharashtra*,[8] one of the issues, was whether every demand of money will be treated as dowry demand or the nature and reason of demand will be the decisive factor? In this case it was alleged that some money was demanded from deceased wife to purchase manure as husband was passing through financial stringency. He was not able to meet some urgent domestic expenses. The court made a literal and strict interpretation of the provision as under and held:[9]

> In view of the aforesaid definition[10] of the word "dowry" any property or valuable security should be given or agreed to be given either directly or indirectly at or before or any time after the marriage and in connection with the marriage of the said parties. Therefore, the giving or taking of property or valuable security must have some connection with the marriage of the parties and a corelation between the giving or taking of property or valuable security with the marriage of the parties is essential.

The rational for strict interpretation in *Appasaheb*[11] was given as:

> *Being a penal provision it has to be strictly construed*. Dowry is a fairly well known social custom or practice in India. It is *well settled principle of interpretation of Statute that if the Act is passed with reference to a particular trade, business or transaction and words are used which everybody conversant with that trade, business or transaction knows or understands to have a particular meaning in it, then the words are to be construed as having that particular meaning*. [Emphasis Added]

Appasaheb made something which is called as 'distinction without difference.' The purpose of dowry enactment was defeated by this interpretation. The Parliament should have incorporated modifications under dowry laws. But it did not do it despite the Criminal Laws Amendment Act 2013 was brought. This indirectly indicated that the Parliament did not notice the problem due to *Appasaheb* or was comfortable with the dowry demand *vis a vis* commercial demand difference or thought that the judicial process will correct it. This indecisive approach of the Parliament led to further follow the wrong path made by *Appasaheb* case.

[8] AIR 2007 SC 763.
[9] *Id.*, para 9.
[10] Section 2 of the Dowry Prohibition Act, 1961.

B. Appasaheb followed

In the case of *Vipin Jaiswal* v. *State of A.P.* a demand of Rs. 50,000/- was made by the Appellant for purchase of a computer. The question was regarding the interpretation of expression 'dowry' and "in connection with the marriage of the parties to the marriage".[13] Is the word 'dowry' wide enough to cover any monetary demand for any purpose? Or the demand must be very closely related 'in connection with the marriage'. The court observed:[14]

> In our view, both the Trial Court and the High Court failed to appreciate that the demand, if at all made by the Appellant on the deceased for purchasing a computer to start a business six months after the marriage, *was not in connection with the marriage and was not really a 'dowry demand'* within the meaning of Section 2 of the Dowry Prohibition Act, 1961.

Taking clues from the precedent of *Appasaheb* and the rule of strict interpretation the court decided that demand of Rupees 50000/- for computer after six months of marriage is not 'in connection with the marriage' and therefore does not amount to 'dowry'.

C. Distinguishing Vipin Jaiswal

Appasaheb (2007) and *Vipin Jaiswal* (2013) were against the spirit of dowry enactment. Dilution and discard was the fate of the judgments. Dilution started in 2014 while discard took place in 2015. In *Surinder Singh* v. *State of Haryana*[15] the wife died within three months of marriage (date of marriage was 20/04/1994 and the date of her death was 22/07/1994). One of the issues was 'demand being for commercial needs and not dowry demand.' Distinguishing *Vipin Jaiswal* the court held in *Surinder Singh* case that there is convincing evidence that 'the accused were unhappy by the quality and quantity of the dowry' given at the time or before marriage transaction. As 'sufficient quantity of dowry was not given and that transaction was sought to be completed by asking for Rs. 60,000/,' the latter demand was a part of the first transaction. Proximity of demand with marriage was proved beyond reasonable doubts. While in *Vipin Jaiswal* the nexus between two transaction could not be proved proximately by prosecution and the benefit on the point has to go to the accused. Next arguments in *Surinder Singh* was that 'being a penal provision Section 2

[11] *Supra* n. 9.
[12] AIR 2013 SC 1567 (*hereinafter* referred as *Vipin Jaiswal*).
[13] Section 2, Dowry Prohibition Act, 1961.
[14] *Supra* n. 12, para 6.
[15] (2014) 4 SCC 129, (*hereinafter* referred as *Surinder Singh*).

of the Dowry Prohibition Act, 1961 will have to be construed strictly,' more so in the light of the case of *Vipin Jaiswal* and *Appasaheb* where the court construed it strictly in no uncertain terms.[16] Partially admitting this fact, the court in *Surinder Singh*[17] observed that the rule of strict interpretation of penal statutes is not absolute.[18] In the words of the court :

> It is true that penal provisions have to be construed strictly. However, we may mention that in *Murlidhar Meghraj Loya* v. *State of Maharashtra* [19] this Court was dealing with the Prevention of Food Adulteration Act, 1954. Speaking for this Court, *Krishna Iyer,* J. held that "It is trite that the social mission of Food Laws should inform the interpretative process so that the legal blow may fall on every adulterator. *Any narrow and pedantic, literal and lexical construction of food laws is likely to leave loopholes for the offender to sneak out of the meshes of law* and should be discouraged and *criminal jurisprudence must depart from old canons defeating criminal statutes* calculated to protect the public health and the nation's wealth."[20]

Similar view was taken in *Kisan Trimbak Kothula* v. *State of Maharashtra*.[21] The court also found force from *State of Maharashtra* v. *Natwarlal Damodardas Soni*[22] which dealt with Section 135 of the Customs Act and Rule 126-H(2)(d) of the Defence of India Rules, where a narrow construction given by the High Court was rejected, because that will emasculate these provisions and render them ineffective as a weapon for combating gold smuggling. It was further held that the provisions have to be specially construed in a manner which will suppress the mischief and advance the object which the legislature had in view.[23]

The court further observed:

> While we reiterate what this Court has said in *Appasaheb* that a penal statute has to be construed strictly, in light of *Kisan Trimbak* and *Natwarlal Damodardas*, we are of the opinion that penal statute, even if it has to be strictly construed, must be so construed as not to defeat its purport…*The presumption under Section 113B of the Indian Evidence*

[16] *Id.,* para 17.
[17] *Ibid.*
[18] *Id.,* para 18.
[19] (1976) 3 SCC 684, at para 5.
[20] *Ibid.*
[21] AIR 1977 SC 435.
[22] (1980) 4 SCC 669.
[23] *Supra* n. 15, para 18.

Act, 1872 and the presumption under Section 304B of the IPC have a purpose. These are beneficent provisions aimed at giving relief to a woman subjected to cruelty routinely in an Indian household. The meaning to be applied to each word of these provisions has to be in accord with the legislative intent. Even while construing these provisions strictly care will have to be taken to see that their object is not frustrated.[24]

The court in *Surinder Singh* case found proofs to convince that the demand of Rs 60000/ was in continuation of demand made in marriage while in *Vipin Jaiswal* the court did not found convincing evidence that the demand of Rs 50000/ was in continuity of the previous dowry transactions.

D. Discarding Appasaheb and Vipin Jaiswal

In 2015 a full bench of the apex court in *Rajinder Singh* v. *State of Punjab*,[25] not only addresses the issue of interpretation of dowry provision but also corrects two precedents. In the previous judgments of *Appasaheb* and *Vipin Jaiswal* a two judge bench gave strict interpretation to dowry provision and declared that demand of dowry is different from commercial demand or demand for domestic needs. *Rajinder Singh* rightly held that:

Given that the statute with which we are dealing must be given a fair, pragmatic, and common sense interpretation so as to fulfill the object sought to be achieved by Parliament, *we feel that the judgment in Appasaheb's case followed by the judgment of Kulwant Singh*[26] *do not state the law correctly.* We, therefore, declare that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise.[27]

The Court also produced the opinion of *Standard Chartered Bank* v. *Directorate of Enforcement*,[28] a Constitution Bench (3:2) judgment, which follows:

All penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment.

[24] *Id*. para 24.
[25] (2015) 6 SCC 477.
[26] *Kulwant Singh* v. *State of Punjab*, (2013) 4 SCC 177.
[27] *Supra* n. 25, para 20.
[28] (2005) 4 SCC 530, p. 547.

Here, the legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. It is sheer violence to common sense that the legislature intended to punish the corporate bodies for minor and silly offences and extended immunity of prosecution to major and grave economic crimes.

In the conclusion of 'Interpretation of Statutes' in the Annual Survey of Indian Law Institute (2013) while commenting on *Vipin Jaiswal* this author suggested that: [29]

Parliament should intervene with an explanation that 'any demand was for business needs and not in continuity of dowry has to be proved by the accused party.'

The suggestion was made because it was thought the decision was not in right spirit. Before parliament removes the anomaly, the Supreme Court has itself and rightly repaired the derailment. Dowry, though is a penal enactment, is also a welfare and protective legislation. Sticking to strict interpretation of penal provision will frustrate the purpose of provision.

E. Relative of husband

Section 304B Indian Penal Code uses the words *'relative of husband'*. In the case of *State of Punjab* v. *Gurmit Singh*[30] interpretation of these words were in dispute. Does it include husband's Aunt's brother (Chachi's brother)? The court observed that "IPC is a penal provision which is to be construed strictly. A word for which the definition is not mentioned should be construed in natural, ordinary and popular sense. For this reliance was placed on dictionaries as to what a word would mean in common parlance."[31] Relative means relations coming out of marriage, adoption and blood. The court did not find any reason to go beyond this meaning. It observed:

It is well known rule of construction that when the Legislature uses same words in different part of the statute, the presumption is that those words have been used in the same sense, unless displaced by the context. We do not find anything in context to deviate from the general rule of interpretation. Hence, we have no manner of doubt that the word "relative of the husband" in **Section 304** B of the IPC would mean such persons, who are related by blood, marriage or adoption.[32]

[29] Anurag Deep, *Interpretation of Statutes,* XLIX ASIL 825 (2013).
[30] (2014) 9 SCC 632.
[31] *Id.,* para 11.
[32] *Id.,* para 12.

Hence, in this case the respondent was not covered in the ambit of 'relative' but court went on to add that this shall not preclude the court from fastening liability under some other section of the IPC. This interpretation does not serve the purpose of incorporating section 304B. Purpose was to protect wife from dowry demand and harassment. If this strict interpretation is continued it shall leave chances wherein the other relatives who could enjoy the shield (of not being relative because of blood, marriage or adoption) under this section (due to narrow understanding, though they would be liable in other sections) would perpetuate such crimes knowing they would be safe while they are equally playing with the plan of the husband and others. Indian family structure in many cases is a joint family which contains various members. Also, for people who are aware of the nuances of law shall always have their exits before they undertake to indulge in such crimes by engaging their relatives and refraining themselves. Moreover women being vulnerable class a liberal interpretation may be considered so that she feels protected.

F. Section 304B – Whether a Legal Fiction

Section 304B attracts interesting interpretation. There was some controversy on the issue whether section 304B Indian Penal Code creates a legal fiction or not? In *Devinder @Kala Ram* v. *State of Haryana*[33] the bench observed that "the word 'deemed' in Section 304B, IPC, however, does not create a legal fiction but creates a presumption that the husband or relative of the husband has caused dowry death."[34] In a previous decision in 2012 the Supreme Court in *Rajesh Bhatnagar* v. *State of Uttarakhand*[35] maintained that, "it is by fiction of law, that the husband or relative would be presumed to have committed the offence of dowry death rendering them liable for punishment unless the presumption is rebutted". *Devinder* sounds more logical. A legal fiction is something, which does not exist in reality but has been brought to existence by virtue of law. Reverse evidences cannot deny this existence. In dowry death cases husband and relatives are deemed culpable but they can rebut their deemed culpability. This however is a matter of academic dispute.

(i) *Read up and read down of dowry provision*

There is an impression that 'read into' or 'read down' is used to save a provision from being declared as unconstitutional. This is correct statement of a principle of Constitution but is not limited to it. Read into or read down may be

[33] (2012) 10 SCC 763 (hereinafter referred as *Devinder*), decided on 18.10.2012. This case has been decided by division bench of Hon'ble Justice K.S. Radhakrishnan, Dipak Misra, J., unanimously. The judgment was delivered by Hon. Justice Dipak Mishra.

[34] *Id. at* para 9.

[35] AIR 2012 SC 2866.

used for interpretation other than non constitutional purpose. *Sher Singh @ Pratapa* v *State of Haryana* [36] uses the tool of read up and read down even if it is not a case of constitutional validity. A statement from the case can be useful for reference:

> Section 304B, the proper manner of interpreting the Section is that "shown" has to *be read up to mean "prove" and the word "deemed" has to be read down to mean "presumed*". [Emphasis added].[37]

In this case the constitutional validity of 304B (or any provision) was not in question but meaning of certain words in the section was discussed. While it is understandable why shown should be read up to prove, it is not understandable how "*deemed"* to be read down to mean "*presumed*" is helping. It does indicate that even if the validity of a provision is not in question, the tools of read into or read down may be used.

(ii) *Shown, prove, deem and presume*

Sher Singh is probably one of the few cases which deliberates on the meaning and scope of shown, prove, deem and presume. It observes as under:[38]

> 17. Keeping in perspective that Parliament has employed the amorphous pronoun/noun "it" (which we think should be construed as an allusion to the prosecution), followed by the word "shown" in Section 304B, the proper manner of interpreting the Section is that "shown" has to be read up to mean "prove" and the word "deemed" has to be read down to mean "presumed".

Following finding in *Sher Singh* regarding 304B is perplexing:

> Once the *presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility*, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the *heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt*. [Emphasis Added]

This observation in *Sher Singh* has been approved by three judges bench in the case of *Rajinder Singh* v. *State of Punjab*[39] The judgment in *Sher Singh* gives a U turn in the traditional jurisprudence which goes against

[36] (2015) 3 SCC 724 (*hereinafter* referred as *Sher Singh*).

[37] *Id.* at para 16.

[38] *Id.* at para 17.

[39] *Supra* n. 25.

accused. It would be harsh to expect the accused proves his/her case beyond reasonable doubts when the elements of crime has already been reduced to conduct and circumstances element, and no mental element is required to be proved by prosecution. As it is approved in various judgments, soon this precedent will get the status of *stare decisis* and make the life of accused more miserable in the light of fact that female related laws are alleged to be misused. Deliberate use of word 'shown' is understandable but the mandate of beyond reasonable doubts for accused is not digestible.

This judgment is a setback to a time honoured principle of criminal jurisprudence. This undisputed principle mandates that the prosecution has to prove its case beyond reasonable doubts and the accused, if required, can prove his arguments on balance of probabilities. This well established rule of evidence was completely reversed by a division bench in *Sher Singh.* As submitted above what is more disturbing is the fact that precedent of *Sher Singh* has been approved by three judges bench in the case of *V.K. Mishra* v. *State of Uttarakhand*[40] as well as *Rajinder Singh.*[41]

Prosecution is not required to prove beyond reasonable doubts. The judgment in *Sher Singh* has gone to the extent of upholding that 'accused' in dowry death cases has to prove beyond reasonable doubts because of 'deemed' culpability. The judgment has not produced a single authority which can substantiate its findings. Indeed it has referred cases which has no direct bearing on the interpretation of dowry provision. *Sher Singh* has grossly overlooked not only well established principle of criminal jurisprudence but also precedents of larger bench.

(iii) *The principle*

Presumption of Innocence is a celebrated principle of criminal jurisprudence. According to this principle an accused is presumed to be innocent unless the State proves him guilty beyond reasonable doubts. Then the accused is required to give his evidence. In civil cases both parties are required to prove by preponderance of probability. In criminal cases State is bound to prove beyond reasonable doubts while for accused it is preponderance of probability. In other words accused has only to raise doubts in the evidence of prosecution and has nothing to prove beyond reasonable doubts. This is known as standard of proof and the principle is applicable in common law countries. *Sher Singh* has changed this traditional principle of criminal law and also further diluted the protection available to accused.

[40] (2015) 9 SCC 588.
[41] *Supra* n. 25.

Unlike civil cases, in criminal cases one party is accused and other is State. Judiciary is neutral in civil cases but not neutral in criminal cases because State is very strong *vis a vis* accused. This non neutrality is essential part of fair trial which creates balance between State and accused. The State has human and material resources to bring evidences. A powerful State with the help of justice seeking victim can make a strong case against accused. Accused is not only weak but becomes vulnerable because an allegation of crime brands him/her as criminal in the eye of general public. Not only people but friends begin avoiding him/her. His vulnerability is further increased because his liberty is also completely curtailed if s/he is arrested and partially restricted if s/he is on bail. Therefore, great jurist Stephen suggests that the State 'can afford to be generous.' To make a level playing field the more powerful State has more obligations and heavier responsibilities. Less privileged accused has lesser responsibilities.

However in certain cases like socio economic crimes State finds its responsibility too difficult to prove. In other words it is humanly not possible for the prosecution to prove all the elements of crime beyond reasonable doubts like in dowry death cases where the crime is committed in close doors. In those cases the offender cannot be punished for want of evidence and victims cannot get justice. Therefore the law thought of reducing the burden of prosecution. In these cases the State has two options, that it reduces the number of elements to be proved by drawing inferences from certain facts. Such inferences are called presumption. Or it dilutes the standard of proof for prosecution. The practice all over the world is to choose first option, which is called as reverse burden. In this case the prosecution is not required to prove all elements of crime (like *mens rea* or elements of *actus reus viz* conduct, circumstances, causal relation etc). Rather the accused has to prove certain facts in order to secure his acquittal. In dowry death cases the prosecution is neither required to prove that the death was with *mens rea* (intention or knowledge), nor who actually killed the married women nor to prove any proximate causal relationship between death and conduct of accused in all cases unlike murder under section 302. What the prosecution has to prove is death within 7 years of marriage (unnatural death including suicide), soon before death, demand of dowry and harassment of wife by accused. If the prosecution proves these elements beyond reasonable doubts, 'such husband or relative shall be deemed to have caused her death'. Now the accused may prove his innocence on mere balance of probabilities.

(iv) *Precedents ignored*

This is the law laid down and followed in various dowry death cases

like *Shanti* v. *State of Haryana*,[42] *Pawan Kumar* v *State of Haryana*,[43] *Kans Raj* v. *State of Punjab*,[44] [which is a three judges bench decision] , *Indrajit Sureshprasad Bind* v. *State of Gujarat*,[45] *Karan Singh* v. *State of Haryana*,[46] *Asha* v *State of Uttarakhand*,[47] *Rajeev Kumar* v *State of Haryana*.[48] It is inconsistent with the interpretation made to 'shall presume' by a three judges bench in *V.D. Jhangan* v. *State of Uttar Pradesh*[49] and *State of Maharashtra* v *Wasudeo Ramchandra Kaidalwar*[50]. *Sher Singh* also goes contrary to the law laid down in the constitution bench cases of *K. Veeraswami* v *Union of India*[51] and *Sanjay Dutt* v *State Through C.B.I., Bombay* [52] on reverse onus. On reverse onus clause (when a statute shifts burden of proof on accused regarding certain facts) way back in 1981 in the case of the *State of Maharashtra* v *Wasudeo Ramchandra Kaidalwar*, a three judge bench discussed the nature and scope of 'shall presume' clause. In context of Prevention of Corruption Act, 1947 it held that accused has 'not to prove his innocence beyond reasonable doubt, but only to establish a preponderance of probability.' Similarly the constitution bench in the case of *K. Veeraswami* v. *Union of India* held that prosecution has to prove beyond reasonable doubts. In the case of *Justice K. S. Puttaswamy (Retd)* v. *Union of India*,[53] a three judge bench reiterated that "the pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches." *Sher Singh* case has not discussed any of previous precedent on reverse onus which is inconsistent with institutional integrity and judicial discipline.

(v) ***Restore protection of accused***

The rights of accused in case of dowry laws have been diluted because the substantive elements have already been reduced by deeming clause and presumption. Misuse of these laws have been recognised by courts. *Sher Singh* further dilutes the protection available to accused by changing the rules regarding standard of proof which is not only unreasonable but also lead to absurd consequences. "Shown" word is used in Indian Evidence Act 1872,

[42] (1991) 1 SCC 371.
[43] (1998) 3 SCC 309.
[44] (2000) 5 SCC 207
[45] (2013) 14 SCC 678.
[46] (2014) 5 SCC 73.
[47] (2014) 4 SCC 174.
[48] AIR 2014 SC 227.
[49] AIR 1966 SC 1762.
[50] AIR 1981 SC 1186.
[51] 1991 SCC (3) 655.
[52] 1995 CriLJ 477.
[53] (2015) 8 SCC 735.

sections 111A, 113A, 113B, 114A. Can the same interpretation be applied in these cases? Will provisions in these cases be proved just by preponderance of probability and the accused will have to prove beyond reasonable doubts. Another apprehension is that in terror enactment the interpretation by judiciary and amendments by Parliament can be made in similar lines where an accused would be required to prove beyond reasonable doubts and prosecution will satisfy by a mere preponderance of probability. Surprisingly and thankfully a few judgments on dowry death cases in 2016 and 2017 have overlooked the dictum of *Sher Singh* probably because the case was not brought to their notice. But two inconsistent opinion (one mandating that prosecution has to prove beyond reasonable doubts and other giving liberty to prosecution to prove on balance of probability) on the interpretation of dowry death provision create confusion and problem to thousands of sessions courts and hundreds of high court judges. It is high time a higher bench of the Supreme Court removes the confusion and restores the well established principle of criminal jurisprudence. *Baijnath* v. *State of Madhya Pradesh*[54] though a two judge bench opinion, has (rightly) not taken note of *adverse* precedents of 2015 on 'reverse onus' clause but based its decisions on the precedents of pre 2015 criminal jurisprudence.

III. Maintenance under Section 125 CrPC, 1973

Another significant aspect of interpretation of female related criminal law is section 125 of CrPC 1973. Can the marriage be a matter of presumption for the purpose of maintenance? Can the proof of marriage may be dispensed with by the court in certain circumstances? This issue came for discussion while interpreting the word 'wife' under section 125 of CrPC 1973.

A. Presumption as to legal marriage

Badshah v. *Sou. Urmila Badshah Godse*[55] rejected the argument that the term 'wife' in section 125 of CrPC be given a legalistic interpretation because it is a penal legislation. It allowed a broad and expansive interpretation and included even those cases where a man and woman have been living together as husband and wife.

In *Dhannulal* v. *Ganeshram*,[56] the question relating to presumption of a valid marriage arose. The Supreme Court referred the classic decision of *A. Dinohamy* v. *W.L. Balahamy*,[57] where it was held that where a man and woman

[54] AIR 2016 SC 5313, decided by a division bench on 18 November, 2016.
[55] AIR 2014 SC 869.
[56] (2015) 12 SCC 301.
[57] AIR 1927 PC 185.

are proved to have lived together as husband and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage. However, the presumption can be rebutted by leading unimpeachable evidence. A heavy burden lies on a party, who seeks to deprive the relationship of legal origin.[58]

In the case of *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit* [59] it was held that:[60]

> If the claimant in proceedings under Section 125 of the Code succeeds in showing that she and the Respondent have lived together as husband and wife, *the court can presume that they are legally wedded spouse*, and in such a situation, the party who denies the marital status *can rebut the presumption'*. [Emphasis Added]

May presumptions are presumption of fact. For factual presumption of marriage i.e. may presume, a court might require two proofs, living together and living together as husband and wife. Suppose two are living together but the people are aware that they are not husband and wife. In that case the court cannot presume a marriage. This is important for subordinate judiciary because marriage disputes go to family courts.

Similar dispute arose in the case of *Chanmuniya* v. *Virendra Kumar Singh Kushwaha*.[61] The question was whether 'wife' under section 125 CrPC 1973 may include a second wife or not? There are inconsistent precedents of different benches of the Supreme Court. Therefore the court in this case referred this matter to a larger bench after framing following three issues:

i. Whether the living together of a man and woman as husband and wife for a considerable period of time *would raise the presumption of a valid marriage* between them and whether such a presumption would entitle the woman to maintenance under Section 125, CrPC?

ii. Whether strict proof of marriage is essential for a claim of maintenance under Section 125, CrPC. having regard to the provisions of the Domestic Violence Act, 2005?

iii. Whether a marriage performed according to the customary rites and ceremonies, without strictly fulfilling the requisites of Section 7(1) of the Hindu Marriage Act, 1955, or any other personal law would entitle the woman to maintenance under Section 125, CrPC?

[58] *Dhannulal* v. *Ganeshram* (2015) 12 SCC 301, 306.
[59] (1999) 7 SCC 675.
[60] *Ibid*.
[61] (2011) 1 SCC 141 (hereinafter *Chanmuniya*).

B. Chanmuniya inconclusive

Unfortunately the matter in *Chanmuniya* case was dismissed on 5.9.2014 by an order because the court found that 'the appellant is not interested in pursuing the matter.'[62] It is doubtful if a question of law raised by one bench which has inconsistent pronouncements by different judgments of the Supreme Court and has been referred to a larger bench, can be dismissed because of technicalities of uninterested party?

The Supreme Court in *Badshah* case considered *Chanmuniya* and discussed the scope and limitation of the phrase "wife". In this case a lady married the petitioner as per Hindu rites and customs. She was not aware that the petitioner was already married. After three months of marriage the lady came to know this material fact, which he did not disclose to the lady while marrying. Factually this lady was now second wife and the marriage was *void ab initio*. The lady, however, claimed maintenance for her and her daughter. The issue was whether a lady who is not "legally wedded wife" may claim for maintenance under section 125, CrPC 1973 or not? The court held:[63]

> We are of the opinion that *there is a non-rebuttable presumption* that the Legislature while making a provision like Section 125 Code of Criminal Procedure, to fulfill its Constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances.

The court identified *Heydon's* case[64] as historical source of purposive interpretation. It also took support from the maxim *magis valeat guam pereat*[65]. It also used the precedent for 'selective in picking out that interpretation out of two alternatives which advances the cause – the cause of the derelicts.'[66] The Supreme Court upheld the grant of maintenance. Fortunately the maintenance was granted by Trial Court and affirmed by the Additional Sessions Judge. The High Court also granted maintenance of Rs.1000/- per month to second wife and to respondent No.2 (daughter) at the rate of Rs.500/- per month. Objective

[62] Advocate on Record who was representing the appellant has died. In these circumstances the Registry had issued notice to the appellant for making alternate arrangement. The said notice has been duly served. However, no arrangements are made. It seems that the appellant is not interested in pursuing the matter. It is accordingly dismissed. .....J. (A.K. Sikri)
[63] *Supra* n. 55, para 22.
[64] [1584] EWHC Exch J36.
[65] Where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way.
[66] *Capt. Ramesh Chander Kaushal* v *Veena Kaushal*, AIR 1978 SC 1807.

of Section 125 is to provide financial relief to wife. A couple starts living together in a traditional society, the community presumes that they must be married. This is a social presumption. This social presumption becomes conclusive for the purpose of law if the couple stays together for various years. Any other presumption will always give benefit to male and will always be detrimental to the interest of female.

This case has a different dimension also. The case was filed in 2005 and Supreme Court decided it in 2013. The petitioner husband used two forums at district level, came to High Court and then to the Supreme Court for a sum of Rs 1500/ month. He must have been wealthy enough to pay Rs 1500/ because he could afford to come to the Supreme Court. This seems more a case of harassment of the lady (second wife) and satisfaction of 'wounded vanity' of husband for which he used the legal tools of appeal. This tendency should be checked. Parliament could have checked it by bringing suitable amendment to relevant provisions in time. It can still do it. Courts (High Court and the Supreme Court) should discourage this type of access to court just because one can afford. Least the Supreme Court could have done was to grant the lady the reasonable cost of litigation and time. As it was a case of fraud by husband, it should have ordered authorities to file a criminal case so that the petitioners like him and advocates who encourage such litigations have some deterrence.

C. Wife aware of Previous Marriage: Presumption denied

Similar question of presumption of marriage was raised in the case of *Indra Sarma* v. *V.K.V Sarma.*[67] A female lived with a male knowing the fact that the male is husband of some other lady and also father. All family members of male were opposed to her living with him. Can she argue this "relationship in the nature of marriage" because she lived in for a long period of time. Will the 'law presumes that they are living together in consequence of a valid marriage'[68] The court, taking clues from *Gokal Chand* v. *Parvin Kumari* [69] held that :[70]

> …the continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage, but the presumption which may be drawn from long cohabitation is a rebuttable one and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.

[67] AIR 2014 SC 309.
[68] *Id.* at para 56.
[69] AIR 1952 SC 231.
[70] *Supra* n. 67, para 56.

In this case the appellant lady knew the male is married. Therefore the court held that:[71]

> in the instant case, *there is no necessity to rebut the presumption*, since the Appellant was aware that the Respondent was a married person even before the commencement of their relationship, hence the status of the Appellant is that of a concubine or a mistress, who cannot enter into relationship in the nature of a marriage.

In other words there is no need to 'rebut the presumption' because there is no presumption at all in this case as lady was a consenting and willing party in the relationship with male who was already married.

A lady who is staying in living in relationship with a married male knowing the fact of marriage, whether this illegitimate culpable wife can legally claim maintenance? Present position is that such lady/wife is not entitled to maintenance because the Supreme Court has not interpreted in favour of such lady. The Supreme Court has made liberal interpretation if lady/wife is illegitimate but not culpable. It has not made more liberal interpretation because lady/wife is illegitimate as well as culpable. Should the judiciary protect such illegitimate and culpable lady/wife by resorting to ultra liberal interpretation? The decision raises various questions:

i. Is judiciary right or wrong in not making an over liberal interpretation?
ii. Should the judiciary modify its approach next time in a similar case?
iii. Should parliament step in?
iv. If parliament does not do, should state legislature amend?
v. Why instead of parliament state legislature should step in?
vi. First two questions may be taken together.

Is judicial interpretation wrong? No, judiciary has already made a wide interpretation. An *Austinian* judge with positivist attitude would never have presumed a lady as wife unless there would have been a proof of marriage. Following arguments may be made to explore the judicial process in reaching to the decision that such lady should not receive maintenance. This author does not agree with all six reasons (which are not given by the apex court and is a common sense guess), which may have consciously or unconsciously come in the mind of the Judge:

i. Judicial restraint—A more wide interpretation would have been an illustration of unwarranted judicial legislation. The law experts should not push judiciary for doing the job of legislature except in extraordinary case.

[71] *Id.* at para 57.

ii. *Volenti non fit injuria*—As the lady is aware of the marital status of man with whom she is enjoying living-in relationship willingly and with consent, she cannot complain later on that the male does not maintain him. After all the male is legally bound to maintain his lawfully wedded wife and children. How many ladies in her life would claim maintenance from him?

iii. Rights of illegitimate Child—The rights of child born of the relationship between a married male and a woman living with him knowing the male is married is protected by law to some extent as such child, though illegitimate is entitled to receive maintenance under various laws in India.

iv. Moral concern—Another view of why judiciary has not made a more wide interpretation could be that judiciary is concerned as to moral fabric of Indian society. It does not wish to encourage and legitimize an illegal and penal relationship by designating such women as wife for the purpose of maintenance.

v. Punishment to such lady—By not giving maintenance the court wanted to punish the lady for her immoral and illegal conduct.

vi. Equity—Equity is also not in her favour as those who want equity must come with clean hands. The lady being involved in immoral and illegal conduct cannot claim equity.

Should the legislature step in these cases of illegitimate culpable lady/wife. It is correct that the female partners are involved in those activities, which the conservative societies find immoral. This does not deprive the female partner their claim for maintenance. The incidents of living in, bigamous marriage are increasing because of departure in social norms, greater scope for female education and jobs, change in mind set of society, dilution of morals and values in human life. The increasing incidents of family disputes, divorce petitions, false cruelty cases under 498A Indian Penal Code 1860 etc has compelled even persons of older generation to modify their thinking on 'living in' relationship. A few of the legal experts, who are absorbed in traditional thinking, are of the opinion that there is nothing wrong in 'living in'. This makes both the parties know each other before marriage. Though 'living in' is a moral departure from traditional thinking, even then law should not leave the female on the mercy of males. Not providing maintenance will invite further complications to these female. The lady like other wife may be without any means and resort to other immoral practices like, prostitution, begging etc. This is the very purpose of maintenance. By not providing maintenance the law frustrates the purpose of maintenance. Such maintenance, therefore, should be made mandatory and law should be changed accordingly.

Parliament may not take steps as it may find the conduct of lady not worthy of maintenance. There are, however, certain States, which are either open to such conduct or have more such problems. For example the State of Goa, NCT-Delhi etc where living in relationship is not a very surprising conduct and may find it suitable to modify law.

IV. Conclusion

Penal laws are known for their strict interpretation where words have to be literally interpreted. However, the penal legislation which are either protective (section 498A, 304B IPC) or procedural (section 125 CrPC 1973) in nature are being given liberal and purposive interpretation which is a right approach. Interpretation of penal laws regarding dowry is showing inconsistent trends in last few years because some judgments are *Austanian* in their approach. They seem to believe in what is written in black and white only. That is why meaning of words like 'dowry', 'relative of husband', 'wife' has been given diverse meaning. *Sher Singh* restates the law on section 304B regarding standard of proof without satisfactorily discussing that prosecution has to prove on balance of probabilities while accused has to bear a heavy burden to prove his innocence beyond reasonable doubts. This is approved by three judges bench judgement in *Jivendra Kumar.* In this light *Sher Singh* requires reconsideration as it does not seem to follow any principle or precedent or policy or professional opinion and needs to be declared *per incuriam*. Before the precedent of *Sher Singh* finds the status of *stare decisis* the judiciary should intervene. A positive aspect of *Rajinder Singh* is that it refuses to give strict interpretation to 'dowry' and denies to accept *Vipin Jaiswal* which declared that demand of dowry is different from commercial demand or demand for domestic needs. A connected commercial demand is also dowry demand. It was expected that *Vipin Jaiswal* needed reconsideration and legislative modification. Now it is not required because judiciary has corrected the bad law. Indications of *Vipin Jaiswal* and *Surinder Singh* decided in 2013 can be summarized as under:

i. One transaction rule—Prosecution has not only to prove that there was some demand of money or property but also that the demand was not independent of dowry transactions, *i.e.* not for business or commercial purpose but to satisfy the customary practice of dowry.

ii. Inconsistencies in judicial means of reasoning—The judges are in dilemma which interpretative tool to use? Whether to interpret strictly or take into consideration the objective of legislation? This dilemma is a part of judicial process but law has to reduce this dilemma to reduce chances of discretion and enhance the chance of certainty. Otherwise the illustrations of two

inconsistent interpretations of same provision will increase as happened in *Vipin Jaiswal* and *Surinder Singh*. Both are decided in 2013 on section 2 of Dowry Prohibition Act 1961, but in *Vipin Jaiswal,* tool used was literal interpretation while in *Surinder Singh* liberal interpretation was made to satisfy the objective of legislation.

iii. It seems in *Vipin Jaisawal* and *Appasaheb,* the court is more worried for the misuse of section 498A and 304B and therefore interpreted to balance the needle in favour of husband and his relatives. In other words while *Surinder Singh* is a victim oriented interpretation, *Vipin Jaiswal* is concerned for individual liberty of accused.

The *Badshah* case rejected the argument that the term 'wife' in section 125 of CrPC be given a legalistic interpretation because it is a penal legislation. It allowed a broad and expansive interpretation and includes even those cases where a man and woman have been living together as husband and wife. However same spirit of interpretation cannot be found in the case of *Indra Sarma* where the phrase "relationship in the nature of marriage" used in section 2(f) of Protection of Women from Domestic Violence Act, 2005 was given a strict interpretation because the section used 'means' and not 'includes.' The law needs to be amended to make it inclusive and because of immoral relationship the female cannot be left at the mercy of male partners and conservative societies. *Sher Singh* is the biggest blunder which the Supreme Court has committed in the area of criminal jurisprudence. A larger bench ought to be set up to settle the matter regarding interpretation of reverse onus clause under section 304B of IPC and 113B of Indian Evidence Act 1872 regarding 'shall presume and deeming clause.'

ROLE OF FORENSIC SCIENCE IN ADMINISTRATION OF JUSTICE IN THE INDIAN LEGAL SYSTEM

Dr. Mahavir Singh Kalon & Sonali Sharma***

I. Introduction

Crime is a part of any civilization. It is as old as human civilization itself.[1] Since the beginning of mankind, man has always tried to develop everything that he has come across. This has led to many inventions and discoveries. Man's ability to think has made it possible for him to achieve perfection in everything. The process of thinking gives birth to both constructive as well as destructive ideas. Destructive ideas generally lead to crime.[2]

It is often said that 'wherever there is civilization there will be crime'. Hence, ever since the beginning of civilization the humanity has witnessed a range of crimes having been committed in the society from time to time.[3] Crimes may be classified into five categories and they are traditional crimes such as theft, robbery, rape and rioting etc., political crimes, economic crimes, social crimes such as child marriage and miscellaneous crimes which are committed under local or special Acts such as offences under the Drugs and Cosmetics Act, 1940 (Act 23 of 1940).[4] To deal with crime every civilized nation has a set of rules called 'law.' Salmond has defined the term 'law.' He explained it as a body of principles,which are recognized by the State. The State applies them to achieve justice.[5]

The vigilant search of truth is the symbol of our criminal justice system. Our methods and rules of criminal laws are designed in such a way that ten guilty persons may escape but one innocent should not suffer. However, while ours is a system to be cherished, it is not a perfect system, and those charged with the administration of justice have a responsibility to look for its persistent improvement.

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1 Lalji Singh, *DNA Profiling and its Applications*, CBI Bulletin 30 (June, 1995).

2 Namrata Shrey, *Role of Medical Science in Criminal Administration*, Criminal Law Journal 235 (September, 2006).

3 Gurjeet Singh, *DNA Profiling and its Impact and Application on Law: Principles, Potentials and Pitfalls*, 4 Journal of Symbiosis Law College 46 (2004).

4 N. V. Paranjape, Criminology & Penology with Victimology (Central Law Publications, Allahabad, 2014) pp. 9-12.

5 N. V. Paranjape, Studies in Jurisprudence and Legal Theory (Central Law Publications, Allahabad, 2011) p. 143.

Initially the crimes committed in the society were mainly simple in nature as well as the manner in which they were committed. To solve these crimes traditional methods such as a testimony by an eye witness or confession by the criminal was sufficient. But over the period of time the credibility of the testimony of an eyewitness came under suspicion. Many eyewitnesses turned hostile or did not come up with their statement at all in front of the judiciary. This led the investigating officers to rely on the confessions made by the accused. But that was also not sufficient as mostly the accused would not testify against himself. This was followed by various inhumane treatments on the accused such as third degree torture of the accused in jails to force the accused to give a confession. But such a confession was not admissible in the court.

II. Use of Scientific Techniques in Crime Detection

Over a period of time criminals started using advanced technology and it became difficult for an investigating officer to catch them. Crimes, which were committed by the criminals, were no longer simple.[6] Hence, it was realized that there was a need to use modern and advanced technologies to solve any crime. Since then there has been a remarkable increase in the use of scientific methods.[7] Blood group testing, fingerprint comparison, footprint comparison, ear print comparison, DNA technology, micro-tracing and voice-analysis are some of the examples of various scientific methods that are used all over the world to solve crimes.

It goes without saying that these techniques have played a major role in solving numerous cases throughout the world. Some of them are:

i. Fruits of Palo Verde Tree—In this case a man was accused of killing a woman in Arizona. The pager of the accused was found near the dead body of the victim. The accused said that the victim robbed him and took away his pager and wallet. During the investigation the investigating officers found some bean like looking seeds in the truck of the accused. These seeds were later identified as the fruits of a tree called Palo Verde. A damaged Palo Verde tree was also found near the scene of crime. The question before the officers was whether each tree has a matchless DNA pattern. This was proved by a geneticist at the University of Arizona in Tucson. Interestingly, each Palo Verde tree has its own DNA pattern. The DNA pattern of the fruit, which was found in the truck matched with the tree at the scene of crime. Hence, the accused was convicted.[8]

6 Arun Kumar Singh, *Scientism of Investigation of Crime: A Boon or Bane*, 3 Chotanagpur Law Journal 42 (2010-2011).

7 Amita Verma, Cyber Crimes and Law (Central Law Publications, Allahabad, 2009) p. 1.

ii. Identifying September 11th victims—More than 2000 people died in the attack on the World Trade Centre on September 11, 2001. Identification of so many dead bodies was a challenge as most of the bodies were charred so brutally that only some tissues and bones were left. A panel of experts was made by the Institute of Justice. These experts matched the DNA samples from the dead bodies with their relatives. Sadly, out of 2792 people who died in the attack only 1585 could be identified.[9]

iii. Osama Bin Laden—Osama Bin Laden was killed on May 2, 2011 in Pakistan. After his death the challenge before the officials was to identify his body. For this task the officials used biometric and DNA technology. The biological samples from the dead body were compared with the samples from his family. A visual id was made and it was proved to the world that the body was indeed of Osama Bin Laden[10]

At the same time, in India the criminals are classy but the laws are not. The Indian legal system is based on laws such as the Constitution of India, Code of Criminal Procedure, 1973 (hereafter Code), Indian Penal Code, 1860, Indian Evidence Act, 1872, Code of Civil Procedure, 1908. It is the responsibility of law enforcing agencies to detect crime, apprehend perpetrators and to provide such evidence, which can help in solving the matter. India has enough number of legislations but they are mostly outdated. The Parliament passes new laws to control crimes in the society. However, the Parliament does not work in advance and generally laws are passed after the commission of a heinous crime.

It cannot be denied that detection of crime requires painstaking effort by a number of agencies. And now with a rampant increase in the technology the criminals have become more advanced as compared to the law. Even though a well-formed system of laws is not present in India the police officers have utilized many scientific techniques to solve various cases. Some of them are:

i. Rajiv Gandhi Assassination Case—Rajiv Gandhi was assassinated on May 21, 1991. He was killed by a suicide bomber. In the attack the bodies were dismembered and could not be identified. After the investigation it was found that a belt bomb was used for the attack. DNA tests helped in finding the body parts of the accused as well as of the victims. The identity of the accused was also found by DNA tests.[11]

ii. Tandoor scam—On 2nd July, 1995 Mrs. Angoori Devi saw flames coming out of Bhagya Restaurant in Ashok Yatri Niwas in Delhi. She called the Beat constable who found a body in the *Tandoor* of the restaurant. The body was not completely burnt. Few droplets of blood were found near the crime scene. A DNA test was conducted and it was discovered that the body was of Mrs. Naina Sahni. After the investigation it was found that she was murdered by her husband.[12]

iii. Nithari Serial Murders—The crime, which shook the conscience of the entire nation, took place in the house of Moninder Singh Pandher in Nithari, Uttar Pradesh. The accused Surender Koli confessed that he used to lure girls and rape them and then kill them. Further he used to chop and cook the parts of the body and ate them. In this case the human skulls and various other body parts, which were recovered from the drain were sent for DNA analysis. This helped in identifying victims.[13]

iv. Neeraj Grover Murder Case—The biological sample from the dead body of Neeraj Grover, which was found in Manor, Maharashtra, was matched with that of his parents to identify him. To identify the accused in this case the police had matched the mud from the tyres of the car used by the accused and the scene of crime. Lieutenant Jerome Mathew was convicted in this case for culpable homicide not amounting to murder and Maria Susairaj for destroying evidences.[14]

It cannot be denied that these scientific techniques hold the possibility of finding an extremely accurate fact but on the other hand it often includes a risk of uncertainty, which our legal system is not willing to tolerate. There are several concerns such as the rights of an accused, which are highlighted over the period of time against the use of scientific techniques in any legal system.

III. Modern Techniques in Forensic Science

Various techniques such as Narco-Analysis, Polygraph or Lie-Detector Test, Brain-Mapping or P 300 Test, DNA Profiling and Fingerprints etc. are commonly understood as the forensic science in the field of law.

8 R. Usharani, *DNA Evidence and The Courts*, 1 Karnataka Law Journal 6-7 (2008).

9 Sarla Gupta Aggarwal & Beni Prasad Aggarwal, Forensic Science in Criminal Investigation & Trial: Prosecution & Defence (Premier Publishing Company, Allahabad, 2013) pp. 1071-1072.

10 Madison Park & Sabriya Rice, *How did U.S. Confirm The Body was Bin Laden's?, available at* http://edition.cnn.com/2011/HEALTH/05/02/bin.laden.body.id/. (last visited on October 4, 2017).

11 AIR 1999 SC 2640.

12 *Sushil Sharma* v. *Delhi Administration*, 1996 CriLJ 3944.

13 *Surendra Koli* v. *State of Uttar Pradesh*, AIR 2011 SC 970.

14 Shahkar Abidi, *Forensic Evidence Help Solve Neeraj Grover Murder Case, available at* http://www.dnaindia.com/mumbai/report-forensic-evidence-helped-solve-neeraj-grover-murder-case-1561005 (last visited on October 4, 2017).

i. Narco-Analysis Test—In the early 20th century the doctors used scopolamine along with morphine and chloroform to help induce a state called twilight sleep during child birth. A major side effect of scopolamine was that it caused disorientation, confusion and amnesia during the period of intoxication. In the year 1922, Robert House who was an Obstetrician in Texas used this technique on two criminals and found out that they had not committed the crime. The court also reached to the same conclusion after the trial. His idea and experiment gained a lot of attention and this led to the beginning of an era of use of Narco-Analysis in solving crimes.[15] Narco-Analysis is a process whereby a person is induced to a state of semi consciousness by the use of chemical injections. A truth serum is injected into the body of the person and thereafter he is interrogated. This process is even used for enhancing the memory of a witness.[16]

ii. Polygraph or Lie-Detector Test—The term Polygraph means several writings. Lombroso used this technique for the first time in 1895 to distinguish between reality and fraud. This technique is based on the fact that a person becomes nervous when he lies. This nervousness causes mental excitation. In order to hide this excitement adrenal glands are stimulated and they secrete adrenalin, which enters the blood stream. The pulse rate as well as the blood pressure increases due to the presence of adrenalin in the blood. When all these psychological changes are recorded it is known as Polygram. The Polygram is used to find out whether the person experienced any emotional stress while answering any particular question during the lie-detection test.[17] This test is conducted in three stages. They are pretest, polygraph test and post test. Initially the examiner prepares a set of questions. The correct answers of these questions are already knows to the examiner. On the basis of the reaction of the person a base line is created. Thereafter questions related to the case are asked. Whether a person is lying or not is diagnosed by behavioral and psychological changes, which are exposed by the graph. The sign of lie is derived from the baseline.[18]

iii. Brain-Mapping or P 300 Test—In this test various electrodes are placed on the body of the person. In most of the cases these electrodes are kept on the skin of head and face. These electrodes measure any changes in the

[15] Deepak Ratan & Mohd.Hasan Zaidi, AN INTRODUCTION TO FORENSIC SCIENCE IN JUSTICE DELIVERY SYSTEM (Alia Law Agency, Allahabad, 2008) p. 13.

[16] P. Ramanatha Aiyer, THE MAJOR LAW LEXICON (Lexis Nexis, India, 2005) p. 3121.

[17] Yawer Qazalbash, LAW OF LIE DETECTORS: NARCO-ANALYSIS, POLYGRAPH, BRAIN MAPPING, BRAIN FINGERPRINTING (Universal Law Publishing Co. Pvt. Ltd., New Delhi 2011) p. 60.

[18] *Available at* https://www.liedetectortest.uk/publications/lie-detector-test-procedure/ (last visited on October 4, 2017).

electrical field potentials in the person that are produced by neural activity, which happens in a brain when the brain is exposed to a stimulus. Human brain generates a unique pattern when it is exposed to a familiar stimulus. This pattern is recorded in Brain-Mapping. In this technique the person is not asked any questions but is shown some visuals. His response to those visuals is recorded. In this test the person is shown some relevant and some irrelevant videos, pictures or sound. If the person is familiar with any visual or sound then his body will transmit a P300 wave. These waves are recorded in the instrument. These records are examined to identify the familiarity of the person with a particular situation.[19]

iv. DNA Profiling—Frederick Micscher first discovered DNA in the year 1869. It was Sir Alec Jeffery who used this technology to solve a crime for the first time in the Collin's case in the year 1984 in England.[20] Scientists have developed various other technologies to enhance the use of DNA Technique to solve a crime such as, RFLP (Restricted Fragmented Length Polymerase) and PCR (Polymerase Chain Reaction).[21] DNA Tests are highly effective as each individual except identical twins have a unique pattern of DNA. It cannot be tampered with and its credibility can't be questioned.[22]

v. Fingerprints—All human beings are born with a characteristic set of ridges on their fingers. These ridges can be in the shape of a loop, swirls or whirls. They are rich in sweat pores. Oil gets trapped in these ridges. When a finger touches a place it leaves the fingerprint of an individual on that place. The fingerprint pattern of each individual is distinct. It is this unique pattern of the fingerprint that motivates a police official to record the fingerprints at the scene of crime. The fingerprints can be used later on to identify the culprit.[23]

IV. FORENSIC SCIENCE V. HUMAN RIGHTS

In order to conduct a forensic test on an individual, body samples from that individual are required. These samples can be obtained with the consent of an individual or coincidently. These samples can also be obtained by force or

[19] *Available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3171915/ (last visited on October 4, 2017).

[20] Surbhi Singh Sisodia, *DNA Profiling: Use of Forensic in Administration of Justice*, 4 INDIAN LAW REVIEW 74 (2012).

[21] B.R. Sharma, SCIENTIFIC CRIMINAL INVESTIGATION (Universal Law Publishing House, Delhi, 2013) p. 155.

[22] J.K. Mason & McCall Smith (eds.), MEDICO-LEGAL ENCYCLOPEDIA (Butterworth, London, 1995).

[23] *Available at* http//.Sciencejrank.org /Pages 12822/Forensic Science Fingerprinting.html. (last visited on October 4, 2017).

coercion on an individual. If a body sample is obtained with the consent of an individual then there exists no doubt on the use of that sample for a forensic test. If a sample is taken by force or coercion then the results of a test is not admissible.

In all these cases the most important question,which arises is that whether a forensic test can be conducted on a sample that is obtained coincidentally? Can a forensic test be conducted on a sample, which was neither obtained by force nor by consent of an individual?[24]

There are two theories, which make an attempt to give an answer to this crucial dilemma. As per the first theory a forensic test itself is not an infringement of a human right of a person. It does not violate the right to integrity of a human being. If the biological sample has been obtained lawfully either with consent of the individual or coincidentally then there is a right to perform a forensic test on such material. This theory is based on the logic that there is no legal consideration that is specific to forensic tests. The second theory is based on the fact that it is the right of every individual to decide what happens to any sample that is taken from his or her body. As per this theory if a biological sample is taken by consent or even coincidentally then also it is the right of an individual only to decide whether a forensic test can be done on that material or not. If a forensic test is conducted without the consent of that individual then it will be considered a violation of right to integrity.[25]

The term human right is defined in section 2(d) of the Protection of Human Rights Act, 1993 (Act 10 of 1994).[26] When the issue of use of scientific evidences in a trial is debated, the foremost question that arises is that it infringes the right of an accused person. The second issue that arises is that it infringes the right of privacy of not only the person whose body sample is collected but also of those who are related to him.[27] A balance needs to be struck between all these issues if scientific evidence is to be produced before the court of law.

[24] Subhash Chandra Singh, *DNA Profiling And The Use Of DNA Evidence In Criminal Proceedings*, 53(2) JOURNAL OF INDIAN LAW INSTITUTE 220 (April-June, 2011).

[25] *Id.* at 221.

[26] The Protection of Human Rights Act, 1993 (Act 10 of 1994), section 2(d), "Human rights means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India".

[27] Subhash Chandra Singh, *Protection of Human Genetic Information: Balancing Interests in the Use of Personal Genetic Data*, 55(2) JOURNAL OF INDIAN LAW INSTITUTE 179-181 (April-June, 2013).

V. FORENSIC SCIENCE V. RIGHT AGAINST SELF INCRIMINATION

In every case where the prosecution demands for taking of DNA samples for the purpose of investigating the case it is challenged by the accused on the ground that such a demand is violative of Article 20(3) of the Constitution of India.[28] It is true that our Constitution gives protection to an accused against testimonial compulsion. However, the Supreme Court of India has always aimed to increase the scope of this right in such a way that it does not hamper the rights of the victim. A balance is created between the rights of both the parties in a case.

The Supreme Court in *M.P. Sharma* v.*Satish Chandra*[29] declared that the immunity given under Article 20(3) is absolute. It provides a protection to the accused from giving any kind of evidence, which can be used by the prosecution against him but later on in the year 1961 the court narrowed down this decision in *State of Bombay* v. *Kathi Kalu Ougadh.*[30] The court pointed out that only self-incriminatory statements are not admissible and reasonable force can be used according to the powers given in the Code. Referring to the powers conferred in section 53 of the Code the court held that it is valid to use such force as is reasonably necessary for making such an examination. The court remarked in *Anant Kumar* v. *State of Andhra Pradesh*[31] that even if there is no specific provision for taking blood samples in any statute the samples can be taken under section 53 of the Code. The court held that taking of blood and semen sample from a person comes within the scope of examination of the person. An examination of a person by a medical practitioner will be conducted by taking a sample of his blood, semen, urine etc. and if due to this examination discomfort is caused to any person then that alone cannot be a reason for not allowing the examination of that person. This discomfort is justified.

In *Ratan Lal Bhogi Lal Shah* v. *V.K. Guha*[32] it was held that the armor given by Article 20(3) of the Constitution of India doesn't mean that the accused is not required to give evidence on any matter at all. The accused can be asked to give information in matters, which do not incriminate him. The accusatorial system gives too much importance to the right of the accused. It does not care about law enforcement. If the accused is innocent then why should he take refuge under Article 20(3), when subjected to DNA Test? In

[28] The Constitution of India, Article 20(3), "No person accused of an offence shall be compelled to be a witness against himself".

[29] AIR 1953 SC 300.

[30] AIR 1961 SC 1808.

[31] 1977 CrLJ 856 SC.

[32] AIR 1973 SC 116.

order to reach the right conclusion one must see the right perspective.

VI. Forensic Science v. Right to Privacy

In India right to privacy is enshrined in Article 21 of the Constitution of India.[33] India is a signatory to Universal Declaration of Human Rights, 1948 and to International Covenant on Civil and Political Rights, 1966. Article 12 of the Declaration protects a person from capricious interference with his right to privacy.[34] Similarly, Article 17 of the Covenant also gives protection from unlawful interference with the right to privacy.[35] Right to privacy is now a fundamental right as was declared by the Supreme Court in *Justice K. S. Puttaswamy (Retd.)* v. *Union of India*.[36]

If a question arises whether taking of a body sample from a person infringes the right of privacy the answer will be no but if that body sample is misused then definitely it infringes the right of privacy of a person. There are several instances in the history where biological samples were misused. Such as in the late 1930's Hitler's eugenic based program of race hygiene resulted into a program of euthanasia where many adults and children with various physical and mental disorders were killed. This policy ultimately culminated into killing of millions of Jews.[37] Employers and insurers can further misuse information. It can lead to loss of employment or other insurances.[38]

Recently news about leak of sensitive information in *Aadhaar* was also revealed by a study published by Centre for Internet and Society (CIS), a Bengaluru-based organization. In a study published on May 1, two researchers from CIS found that data of over 130 million *Aadhaar* cardholders was leaked from just four government websites.[39]

[33] The Constitution of India, Article 21, "No person shall be deprived of his life and personal liberty except according to the procedure established by law."

[34] Universal Declaration of Human Rights, Article 48, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of law against such interference or attacks".

[35] International Covenant on Civil and Political Rights, 1966, Article17, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation and everyone has the right to the protection of the law against such interference and attacks".

[36] AIR 2017 SC 4161.

[37] Alka Bhatia and Neha Dixit, *Forensic DNA Databases: Socio-Legal Impediments and Solutions*, 43 (1&2) Indian Socio-Legal Journal 20 (2017).

[38] *Ibid*.

[39] *Available at* http://indiatoday.intoday.in/technology/story/aadhaar-data-of-130-millions-bank-account-details-leaked-from-govt-websites-report/1/943632.html (last visited on October 4, 2017).

It is the responsibility of the government to ensure that such sensitive information of any individual must not leak. If a National DNA Database is created then the information stored in that databank must be kept confidential. If any information from this databank is misused then it will lead to a gross violation the right to privacy.

VII. Legislative Approach Towards the Use of Forensic Science in India

Unlike most of the developed countries in the world India does not have a specific legislation till date which deals with the use of DNA Technology in solving cases. Section 53(1) of the Code[40] provides that a registered medical practitioner can examine an accused. The medical practitioner can conduct such an examination only when a request is made by a police officer. This examination is done by the use of scientific techniques such as DNA profiling. The provision gives the power only to police officers in criminal cases. However, this provision is only for criminal cases. In civil cases a complainant cannot bring a culprit for DNA profiling. Moreover, not every registered medical practitioner is competent to know the complex principle of DNA profiling. Under section 293 of Code, the scientists of DNA Finger printing and Diagnostics are not specifically exempted from being examined as a witness; they have to give evidence in each and every case personally. As DNA profiling is an exact science so these scientists must be exempted.

Section 45 of the Evidence Act, 1872 provides for relevancy of an opinion of an expert on the question of handwriting or finger impression and under section 73 a comparison can be done of the signature, writings or seals with other admitted documents. But, it is not binding on an accused to give sample of his handwriting and this causes another lacuna in the process of investigation.Under section 27(1) of Prevention of Terrorism Act, 2002 court can ask for samples of handwriting, finger prints, foot prints, photographs, blood,

[40] The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 53(1), "When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonable for that purpose."

saliva, semen, hair, voice of any person.[41]As per section 27(2) if the accused does not give his samples then it will lead to a negative inference against him.[42]

The Law Commission of India has prepared the DNA Based Technology (Use and Regulation) Bill, 2017. According to this bill right to collect DNA samples is given to licensed laboratories, police stations and courts in the country. The samples will be analyzed to give information about the identity of the person. This information will be safely stored in a databank. This can be used to either identify any person who was missing or even any dead body that was unidentified. Any sample, which was recovered from any scene of crime or from an undertrial/suspect or an offender, can be stored in this database. The main highlight of this bill is that before a medical practitioner takes any sample from a person, the consent of that person is mandatory. But if a person is convicted of an offence that is punishable with death or imprisonment of more than seven years then the provision of mandatory consent is not applied before collecting the sample from that person. The consent must be in written form.

The databank shall have indices for suspects and offenders. If a person is a suspect or an offender then his samples will be matched with the entries in the suspects' and offenders' indices. If a person is neither a suspect nor an offender then his samples will be matched with the samples that were recovered from the crime scene or from missing persons or the samples that were of any dead body that was not identified. Only when a person who is not a convict or an offender gives an application his profile will be deleted from the databank. There is no provision for an automatic deletion or time bound deletion of any profile. If no application is given then the data will not be deleted.[43]

VIII. International Approach Towards the Use of Forensic Science

Several countries have developed their laws in such a manner that modern scientific techniques can be utilized to deal with criminal cases. In United

41 Prevention of Terrorism Act, 2002 (Act 2 of 2002), section 27(1), "When a police officer investigating a case requests the Court of a Chief Judicial Magistrate or the Court of a Chief Metropolitan Magistrate in writing for obtaining samples of handwriting, finger-prints, foot-prints, photographs, blood, saliva, semen, hair, voice of any accused person, reasonably suspected to be involved in the commission of an offence under this Act, it shall be lawful for the Court of a Chief Judicial Magistrate or the Court of a Chief Metropolitan Magistrate to direct that such samples be given by the accused person to the police officer either through a medical practitioner or otherwise, as the case may be."

42 Prevention of Terrorism Act, 2002 (Act 2 of 2002), section 27(2), "If any accused person refuses to give samples as provided in sub-section (1), the Court shall draw adverse inference against the accused."

43 Law Commission of India, 271ST Report on Human DNA Profiling - A Draft Bill for the Use and Regulation of DNA-Based Technology (July, 2017).

States of America— The Federal Bureau of Investigation (FBI) designed a Combined DNA Index System (CODIS). This system combines forensic science and computer technology into a system, which can help in solving crimes. There are two statutes namely; the DNA Identification Act, 1994 and Violent Crimes Control and Law Enforcement Act 1994 which regulates the identification of an accused using forensic evidences.[44] In *Maryland* v. *King*[45] it was held that DNA test is not a violation of the fourth Constitutional amendment.

In United Kingdom—A National DNA Database was created under the Criminal Justice and Public Order Act, 1994. Under this Act the DNA sample of any accused charged with an offence classified as 'recordable offence' can be taken. The police officers are allowed to take the DNA samples of the arrested person before the process of investigation begins.

China established a DNA Bank in the year 1999. The convicts as well as the suspects of sexual crimes can be compelled to give their body sample for DNA tests. A time period of ten years is prescribed for storing the body sample. A person who is punished for imprisonment of more than five years can be asked to give a non-intimate body sample.

In the year 2000 Canada passed the DNA Identification Act, 2000. Under this Act a DNA databank was established. The samples under this Act can only be collected for legal purposes and privacy of an individual is protected.

IX. Conclusion

It is the need of the hour to have a system that is not only specific but also unambiguous to solve several cases in which scientific technologies are used. A well-formulated system will help in successful application of scientific technologies in Indian legal system. If a law is made on the use of forensic science then it must ensure that the data that is collected is secured and not misused by any unauthorized person. Such misuse of data will definitely lead to an infringement of a right to privacy, which is now a fundamental right in India. The main aim of the Parliament should be to bring in force a law, which has specific guidelines that will regulate the collection of data from the scene of crime or from any person. It should also have rules, which can guide an investigating agency before they collect a biological sample. It should create a balance between the rights of the accused as well as of the victims. There must be safeguards to balance the conflicting interests of both the parties. If in future

44 Jyotrimoy Adhikari, DNA Technology in Administration of Justice (Lexis Nexis Butterworths Wadhwa, New Delhi, 2007) p. 35.

45 133 SCt 1958 (2013).

such a law is made and passed by the Parliament then it will help the judges to handle cases more conveniently and evidences, which are collected by the use of scientific technology will be examined more accurately.

India can take a cue from the DNA Identification Act, 1994. The DNA Index System that is called CODIS under this Act has a three-tier system to store information. The first level is the Local DNA Index System. At this level information is stored by the laboratories of the local police and sheriff departments. The second level is the State DNA Index System. In this system local laboratories can exchange information throughout the State. The third level is the National DNA Index System. Here information is shared on a national scale.

Whenever the process of DNA profiling is used on a human being it involves three types of intrusion of individual privacy. When the samples are taken from the body of any person then it infringes the right to privacy of body of a person. It leads to intrusion of genetic privacy of a person as information, which can predict the genetic structure of a person can be revealed. It can also lead to an intrusion of behavioral privacy of a person. Application of these scientific technologies can reveal where a person has been and what he has done.

A welfare state like India should not disregard the right to privacy even at the cost of larger interest of the community. If sound principles for protecting the privacy of a person are made then it can automatically enhance the legitimacy of use of scientific technologies in solving cases. A well-framed, transparent law must be formulated to protect the issue of privacy of an individual. The system must be accountable for any misuse of the Technology. Such a system would reassure the community that the use of this scientific technology is for a greater good. It is for the safety and security of the citizens and is done legitimately with the authority of law. Right to privacy cannot be denied.

CULTURE SENSITIVE JUSTICE MECHANISM FOR THE RURAL POOR

*Dr. Nachiketa Mittal**

I. Introduction

Rural citizens are most deprived of access to justice infrastructure in almost every legal regime.[1] Legal services including legal aid are virtually cut-off from their reach.[2] Their rural inhabitance is often cited as a reason to shield, State's failure in ensuring door-step justice delivery to the rural poor. This creates a huge disconnect between the rural folks and the formal justice delivery system. Incidentally, it has been happening in India, even though our legal system promises legal services for all. For instance, the Legal Services Authorities Act, 1987 promises legal aid to all, but in reality such an aim of the law has remained an unfinished business. Even despite several schemes rolled out by the National Legal Services Authority, rural poor are still far away from accessing basic legal services for resolving their petty disputes involving cattle theft, drinking water disputes, etc. Such circumstances in no way reduce the State's burden of facilitating access to justice services in the rural societies. Indian case is in fact more critical, given the multi-cultural legal pluralism practiced in different parts of the country. This raises a fundamental issue- What is the tradeoff between State sponsored fair and equal access to justice services, and the traditional methods of justice dispensation already existing among the rural communities? It is a complex problem, which needs a multi-disciplinary approach.

Merely, the disciplines of law, sociology, anthropology and political science may not individually provide a plausible solution. Perhaps, many more fields of study concerning human life, values, traditions and civilization would be needed for finding series of possible ways to handle such social predicament.

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1 Magdalena Sepúlveda Carmona and Kate Donald, *Access to justice for persons living in poverty: A human rights approach*, Ministry of External Affairs, Finland, pp. 7, 12, 16-20, 26-28, available at << http://formin.finland.fi/public/download.aspx?ID=126504&GUID=%7B6A61135F-7C53-45BB-A434-DE24D6AB5557%7D.>>, accessed on July 18, 2017. Also, *see generally,* Roberto Gargarella, *Too far removed from the people- Access to Justice for the Poor: The Case of Latin America*, Available at <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.407.7047&rep=rep1&type=pdf.>>, accessed on July 15, 2017.

2 Courts are mostly inaccessible by the rural communities. This is simply because, courts are usually located in towns away from the rural poor and the languages and procedures used by them during the proceedings is alien to the illiterate rural poor. See, *Justice and Poverty Reduction*, Department of International Development, p. 13, Available at << http://www.gsdrc.org/docs/open/ssaj35.pdf.>>, accessed on July 18, 2017.

However, for the purpose of this paper, only certain examples of rural Indian societies, practicing traditional methods of dispute resolution will be studied. The paper will also examine an emerging landscape of Gram Nyayalaya as the most modern, State sponsored model of ensuring justice services to the rural folks. This discussion will also address the issue- that how the promise of legal aid to the rural citizens is still an unfinished business. The issues raised in the paper are mainly based on the empirical studies conducted by the author in the States of Rajasthan and Odisha.[3]

II. Intersection of Law and Culture in Rural India

Foremost, it is imperative to understand the issue of an intersection of law and culture concerning the rural communities. Thus, based on the first-hand experience[4] of working with the rural folks in the villages across the States of Rajasthan, Uttar Pradesh and Odisha in India, the following concerns seem to most significantly affect justice delivery in rural areas.

A. Social and Traditional Practices

Indian society and societies in many similar democracies of South Asia are often segregated into distinct segments principally on account of deeply rooted customary social divisions, which may be reinforced by religion. One such is the caste system in India. Owing to such entrenched divisions, the denial of a life of bare dignity amongst citizens is widespread. The socially well known and often self proclaimed higher castes controlling village resources, have the first and quite often the exclusive right to access basic amenities like safe drinking water. The lower caste people, like artisans, landless farm labourers, village waste cleaners and menials, representing the majority of the village poor, are precluded from this access. Such suppressed and disadvantaged groups of

3 The author has been conducting empirical studies in the villages of Rajasthan and Odisha since 2009 and his reflections of the intersection of law and culture is based on the results of such field visits.

4 The researcher/author has spent close to four years working with the civil societies in India's villages. This involved travelling to interior tribal and naxalite insurgency affected jurisdictions. During his stint with the Dehradun based NGO, Rural Litigation & Entitlement Kendra (having Special Consultative Status with the Economic and Social Council of the United Nations), he coordinated the projects on 'legal empowerment for the marginalised communities' in the three States of India (Uttar Pradesh, Rajasthan and Odisha), as the national project coordinator for UNDP- Department of Justice, Government of India. As part of his project duties, the author conducted several field visits to the rural communities in order to empower them about their legal rights and entitlements. Hence, the challenges faced by rural communities in accessing justice are based on such field studies conducted by the author. These findings were arrived at after interviewing hundreds of village persons, administrative authorities, judicial officers, police authorities and NGO workers, all of whom either belong to those villages or have their jurisdiction extended to such far off villages.

communities have to draw water from unhygienic or far off sources.[5] This is rooted in the internalised acceptance of such denial, the lack of any alternative and the futility of seeking an alternative. An aroused consciousness that neutralises the acceptance of this state of affairs then seeks justice for the barest dignity. Disputes become inevitable. The question then is of designing a law that will actually deliver the bare elements of a life of some dignity in the context of the existing distribution of resources and power anchored by custom. The law is not usually so designed. The imperfect law visits unexpected consequences for the poor, including violence. The question then arises whether the extant legal machinery is capable of preventing and dealing with these consequences. Are there courts available for setting in motion processes that will ensure protection for the poor peacefully asking for elementary existence as human beings? Or, does the formal legal system treat the very asking for such existence, as a law and order problem to be tackled by the State's force. Access to justice within the framework of the inherited formal structures of Anglo-Saxon law in developing countries like India poses novel problems of legal thought, design and implementation rooted in the local. As a result, it is now a common knowledge that in most of the developing countries the law is often found to be discriminatory and legal processes are expensive, time consuming and procedurally complex. Resultantly, rural folks in particular, do not enjoy fair and equal access to justice delivery services through the formal legal system. This often compels them to resort to their traditional customary practices for settling disputes and dispensing justice within a community. However, such customary justice practices are often discriminatory in nature. Therefore, the entire scheme of providing access to justice to the rural communities needs to harmonise both the formal and customary systems in order to ensure that the justice mechanism works justly and equitably in favour of these disadvantaged communities living in rural societies.[6]

[5] Water crisis is a universal problem. But greater challenge lies in State's inability to ensure free access to safe drinking water to all as well as equitable distribution of water resource for irrigation and agriculture purposes. Owing to such a peculiar problem in India, there emerged a concept of Pani Panchayat. This was actually a name first given to a movement by Mr. Vilasrao Salunke for motivating farmers of Naigaon village of the drought-prone Purandhar taluka of Maharashtra in 1974. The government's inability to deal with the drought situation prompted him to take a 40 acre land on lease from the village temple trust and develop a recharge pond in the recharge area of the village, a dug well in the discharge zone and a lift irrigation system. Pani Panchayat principles covered equity, demand management, rights of landless, community participation and sustainability of the resource. In order o streamline the concept of Pani Panchayat, the State of Odisha in India has provided statutory colour to this movement. State legislature of Odisha has enacted the Orissa Pani Panchyat Act of 2002 to provide farmers' participation in the management and maintenance of the irrigation system for equitable and dependable supply and distribution of water resource.

[6] It is therefore, much needed to improve the mechanism of access to justice which includes reforming the legal procedures. This necessarily involves reforming the laws, ensuring litigant friendly environment in the courts, and also maintaining a fine balance between the customary systems and the formal legal system. See *supra* n. 2.

B. Customary Practices of Resolving Disputes

Several rural communities in the rural areas in India still follow methods of resolving disputes that are unacceptable and illegal in modern representative democracies. One such classic example can be seen in the villages[7] of Rajasthan. In these villages and similarly[8] in other parts of southern Rajasthan, people follow traditional and strange practices of resolving disputes. Two such practices are eye-opener for every law researcher wanting to study application of law and access to justice at the rural level India.

Firstly, the tribal population largely dominates these villages. And they practice a unique tradition called *chadautra* to claim compensation in matters of motor accident[9] and dowry death. In such cases, dead body of the deceased is put in the house of the accused person and the last rites are not conducted till the accused pays the compensation. Such compensation is called as *mautarna*. To claim *mautarna* family members of the deceased usually assemble in large number and virtually attack the house of the person who is liable to pay compensation, if such person does not agree accordingly. Can the modern formal legal system inherited from British India resolve this predicament in terms of its legality and legal processes?

Secondly, there is a prevalence of *nata pratha*. There are different kinds of *nata pratha*. But one peculiar kind, of such a tradition that was witnessed by the researcher during the field visit relates to a practice where- if a woman wants to leave her husband for any reason (usually to enter into relationship with another man), then her father or any other person who supports her has to pay compensation to the first and separating husband of such a woman.[10] Such compensation is a kind of reimbursement to the first husband for the expenses incurred by him during marriage and maintaining the wife. The village *panchayat*

[7] The author conducted empirical study in the Shamolee, Sahri and Torna villages of Kotda/Kotra block in the Udaipur district of Rajasthan.

[8] The author also conducted empirical study in 'Jijola' village of 'Ameth' block; 'Kambleghat' village of 'Bhim' block and 'Sathiya' village of 'Kelwara' block in the district of 'Rajsamand' in Rajasthan.

[9] This is especially true in matters wherein the victim's family raises allegations of negligent driving. One such case was discussed with the Superintendent of Police (SP) of Udaipur District in whose jurisdiction fall these villages of Kotda block. The SP of Udaipur shared with the author, that, such a dispute, which is necessarily legal in character often, leads to a violent clash between people belonging to different castes or villages if the victim and the accused belong to different castes of the village panchayats.

[10] This 'nata-pratha' is practices in various forms across the State of Rajasthan. But the parts of Rajasthan surveyed by the author practices this peculiar tradition.

usually decides the amount of compensation. But on the contrary, if the husband wants to leave a woman, he need not give any reason or explanation for doing so. Such a practice is quite in vogue in different parts of Rajasthan.[11]

The reference to the empirical study[12], clearly indicates that the village communities in Rajasthan still prefer their indigenous methods over the court processes for resolving disputes and settling claims. This raises very significant question. Whether the State enacted laws lack the cultural touch, which the rural communities find more deeply embedded in their methods of dispute settlement? Or is it simply a reflection of State's failure in connecting, rural folks indulged in traditional practices, to the formal dispute resolution system.

C. Unquestioned cultural practices

In the eastern part of India, there is a prevalence of cultural practices that directly conflict with the evolved democratic idea of the social status, dignity and safety of women. This is quite similar to the reflections seen from the empirical study conducted in Rajasthan.

One such peculiar cultural practice prevalent in the villages[13] of naxalite insurgency prone Pulbani district of State of Odisha is called *jhinka pratha*. As part of this traditional practice, a boy elopes with a girl with mutual consent and keeps a girl in 'concubinage' for a short period of two to four months. Resultantly, in most of the cases a girl conceives during this period and then she is abandoned without marriage. She is often not accepted back even in her paternal house. This is quite comparable with the evils of domestic violence and human trafficking. It is completely bizarre and raises strong concern about the socio-legal condition of women. Recourse to legal rights is taken either by such a woman or her parents in these matters. But the money-time lost and the unquantified consequences of social stigma put almost impossible hurdles in accessing the formal modern legal system.[14]

[11] Similar and other localised forms of *'nata-pratha'* is practiced in some parts of Madhya Pradesh as well.

[12] This empirical study was conducted by the author between 2009 and 2011 in different parts of Rajasthan. This also involves empirical study in the villages of 'Amrapura', 'Narabdaya', and 'Parlaaya' in the 'Bhadesar' block of 'Chittorgarh' district in Rajasthan. Besides, the author also studied villages of Sambhalpur and Sawai Madhopur districts. The field study in all the villages of these districts also testify the prevalence of similar customary practices for settlement of disputes within the communities and also between the communities, by by-passing the court processes.

[13] These were 'Sukrukumpa' and 'Kaaladi' villages of 'Khajuripada' block of Phulbani district of Odisha.

[14] Similar customary practices are also observed in 'Urla Dhani' and 'Singpur' villages of 'Madanpur-Rampur block and 'Dorasarli' village of 'Lanjigarh' block in the 'Kalahandi' district of Odsiha. Author also found observance of alike traditional practices in 'Jhirpani', 'Jalda' villages of 'Bisra' and 'Lathkata' blocks respectively in the district of 'Sundergarh' of Odisha.

The question therefore is of advance homework before enacting a law, which will take such customs into account and design the law as a cultural weapon rather than merely a police-court-jail weapon which ensures that the seeker of justice suffers either way, leaving it to her to weigh the customary practice against the modern dispute resolution methods.

III. Culturally Sensitive Justice Mechanism for the Rural Poor

Under such circumstances, application of law and access to justice both is a matter of deep concern across spectrum of studies including socio-legal, politico-legal, and anthropological-legal perspective. The diversity of population and their social orientation makes it further complicated for access to justice institutions to enhance their reach ability, acceptance and affordability in these most backward and interior even insurgency affected jurisdictions in India. The critical debate of widening the cover of legal aid and legal services even to the rural areas, therefore, needs a second thought. Would formal method of advancing legal aid work, especially in such cases, where some rural communities are still indulged in practicing traditional methods for settling disputes? Also, we may need to address an issue of adequate courts infrastructure and availability of sufficiently trained lawyers, both of which according to the empirical study are still away from the territorial boundaries of the *gram panchayats* and the villages therein.

Intersection of law, society and cultures at the grass-root as highlighted by the case of Rajasthan and Odisha indicate a need to develop equilibrium between these elements. On the basis of the findings above, it can be argued that the promotion of democracy and furtherance of the rule of law is quite unachievable at the grass-root without ensuring access to legal services to the rural folks. At the same time, we must take a cue from the above-referred empirical studies of Rajasthan and Odisha that a culture sensitive judging at the grass-root level is essential and critical to connect the rural communities with the mainstream justice delivery system. This is very significant because the rural communities are extremely sensitive in terms of gender issues; cultural issues of castes and class; traditional inheritance issues over property; matrimony issues, and many others. Merely, erecting a technical as well physical infrastructure like that of a 'formal court' in the villages may not yield desired result. For instance, one of the cardinal reasons for the failure of *nyaya panchayat*[15] was promotion of legal principles in dispute resolution amongst indigenous communities for whom law was an alien concept.[16] This was done without ensuring a balance between law and culture at the rural level.

Hence, it is indisputable that legal aid and legal services are as much a necessity of the rural citizens as of the urban justice seekers. This can possibly be done by taking justice closer to the people even in the rural societies including the last person in the village who may not be able to access legal services due to physical or mental disability or any other unforeseen social condition. Gram Nyayalayas Act, 2008 has generated a ray of hope in this regard for it clearly lays down an agenda of doorstep justice delivery including the right to legal aid and legal services.[17] The next section will examine this law and the promise it makes towards enhancing access to justice to the rural poor.

IV. Gram Nyayalayas: Promise of Access to Justice at the Door-Step

India recently saw a rise of fresh legal infrastructure in rural India in the form of Gram Nyayalayas Act 2008 (hereinafter Act, 2008)[18]. This law envisions creation of one or more *gram nyayalayas* (Village based courts) for every *panchayat* at intermediate level or a group of contiguous *panchayats* at intermediate level in a district.[19] The law also clearly stipulates that in case there is no *panchayat* at intermediate level in any State, then a *gram nyayalaya* shall be established for a group of contiguous *gram panchayats*.[20] In order to make *gram nyayalayas* culturally sensitive and widely acceptable across all

[15] See, *The Nyaya Panchayats: Road to Justice* (Ministry of Community Development & Co-operation, Government of India, 1964). This report conducted a detailed examination of the working of *nyaya panchayats* in India. This study studied the recommendations of the 'Study Team on *nyaya panchayats*' and particularly reflected upon the suggestion of the Study Team to prepare a manual for *nyaya panchas* to conduct the proceedings of the *panchayat* courts in a judicial manner and also to help the *nyaya panchas* in discharging their judicial duties by all fairness and in a non-arbitrary manner.

[16] See, Catherine S. Meschievitz and Marc Galanter, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution*, in Richard L. Abel (ed.), The Politics of Informal Justice (Academic Press, II, 1982). This work examines the functioning of *Nyaya Panchayats* especially in context of the State of Uttar Pradesh (UP) and makes an assessment of the reasons of both, their influence among people as righteous institution for rural justice and also the factors responsible for the decline of *Nyaya Panchayats*. This study drawn upon the earlier filed work of one of the authors and in detail makes an assessment as to why *Nyaya Panchayats* became moribund and got severely affected by the local political inequality.

[17] Objects and Reasons of Gram Nyayalayas Act, 2008: An Act to provide for the establishment of *Gram Nyayalayas* for the purposes of providing access to justice, both civil and criminal, to the citizens at the grass-roots level and to ensure that opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities and for matters connected therewith or incidental thereto.

[18] See, Law Commission of India, Report No. 114: Gram Nyayalaya (August, 1986). This law commission report laid down the conceptual framework for the establishment of *Gram Nyayalayas* in the country. This work is an assessment of *Nyaya Panchayats*, which faded away, with the passage of time and paved way for improving the rural justice in villages of India. This study made several recommendations to re-invent the wheel in the form of *Gram Nyayalayas*. The recommendations of this report made attempt to embrace some features of *Nyaya Panchayats* and also suggested participatory model of justice delivery by including laypersons as lay judges along with the trained judicial officer on the panel of *Gram Nyayalayas* for deciding the disputes. This report paved a way for enactment of Gram Nyayalayas Act, 2008.

[19] See Gram Nyayalayas Act, 2008, s 3(1). The law also provides that such Gram Nyayalayas shall be established by the State Government but in consultation with the High Court of the respective State.

kinds of rural communities, the Law Commission of India[21] carefully examined the issue that quality of justice would depend on the nature and structure of an institution created to administer justice. Accordingly, on one hand, the LCI recommended that the structure of *gram nyayalayas* should be such that it comprises of persons with technical expertise to appreciate the principles of law. On the other hand, LCI advocated for representation from the community who would be able to appreciate the local customs, traditions and inherent problems of the villages.[22] Hence, it was prescribed that the *gram nyaylayas* should be composed of one *panchayati raj* Judge[23] and two lay judges. It was also asserted that such a composition of the *gram nyayalaya* will not only lead to effective justice delivery based on the principles of law but according to common-sense, equity and good conscience. This was therefore, proposed by the LCI as unique institution having advantages of both the State Courts approach and the participation of the public in the administration of justice.[24]

However, when the *gram nyayalaya* law came into existence, there was a clear departure from the recommendations of the law commission. The Act, 2008 did not include the concept of lay judges as contemplated by the LCI. On the contrary, this law prescribes that only a person who is eligible to be appointed as the Judicial Magistrate of the First Class (JMFC) shall be appointed as the *nyayadhikari*.[25] And such a *nyayadhikari* shall be the presiding officer of the *gram nyaylaya*, who shall be appointed by the State Government in consultation with the concerned High Court.[26] This kind of structure of *Gram nyayalaya* seems to be in contrast to the village courts, which could be sensitive to the local traditions and cultures prevalent in the villages.

Also, mere structuring of a law suiting the local and rural communities isn't enough. It has to be also ensured that such an institution like a *gram nyayalaya* reaches the most neglected sections of the society, especially the rural folks, in the far off villages of the country. An empirical study conducted by the author in the villages of Odisha and Rajasthan also revealed that the justice institutions in the form of courts were not within the reach of the rural communities. This in turn adds to the continuance of their customary practices for resolving disputes like motor accident and dowry death. An attempt has

[20] *Ibid*.

[21] Hereinafter referred to as 'LCI'.

[22] Law Commission of India, Gram Nyayalaya (Law Com No. 114, 1986) pp. 18-19.

[23] Such judge should be from the sub-ordinate judiciary cadre in the State. And in order to nominate the judge for the *gram nyayalayas*, the State government would maintain a *panchayati raj* cadre of judges.

[24] *Supra* n. *22*.

[25] The Gram Nyayalayas Act, 2008, s 6(1).

[26] The Gram Nyayalayas Act, 2008, s 5.

been made in this direction by the Act, 2008 which mandates organizing mobile courts in the close proximity where the parties concerned with the case ordinarily reside or the cause of action would have arisen.[27] However, an empirical study in Odisha doesn't indicate its true implementation. A field study of the *gram nyayalayas* in Odisha[28], show that mobile courts are organised in some villages but only once in six months. This reflects the weak implementation of the well thought out provision of this law.

Besides, another fundamental concern was raised in the beginning of this paper, about the availability of legal aid to the rural folks. In this context, the obligatory role of the State *vis-a-vis* legal aid was succinctly narrated by the division bench[29] of the Delhi High Court almost a decade ago in the following words:

Where an indigent accused cannot defend himself effectively and adequately, the inbuilt right to equality, life and liberty envisaged under Article 14 and 21 of the Constitution becomes instrumental. Further, Article 39-A makes it obligatory on the State to ensure that legal system promotes justice on the basis of equal opportunity and works towards providing effective legal aid in order to ensure that no citizen is denied opportunities of securing justice by reason of economic or other disabilities.[30]

Even on this count, the *gram nyayalayas* in Odisha have so far failed in providing timely legal aid services to the persons in need[31]. This is in stark contrast to the original objective for which the *gram nyayalayas* law was enacted. Eventually, the rural folks are still awaiting adequate legal services at their doorstep, despite the institutional presence of *gram nyayalayas* in some districts of Odisha.

Finally, when the functioning of *gram nyayalayas* is put to test, a sample case of Odisha reveals that the implementation of the law is not satisfactory. One of the major findings reflect that the *nyayadhikaris* in Odisha have been placed under a dual charge to also discharge the duties of a regular JMFC[32] from the same premises of the *gram nyayalayas*. Due to this, the primary functioning of *gram nyayalayas* has begun to suffer adversely. The people now often want their cases to be heard by *nyayadhikari* as JMFC and not in capacity of a *nyayadhikari* under the aegis of *gram nyayalayas*. Moreover,

[27] The Gram Nyayalayas Act, 2008, s 9(1).

[28] The author conducted empirical study in five *gram nyayalayas* of Odisha. These were namely, Gram Nyayalayas of Tangi in Khurda district; Sanakhemundi in Ganjam district; Oadgaon in Nayagarh district; Rajnagar in Kendrapada district and Puri in Puri district.

[29] Justice Mukul Mudgal and Justice Reva Khetrapal, the then judges of the Delhi High Court.

[30] See generally, *Jai Shankar* v. *State* [2007] Supp.(6) ILR 136 (Delhi).

nyayadhikaris who are from the regular cadre of sub-ordinate judiciary also find it convenient to perform their additional and dual duty of JMFC court.[33] This has led to diluting an institution of *Gram nyayalayas* in Odisha. Consequently, the functioning of *gram nyayalayas* and its acceptability at the rural level has already begun to see a declining phase.

V. Conclusion

It is quite clear from the empirical investigation and the evidences examined that the rural folks in most parts of India are the greatest sufferers in terms of accessing justice delivery services and adequate legal representation. What can be called as an 'Achilles Heel' is the fact that this is happening despite the enactment of legislations like Act, 2008 which according to the rule book is rural societies friendly. However, empirical evidences force us to draw certain inferences which indicate that even the *gram nyayalaya* law was not designed embracing the local culture values, traditions and customs that could increase the wider acceptability of such a law.

Thus, unless, culture sensitive-localized village courts will be established for the rural folks, no other State action alone would be able to achieve, desired results in this direction. That is, a single formula cannot be used to provide legal aid and legal services to all categories of citizens in a multi-cultural India. Intersection of law, people and cultures is most essential to be understood in designing a law and policy for advancing the rule of law in the rural societies and to the marginalized-cum-vulnerable groups.

Therefore, cross-fertilization of legal knowledge is necessary in ensuring wider out reach of legal services to the poor and especially rural poor. Perhaps there is a need to revisit the existing framework of legal aid and legal services, which is usually implemented through State, and District Level Legal Services Authorities. We must nevertheless, not forget that – an expansion of access to justice is an ongoing process and collectively, we shall constantly strive to improvise on our methods of legal aid and legal services for the rural poor in this country.

[31] The author's findings from an empirical study of Gram Nyayalayas in Odisha reflect such poor availability of legal aid services at the village level. Even till date, most of the persons in need of legal aid have to claim legal representation from the Taluka District Legal Services Committee, access to which is geographically as well as economically challenging for them.

[32] Odisha High Court Notification, dated 14th March, 2014, Cuttack. The author obtained a copy of the order during an empirical study from the High Court of Odisha.

[33] This is simply because the JMFC is trained basically in the adversarial system of justice dispensation. On the contrary, the Act, 2008 does not make it mandatory to follow the Code of Criminal Procedure, 1973 and Indian Evidence Act, 1872 for the proceedings.

INTERNATIONAL CRIMINAL COURT AND PRINCIPLE OF NATIONAL SOVEREIGNTY: ICC'S PERFORMANCE AS A LEGAL AND POLITICAL INSTITUTION

*Anil Kumar Vishwakarma**

I. Introduction

Prior to the end of World War II, save for domestic prosecution of war crimes, there was no international criminal law at all.[1] The only criminal law dispensed was by domestic courts, and this was the reason that international criminals could not be held accountable to their wrongs. The circumstances started changing after the crimes were committed by Nazi regime during the World War II. With the change in technology, the law has to change in order to keep pace with it. Thus Geneva Conventions had to be changed to include air warfare. The huge change was observed when the violation of the fundamental rights of their citizens by other nations was taken into consideration and was evident from the Charter of the United Nations, which, for the first time ever in an international legal instrument, recognizes and seeks to protect individual human rights.[2] No standing in international law was given to individual human beings; it was only observed after the United Nations Charter came into existence. International law dealt with governments, and there were no courts, no mechanisms at all for individuals to seek justice outside their own domestic courts.[3] So, the law followed the Universal Declaration of Human Rights[4] (hereafter UDHR) which was an ambitious document; which was not having any legally binding effect, but it was a source which led to existence of series of international covenants dealing with human rights, particularly the International Covenant on Civil and Political Rights[5] (hereafter ICCPR) and the International Covenant dealing with Economic, Social and Cultural Rights (hereafter ICESCR).[6] Another effect of World War II was that people started doubting and questioning the absolute theory of the sovereignty of nations.[7] It led to grow a belief that people and their governments were entitled to take notice and to comment when human rights violations were perpetrated.

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1 Antonio Cassese, International Criminal Law (2003) p 16.

2 *See,* e.g., U.N. CHARTER Art. 1, para.3, Art. 13, para. (1)(b), Art. 55, para. (c).

3 *Supra* n. 1.

4 G.A. Res. 217, U.N. GAOR, 4th Sess., U.N. Doc. A/810, at 71 (1948).

5 G.A. Res. 2200A (XXI) U.N. GAOR, 21st Sess., Supp. No. 16, pp. 49, U.N. Doc A/6316 (1966).

6 *Ibid.*

7 M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,* 10 Harv. Hum. Rts. J. 11, 21 (1997).

II. International Criminal Court and Its Jurisdiction

When the Dutch first colonized the Cape of Good Hope, racial discrimination and oppression was practiced in South Africa.[8] It was further observed with the systematic development of apartheid system, which legalized racist policies. In the General Assembly in the United Nations a voice was raised by India against legalization of such injustice.[9] A resolution was moved by India regarding the discriminatory treatment of its citizens in South Africa. The resolution was passed and observed negative votes of South Africa, U.S, U.K and Australia.[10] Such resolution and later responses to it attracted a long discussion. Initially the response of South Africa[11] that: "this is not your business; the way we treat our citizens or ill-treat our citizens is our internal affair" was very widely accepted and was seen to be the internal matter of a country of metting out a particular treatment to a particular situation within the state. But such acceptance could not be observed longer and international community played an important role to end the apartheid system in South Africa. Apartheid System was declared to be a crime against humanity and concerning this international Treaty was passed in General Assembly.[12]. The treaty followed the Nuremberg trials, which first recognized crimes against humanity.[13] With the growing experience of World War II many countries decided that there has to be a forum with universal jurisdiction to address war crimes.[14] It meant when a crime has been committed, the nature of the crime should be considered to see the jurisdiction rather than looking into the fact that where the crime was committed.[15] It leads to the understanding that people who are suspected of committing serious crimes could be prosecuted by courts of any country, it does not matter however disconnected with the actual commission of the crime.[16] It was Geneva Conventions 1949, which was credited with the fact of first

8 Frangois du Bois, *The Past and Present of South African Law,* 32 Int'l J. Legalinfo. 217 (2004).

9 G.A. Res. 265, U.N. GAOR, 3d Sess., Supp. No. 20, at 6, U.N. Doc. AIRES/265 (1949).

10 1948-49 U.N.Y.B. [310], U.N. Doc. AIRES/395 (1949).

11 *See,* C. Jalloh, M. du Plessis & D. Akande, *Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court,* African J. Legal Stud. 5-13 (2011).

12 *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973).

13 *See, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal,* adopted by The International Law Commission of the United Nations, G.A. Res. 95, U.N. GAOR, at 188 (1946), U.N. Doc. A/CN.4/SER.A/1950.

14 The reason for extending universal jurisdiction is perhaps best explained in the case of *Eichmann* by the District Court of Jerusalem, judgment of 12 December 1961, English translation in 36 I.L.R. 5-276: "Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations."

15 *Supra* n. 1.

16 *Ibid.*

recognizing Universal jurisdiction internationally.[17] It defined the worst of all crimes and called them grave breaches.[18] Presently many countries have ratified the Geneva Conventions.[19] Under the obligations of these conventions, member nations are supposed to punish people who committed grave breaches, it does not matter when and where it has been committed.[20] It also provides an arrangement of turning or handing over of the wrongdoer to another country if in case one country finds it difficult to deal with or have shown unwillingness of prosecuting that person.[21] It could be observed as a principle, which is more focused about punishing the wrongdoer rather than looking into the jurisdictional aspect and providing obligation clause to exchange of wrongdoer.

It further led to creating universal jurisdiction in case of crime of apartheid under the Apartheid Convention.[22] However this convention was denied by most of the democracies of West.[23] It makes the way clear for those South Africans, who were guilty of committing crimes of apartheid with no fear of them being subject to any arrest, could visit London, Paris, New York and Washington.

There have been many deliberations and discussions about the universal jurisdictional aspect. The provision of universal jurisdiction was though evident in the 1984 Torture Convention[24], it did not have an effect. A very important development happened in international regime with regard to the crimes committed in Chile and, at the request made by the Spanish judge, the former dictator of Chile, General Pinochet was arrested in London.[25] It attracted lot of attention of the international community. In this incidence, the House of Lords agreed to recognize the universal jurisdiction and the Spanish court too accepted the universal jurisdiction and ordered the extradition of General.[26] House of

[17] *See,* Geneva Convention Relating to the Treatment of Prisoners of War, Oct. 21, 1950; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949 (entered into force Oct. 21,1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *adopted on* Aug. 12, 1949 (entered into force Oct. 21, 1950); Geneva Convention Relating to the Protection of Civilian Persons in Time of War, *adopted on* Aug. 12, 1949 (entered into force Oct. 21, 1950).

[18] *See,* Geneva Convention Relating to the Protection of Civilian Persons in Time of War, Art. 147.

[19] For a list of parties to the Geneva Conventions and its Protocols, see International Committee of the Red Cross, *States Party to the Geneva Conventions and their Additional Protocols* (July 6, 2017), *available at* http://www.icrc.org/eng/party-gc(last visited August 10, 2017).

[20] *Supra* n. 18, Art. 146.

[21] *Ibid.*

[22] *See, Supra* n. 17, Art. 4.

[23] There have been no documented cases of prosecution on the basis of the Apartheid Convention.

[24] Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, (1984).

[25] R. v. *Bow St. Metro. Stipendiary Magistrate, Ex Parte Pinochet,* 1 A.C. 147 (H.L. 2000).

[26] *Ibid.*

Lords decided not to fulfill the order keeping in mind the ill health of the wrongdoer.[27] This case of arrest in London and recognition of its legality by the courts of England proved to be important one especially in Chile. With this development, the universal jurisdiction got recognized. There have been as many as twelve international conventions which provide universal jurisdiction, for example, conventions dealing with diplomats being taken hostage, terrorism, ships on the high seas, airplane hijacking, etc.[28] Now the governments empowered their courts to exercise universal jurisdiction in case of serious crimes. Under the 1948 Genocide Convention,[29] jurisdiction would be conferred either on domestic courts where the crime was committed or in an international court having jurisdiction, but this convention didn't recognize or confer universal jurisdiction.[30]

It was understood that if war crimes are committed, it does not matter where it has been committed and there would be an International Criminal Court (hereafter ICC), which will exercise the jurisdiction. However the idea of the development of such an institution was prevented and took a back seat with some of the nations like China and Russia showed no interest in it.[31] Even, module for the procedures and rules of an ICC was not given much attention. But it did not take much time when UN Security Council came up with a surprise and set up the first ever International Criminal Tribunal for the former Yugoslavia,[32] which was further followed by another International Criminal

[27] *Pinochet Set Free,* BBC News, Mar. 2,2000, *at* http://news.bbc.co.uk/l/hi/uk/663170.stm (last visited April. 10, 2017).

[28] The twelve conventions are as follows: Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature on Dec.* 14, 1973, International Convention Against the Taking of Hostages, Dec. 17, 1979, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988; Convention on the Marking of Plastic Explosives for the Purpose of Identification, Mar. 1, 1991; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988.

[29] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948.

[30] *Id.,* Art.6.

[31] Roy S. Lee, The International Criminal Court: The Making of the Rome Statute: Issues, Negotiation, Results (Kluwer Law International, The Hague, 1999).

[32] *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia,* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 6, U.N. Doc. S/RES/827 (1993).

[33] *Statute of the International Criminal Tribunal for Rwanda,* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994).

Tribunal for Rwanda.[33] With the advent of these two tribunals a positive wave was flown in the international community. There have been some doubts about the standing of US towards international law. US want its citizens to be subjected to its courts and not to any international courts because of an anti-American bias. International community is very much aware that it was the United States, which played a crucial role in the establishment of the Yugoslavia tribunal by the Security Council.[34] Again it was the USA, which convinced the UN Security to set up an international criminal tribunal.[35] The Rwanda tribunal would never have became a reality without the political and financial assistance of the United States. Now it's unfortunate to see that US does not wish to subject its citizens to the jurisdiction of ICC through bilateral Immunity Agreements allegedly entered into under Article 98 of the Rome Statute.[36]

The path of the court has not been free from difficulty; nonetheless, the inclusion of large number of members joining the court lead to positivity. There have been instances of horrific crimes being committed throughout the world and thousands and millions of the people were forced into situations of starvation and death.[37] Such kind of crimes must be brought into the category of genocide as considered by US.[38] The reasons for putting such brutal and heinous crimes into the category of genocide would result into putting an obligation on the United States to check that criminal conduct. At times it has been observed that China has made the resolutions weak in the Security Council with no fault of US and under the threat of veto.[39] It demanded the Security Council to intervene and instruct the ICC to immediately investigate war crimes in the Sudan, which the Security Council could do under the Rome Treaty. It would be an exemplary use of the power of the International Court of Justice and eye opener for the rest of the world, leaving a message that situation like Rwanda does not happen again. President Clinton apologized on behalf of the United States for not doing more to stop the Rwanda genocide.[40] The Security Council should come forward and do something right now at very little cost; it wouldn't even be contrary to the approach of the United States, that the Security Council shall hold the key to

[34] Barbara Crossette, *Time is Short for U.S. to Join the International Criminal Court*, New York Times, Nov. 24, 2000, p. 9.

[35] *Ibid*.

[36] *See, e.g.,* Treaty Affairs Staff, *A List of Treaties and Other International Agreements of the United States in Force on January 1, 2004, available at* http://www.state.gov/documents/organization/38401.pdf (last visited August 10, 2017).

[37] See. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, *available at* http:/lwww.un.org/News/dhlsudanlcom-inq-darfur.pdf(last visited August 10, 2017).

[38] Colin Powell, Speech to the Senate Foreign Relations Committee (Sept. 9, 2004); *see Powell calls Sudan Killings Genocide,* Sept. 9, 2004, *available at* http:/www.cnn.com/2004/WORLD/africa/09/09/sudan.powell(last visited August 10, 2017).

[39] *See,* Human Rights Watch, *The United Nations and Darfur* (Jan. 2005).

[40] *See, A News Hour with Jim Lehrer Transcript: Promoting Peace* (Mar. 25,1998).

trigger the jurisdiction of the ICC.

III. What Does the Future Hold for the International Criminal Court?

The ICC is considered and received as one of the important developments and innovations of the world.[41] The institution of ICC is vested with the power to deal with crimes like crimes against humanity, aggression, war crimes, and genocide etc. The negative attitude led to perception that the ICC focuses more upon African countries and at the same time this focus is absent when the serious crimes are committed in other parts of the world. This fear and negative attitude finds its way again when with the inception of the court in the year 2002 when the first prosecutor started investigation, which was followed by another investigation with more focus upon African countries resulting it having a polarizing effect and reaffirming the fear of the court serving the West only.[42] It was entirely predictable that the ICC would soon be accused of neo-colonialism.[43] But the fact seems that most of the cases were sent to ICC by the African governments themselves. Most of the cases before the court involve the defendants who are Africans and are tried under the investigation of Africa. Counter to this there have been some horrific crimes committed around the world, which have not even been noticed or addressed by the court, for example, atrocities in Syria and Iraq.[44] We must pay heed to this reason that the court was not competent to take into account the situation of those countries because neither of these countries are party to the Rome Statute nor the court was having the jurisdiction. There was veto by Russia and China to Security Council resolutions referring situations in those countries to the Court.[45] It further strengthens a call from Kenya asking the African members to withdraw from the Rome Statute and some of the leaders from Kenya have been under the investigation of the court and a call from parliament of Kenya to withdraw from ICC.[46] The unrest with the ICC among African countries is

[41] Created by 1998 Rome Statute of the International Criminal Court and situated in The Hague.

[42] Eklavya Anand, *Third World Approach to International Law and the International Criminal Court: A Perspective from Global South*, in Ashish Kumar (ed.), Contemporary Developments in International Law: Some Random Reflections (Satyam Law International, New Delhi,2017) p. 21.

[43] *See,* President Uhuru Kenyatta's speech during the Extraordinary Session of the Assembly of Heads of State and Government of the African Union in which he repeatedly referred to colonialism and imperialism. His speech is *available at* www.scribd.com/doc/175602445/President-Uhuru-Kenyatta-s-Speech-during-the-Extraordinary-Session-of-the-Assembly-of-Heads-of-State-and-Government-of-the-African-Union-Addis-Ababa (last visited August 10, 2017).

[44] *Available at* http://www.foxnews.com/opinion/2016/10/24/what-does-future-hold-for-international-criminal-court.html(last visited on November 09, 2017).

[45] *Ibid*.

[46] *See,* C. Jalloh, *Situation in Republic of Kenya, No. ICC-01/09-02/11-274; Judgment on Kenya's Appeal of Decision Denying Admissibility*, 106 AJIL 119 (2012).

very much evident and motivated by the political complexities of being a State Party to the statute. This unrest is pointing towards the future dissatisfaction among the member states. One of the important developments could be seen when Sudanese President[47] could not be arrested by the South African government,which led to further criticism. It led to South Africa announcing its withdrawal. It could prove to be a crippling of ICC.[48] Some rising countries too showed their unwillingness to be a part of it.[49] The United States of America has been supporting the ICC, it also backed the referrals of Security Council regarding the prevalent situations in Sudan and Libya but U.S has not ratified the Rome Statute. There have been situations where the U.S citizens cannot be under the jurisdiction of the court without the prior permission from the United States as a result of 90 bilateral agreements. Apart from the political complexities, there have been other issues too which requires serious considerations for example the proceedings of the court are dilatory, expensive and more dependent upon the governments cooperation. It seems to be failing in its approach to contribute "to the prevention of serious crimes". The ICC has launched only 23 cases and managed to arrive at 4 convictions with the staff capacity of 800, budgets of over $150 million in 2016. There have been instances where the governments failed to locate the suspects or they willingly did not arrest them. Such a situation of the ICC does not leave international war criminals shaking their boots. The question of more dependency in seeking the cooperation of governments when it comes to making of arrest and of gathering evidences raise a serious thought as to effectively pursue and prosecute a bigger fish. There has been obstruction and intimidations of witnesses which have hindered the ICC in cases involving government officials, and have mainly involved political opposition figures or fugitives in the Court's successful prosecutions.

IV. Challenges Before the Court

One of the important reasons and objects behind the establishment of the court was to end impunity for the perpetrators of the crimes which were most serious in nature to the whole international community which could be very much seen into the preamble of the Rome Statute. Neither Syria nor Iraq is a party to the Rome Statute. There were horrific crimes committed in these

[47] Sudanese President Omar Al Bashir, who visited South Africa and was subject to an ICC warrant for alleged genocidal crimes in Darfur.

[48] 34 of the 124 ICC states parties are African.

[49] The Court was not positive with refusal of some rising countries like US, China, India and Russia denying being a part of it. US initially singed the Rome Statute but showed its reservation for ICC being a flawed institution that lacks prudent safeguards against politicization, is insufficiently accountable to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party states in some circumstances.

countries, the UN Security Council did not refer the problem to the Court. The court was unsuccessful in dealing and holding those responsible for such wrongs (in the case of Syria because of a veto by China and Russia, while on Iraq there has been no vote).[50] The preliminary investigation concerning war crimes committed by UK military personnel had been conducted by the Prosecutor in Iraq.[51] There have been instances where the people who committed serious crimes had not been caught and such crimes had not been nipped in the bud. This situation where the court could not catch those who were responsible and could not prosecute them led to raise a question upon the jurisdiction and incapacity of the ICC to really focus on the most serious crimes of its jurisdiction. However some of the perpetrators of serious war crimes could be prosecuted provided they are nationals of state parties. As per the evidence,which were gathered by the prosecutor, those in the highest chain of command, who would fall under the jurisdiction of the Court[52] taken into consideration the gravity criterion, are not nationals of states which are party to the statute.

V. State Outside the Jurisdiction of the Court

The United States of America has signed over 100 bilateral immunity agreements[53] with third countries and shields its citizens from the jurisdiction of the court and to ensure the citizens cannot be extradited to the Court by these states. European Union drafted guiding principles[54] for those states that were

[50] *Available at* http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603920/ EPRS_BRI(2017)603920_EN.pdf (last visited on November 18, 2017).

[51] *Ibid.*

[52] The ICC jurisdiction is different from the so-called universal jurisdiction, which existed for example between 1993 and 2003 in Belgium, where it was adopted in reaction to the Rwandan genocide. This universal jurisdiction afforded the right to anyone to submit a war crime for prosecution in Belgian courts, irrespective of whether it was committed on Belgian territory, and whether a Belgian national was involved as either perpetrator or victim.

[53] The international agreements mentioned in Article 98(2) of the Rome Statute are referred to by several terms, including Article 98 agreements, bilateral immunity agreements (BIAs), impunity agreements, and bilateral non-surrender agreements In capitals around the world, the U.S. government representatives have been seeking bilateral non-surrender agreements, or socalled "Article 98" agreements, in an effort to shield U.S. citizens from the jurisdiction of the International Criminal Court (ICC). Dubbed bilateral immunity agreements (BIAs) by leading experts, these U.S. agreements provide that current or former U.S. government officials, military and other personnel (regardless of whether or not they are nationals of the state concerned, i.e., foreign sub-contractors working for the U.S.) and U.S. nationals would not be transferred to the jurisdiction of the ICC, *available* at http://www.iccnow.org/documents/CICCFS_BIAstatus_current.pdf (last visited on November 19, 2017).

[54] EU guiding principles listed below will preserve the integrity of the Rome Statute of the International Criminal Court and – in accordance with the Council Common Position on the International Criminal Court – ensure respect for the obligations of States Parties under the Statute, including the obligation of States Parties under Part 9 of the Rome Statute to cooperate fully with the International Criminal Court in its investigation and prosecution of crimes falling within the jurisdiction of the Court. *Available at* https://www.consilium.europa.eu/uedocs/cmsUpload/ICC34EN.pdf(visited on November 19, 2017).

its members, with the purpose of maintaining the integrity and a response to Article 98 of the Rome Statute. The Court has been opposed often by some of the major powers that are non-members like USA, China and Russia on various grounds. One of the major powers of the world, USA initially signed the Rome Statute but it did not ratify it and later unsigned the same. Russia also signed it initially but withdrew later on. The attitude and position of United States of America seems to be difficult to understand and full of ambiguity as it refuses to accept the Court's jurisdiction, while on the other hand it has expressed positivity and supported the cause of the court and made many claims of the court being worthy and useful. What could be the future of the court? And the very purpose for which it was established as some of the nations like Burundi, Gambia, and South Africa withdrew from the ICC, though such withdrawal seems to be less and representing only a few nations which is 3 in count out of 124 who signed the Rome Statute. But it could be a major setback for the court and could lead to many other nations to follow.

The ICC was established with the intention that it would be a permanent body, which will deal with crimes, which are serious in nature.[55] Whenever there were violations of international humanitarian law it could only be dealt with by tribunals like International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY), which were set up contemporary basis for specific circumstances. These tribunals had been subject to criticism since they were born.[56] Refusal on the part of USA to recognize the court's jurisdiction proved to be serious and major setbacks to the ICC since its inception and attracted criticism either in the form of proceedings being slow or a lack of progress into the proceedings, resulting into only four verdicts; three guilty and one not-guilty during its whole operation time. There was a need to look into the reasons, why are member nations withdrawing from the court's jurisdiction? Perhaps, one of the important and

[55] The ICC was founded in 1998 by the Rome Statute, with the intention of there being a permanent international court to deal with the most serious crimes such as the crime of genocide, crimes against humanity and war crimes. The court was officially established in 2002, when the Rome Statute entered into force, after being ratified by 60 states.

[56] The Court's two predecessors, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were both deeply political creatures and were accused of being products of Western European-style racial and political prejudice. The idea of creating the ICTY was triggered by the shocking images of ethnic cleansing in the Balkans, reminiscent of the Holocaust. The sight of Europeans suffering in this way was simply too much to bear. Something had to be done and creating an ad hoc international criminal tribunal by Security Council fiat was the innovative result. The erection of the ICTR was even more politically controversial. It has often been argued that the ICTR was the West's way of compensating for the American Clinton administration's failure to intervene to stop the genocide. *See*, Samantha Power, A Problem from Hell: America and the Age of Genocide (Harper Collins, New York, 2003).

underlying themes for the criticism of the courts had been its investigations, targeting African States. Such apprehensions of the Africans could find its place into the fact that nine out of ten cases, which were being investigated by the court, involve defendants from different African countries. One of the other facts was that the three trials,which are currently being heard by the ICC relate to Africans too. These apprehensions must have been taken into considerations as its member states raised a point that needed serious thought. One of the important arguments, which were advanced by Amnesty International in counter to the apprehensions raised by Africans nationals, was that for many Africans the only avenue for justice was the ICC for the crimes they have suffered. This fact also must be taken into considerations that 33 African states have ratified the Rome statute and signed up to the court's jurisdiction which made Africa the largest continental bloc to sign up, so perhaps more vulnerable to investigation.[57] Even the member nations, which showed their intention to withdraw and another fact of other countries joining them into withdrawal is a time taking process. There is no denial from the very fact that some of the African countries may join a withdrawal path, leaving a possibility of decrease in the member nations but there is also positivity lies into the fact some of other countries have stood up and reaffirmed their faith into this very institution and issued their continuous support. There may be testing times ahead which cannot be understood anyway unlikely the end for the ICC which will surely grow from the ashes and will prove to be a milestone into the path it is heading.

VI. Conclusion

The birth and growth of international criminal justice has been impressive and has wide global acceptance. What of the future? One must be cautiously optimistic. The reason for caution lies in the present domestic and foreign policy of the United States-the only superpower, and traditionally regarded as the leader of the free world. The reason for optimism is the openness of the society and its commitment to democracy not only for your own people but also for all people around the world. Some African government's reservations about the ICC to a neo-colonial tool of Western governments must also be looked into to avoid any kind of favoritism or bias and setting up the high standard of integrity.

[57] M. duPlessis, The International Criminal Court that Africa Wants (The Institute for Security Studies, 2010) pp. 5-6 (It States the important role-played by African States in creation of ICC).

PRIVATIZATION OF CORRECTIONS: PRIVATE PRISON CONTROVERSY AND THE PRIVATIZATION CONTINUUM

*Prakash Sharma**

I. Introduction

Imprisonment calls into question the institutionalized violence of State and its organs. It touches on the very core of the meaning of State sovereignty and concerns for one of the most disempowered groups of society, i.e., indicted criminals. Therefore, privatization of prisons signals the willingness to apply privatization policies almost with no limitations. Private prisons have become a known phenomenon in many countries. After the debate on this issue seemed to lose its pragmatic value—in contrast to its importance on the theoretical level—privatization of prisons reemerged as an issue of legal debate due to the Israeli Supreme Court decision that declared a law authorizing the establishment of a private prison unconstitutional. It will be suggested through this paper, that the democratic functioning, unlike the market, is an arena for explicitly articulating, criticizing, and conforming preferences and the same needs to be preserved through constitutional means. Privatization weakens this public space—the space for information, deliberation, and most importantly accountability. These are elements of democracy whose value is not reducible to efficiency.

Imprisonment also reflects a justified institutional violence of the State. When the framers wrote our Constitution, the nation's market places were largely local, personal, simple and as a result significantly accountable to the people directly affected.[1] Modern facilities of technological advancement were relatively benign. They had no means to foresee, and consequently did not provide for, marketplaces that would become national or even international—impersonal and complex. They had no premonition of technologies—too arcane to be understood by all but narrow specialties, and so volatile that each one has the capacity to menace a vast population if not all human life sometimes with little public awareness of peril.[2] In modern times, with the changing aspirations, the very Constitution, which was a *potpourri* of future, looking aspirations for transformation, has been picturesquely re-written.[3] How one would assist self,

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1 G. Austin, The Indian Constitution: Cornerstone of a Nation (Clarendon Press, Berkeley, 1966) p. 28. Austin states "The Constitution makers, therefore made themselves clear, that the constitution must be democratic, there was no return to the Indian precedent of a despot with his durbar, nor would the Assembly have Europe's tota litarianisms or the Soviet system."

2 *See* Morton Mintz and Jerry S. Cohen, Power, Inc.: Public and Private Rulers and how to make them Accountable (The Viking Press, New York, 1976).

for any understanding of original (founding framers) constitutional choices and subsequent constitutional developments in the language of economic rationality is what this paper explores. The article argues as to why State, as a constitutional entity must retain the power to enforce criminal law.

II. The Privatization Continuum

The traditional starting-point for discussing any challenges posed by privatization used to be that the decision to privatize is a matter of policy, not of law. Further, the perception of privatization has promoted an underlying assumption of constitutional neutrality regarding any decision to privatize. Since roman republic to modern democracy the dichotomy between private and public property has remained an issue for controversy, for long, and yet to be clarified. Romans have both private as well as public properties, where the later plays an important part in Roman economic system.[4] In India, the public domain comprises of very large area of land, resources and much of it after the introduction of new economic policy has been transferred to private players (on lease as well as on complete transfer) for exploitation of such natural resources.[5] Likewise, today in almost all other countries some considerable amounts of resources are devoted for governmental use, and it is thorough which government of the day generates income. Initial acquisition of resources was done through conquest and accordingly declared such conquered resource to be the public property of the new or existing sovereign. Such a method on one side increases resources (land, money etc.) for the sovereign on the other side decreases few resources too (men, money etc.). Later on new methods of acquisition were developed, and the most effective one was with the introduction of legal procedures for transfer of private/individual property into the hands of government, only later to be transferred back to selective private organizations/individual.[6] It was this legal device/devices, adopted for such taking of property by the state, to be known as expropriation, eminent domain, confiscation, nationalization and socialization.

Confiscation of property/goods by the public authorities has since past been used extensively as a mode of punishment for crime. Today, what we see in this field of law related to expropriation of common public property, that the

3 Prakash Sharma, Prison Privatization: Exploring the Possibilities in India (Mohan Law House, Delhi, 2017) p. 153.

4 F.A. Mann, "Outlines of a History of Expropriation", 75 Law Quarterly Review 188-219 (1959). Justice as a principle for regulating society was propounded by Rawls, *see* John Rawls, A theory of Justice (Harvard University Press, Cambridge, 1971).

5 *See*, Fritz Schulz, Principles of Roman Law (Clarendon Press, Oxford, 1936) p. 161.

6 Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America (Hindustan Law Book Company, Calcutta, 1994) pp. 380-82.

use of public property is transferred on market. Justification for such a step raises some serious issues of justice in both domestic as well international policy making processes. The initial process of taking property for public use was never been questioned as such, which since its true realization caused massive uproar and challenge to the authority of State in taking private individual property for larger common good. Grotius remarked "for the common good the king has right of property over the possessions of individuals greater than that of the individual owner."[7] Expropriation was a method of solving the problem of harmonizing the interests of society with those of the owner, since it's the very idea of property to make peace with the society. Ever since, no law was formed as to deny, governmental power to expropriate, though specific provisions in the Constitution were encrypted for adequate/reasonable (though both appears misnomer in present scenario, but this was the basic idea) compensation by the government while taking any private property under the guise of public purpose.[8] Any taking of property should have been limited to the extent that it should provide general benefit to the public.

In India large scale of expropriations of agricultural, industrial, and business properties have occurred in connection with social revolutions (a false claim, since it didn't reap the desired result, but in fact benefited the ones against whom such revolution took place) which backfired the socialist thinking of benefitting all, since it benefitted neither all nor the ones whose property was taken in the name of public purpose, as such confiscations of property took place without payment of any indemnity. In the course of such social transformation, the rights, in theory though granted to the citizens, which was told that they did not posses prior to such revolution, the citizens were later compensated for the loss of property rights in a limited way only.[9] In this regard, even the United Nations General Assembly adopted a resolution in 1962 entitled *Permanent Sovereignty over Natural Resources*, it reads:[10]

> Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law.

[7] *See*, Iain Hampsher-Monk, The History of Modern Political Thought (Blackwell, Oxford, 1992). Also *see*, US Supreme Court decision in *Kohl* v. *United States*, 91 US 367 (1875), which declares right of eminent domain as the offspring of political necessity and is inseparable from sovereignty, unless denied to it by its fundamental law.

[8] James Delong, Property Matters (Simon and Schuster, New York, 1997).

[9] To countries like India, such a situation caused massive problem for the State, in a sense that, the wealth appropriated by the State belonged to relatively small segment of the huge population, and the financial resources available for compensation were seriously restricted. *See*, Amartya Sen, Identity and Violence: The Illusion of Destiny (Penguin Books Co., London, 2006).

[10] The General Assembly adopted resolution 1803 (XVII) on the "Permanent Sovereignty over Natural Resources"on 14 December 1962.

There appears a common consensus across the world which indicates clearly that the standards of expropriation enunciated by developed market economies, for acquiring public property (indirectly and legally) has a backing of States.[11] These principles are allegedly, in accordance with the fundamental notions of Justice and fair dealing and it is this fair dealing principle which was given much more importance, in a sense that it secures no severe loss for business enterprises, due to any social events, for whose occurrence they were not directly responsible (may be indirectly).[12] India continues to face situations: (a) where conditions and wages of workers, taking into account the general social and economic situation, substandard and indefensible, while corporations derive exorbitant profits from such practices; (b) Multinationals continuously exercise improper pressures on the government resulting in measures greatly detrimental to the interest of people (the supposed sovereign). Does such a situation bring justice for the one who had/will/does suffer(s/ed)?[13] The experiences connected with the problem of justice are of non-sensory character, since they are not perceptions of data given by five senses of human beings. Justice therefore, is a phenomenon of intellectual, intuitive, or emotive nature, but nevertheless real and describable.

III. Constitutional Limits to Privatization

In 2010, Israeli Apex court struck down legislation pertaining to privatization of prison administration.[14] Chief Justice Aharon Barak of Israeli Apex court staged a *constitutional revolution*, declaring that basic laws would

[11] Constitution of India, Article 31A, 31C and 39 (b) (c). In this regard Law Commission Report on Land Acquisition Act would be interesting, which says "The power of the Sovereign to take private property for public use and the consequent right of the owner for compensation are well established" which however is debatable as to the say for compensation is concerned it remains doubtful as what would constitute a just, fair and reasonable *compensation*.Further, the reports says "A critical examination of the various stages of evolution of this power will serve no useful purpose as the power has become firmly established in all civilised countries."See 10th Law Commission Report (Ministry of Law, New Delhi, 1958) p. 1.

[12] *See* Upendra Baxi, Liberty and Corruption: The antulay Case and Beyond (Eastern Book Company, Lucknow, 1999).

[13] Hans Kelsen, What is Justice (University of California Press, Berkeley, 1958).

[14] *The Academic Centre for Law and Business* v. *Minister of Finance* (November 19, 2009 HCJ 2605/05), The Human Rights Division). An English translation is *available at*: http://eIyonl.court.gov.il. files_eng/05/050/026/n39/05026050.n39.pdf. (Last accessed on 16 May, 2017). The Court's decision to invalidate this legislation is interesting, as it stipulates that

function as a Constitution and be supreme over ordinary legislation.[15] This historic decision, which is equivalent of the United States famous case *Marbury* v. *Madison*[16] puts basic laws on the top and established the practice of judicial review of statutes. What this meant was that the Israeli Apex court which over the years has declared the eleven basic laws drafted over some 45 years a Constitution, has granted itself the power to strike down new legislation which contradicted any basic law. Furthermore, this case goes beyond the general argument, raised by many academicians as to the constraints against delegating essential governmental powers to private entities and developed more logical and practical answer as to the issue concerning transfer of essential State's functions into the hands of private players. The Israeli Apex court ruled that executing governmental powers by a prison staff employed by a for-profit setup, will violate prisoner's basic rights to liberty and human dignity, rather than dwelling into the argument of prohibiting the privatization of core governmental powers.

A. Argument of abuse of power

Among many arguments produced through justices, the use of unjustified force by a private body employing governmental powers which poses an unavoidable risk, in short *risk of abuse of power*, sounds more justifiable. Indeed, such use of force is subject to a constraint, which relies on the fact that power holders aim as an institution is to promote the social interest rather than the private interest, the democratic legitimacy for the use of force, which relies on the fact that organized force exercised by and on behalf of the state is what causes the violation of basic rights. Where such force is not exercised by the competent organs of the state, in accordance with the powers given to them and in order to further the general public interest rather than a private interest, this use of force would not have democratic legitimacy, and it would constitute an

despite the popularity of this practice in the democratic world, privatization is unconstitutional per se, irrespective of its specific characteristics or expected outcome. The eight to one decision is based on two main factors. The first, presented by two of the justices, is that a private entity employing governmental powers poses an unavoidable risk of an unjustified use of force. According to this view, the very "culture"of for-profit organizations would create a risk of an abuse of power. This risk is sufficiently high to classify the privatization as an infringement of prisoners rights not to be subject to an unjustified use of force or otherwise humiliating treatment by the prison shards. While this is a consequentialist approach, as it points to the privatization expected outcome, the Court's analysis is profoundly non-empirical, but rather one that is based on axiomatic assumptions about the outcomes of privatization. The second reason, supported by all eight Justices of the majority, stipulates that an inmate is entitled not to be subject to the use of coercive measures by employees of a private, for Profit Corporation. According to this view, the very act of implementing incarceration powers by employees of a private entity infringes upon the inmates rights to liberty and human dignity. This recognition of "right against privatization"is the central novelty of the Israeli Supreme Court's decision.

[15] *Academic Centre of law and Business, Human Rights Division* v. *Minister of Finance* 2009.

[16] 5 US 137 (1803).

improper and arbitrary use of violence.[17] There is a drawback of such argument; the use of force (even by the State) if not done within the parameters of constitutional norms also renders the whole power as unconstitutional.[18] It does happen on a continuous basis in India, especially by State, and judiciary often has been the last saviour in this regard. But, here the constitutional guarantee of fundamental rights are available to such infringement of basic rights, caused by State or agencies authorized by State; in a similar situation the act if done by a private entity, would not call for the enforcement of writs, since any infringement of basic rights by a private entity would not cover prerequisites mentioned under Article 13 of the Indian Constitution,[19] and therefore would not hold private entity constitutionally accountable to higher courts, although a measure of civil or criminal petition is available, which will take years to settle. Therefore, the risk remains high on transferring governmental powers to private entities (though formed on the basis of axiomatic assumptions about the outcomes of privatization). The simple reason is that corporations in order to cut costs, or labour expenses or social securities for its personnel, which will leave inmates at the mercy of unscreened, untrained, understaffed and unpaid employees (much of the points hold good in Indian prison and police conditions, though public in nature). Any liberal democracy considers only a legitimate form of punishment, where inmates are entitled to enjoy some minimal living conditions with justified use of force by prison personnel. It is but obvious that any contractors purpose for attaining operation of government function would be to obtain maximum profits, hence this would likely result in an abuse of prisoner's rights to human dignity.

B. Inmates right to liberty and human dignity

The second argument raised by the Israeli Apex court, stipulates that an inmate is entitled not to be subject to the use of coercive measures by the employees of private corporations. This argument generates wider outcomes and covers issues concerning fields other than just law. The view held by the judges was that the very fact of implementation of incarceration powers by the

[17] In the words of President Beinisch, "The Court stated that a person's right to liberty is infringed not only by the criminal court's decision to imprison that person, but also by the execution of this decision. Justice Procaccia states, "The exercise of coercive authority by a party that is not the state which violates core human rights, necessarily does not enjoy the confidence and acceptance and lacks social, moral and constitutional legitimacy", *see*,*supra* n. 15,para 25.

[18] Any betterment if can be done should not be tested on the popular legitimacy basis, rather it should be seen from the point of view of the person whom it would be ultimately tested upon. Inhuman condition, with degrading state of living behind bars calls for better argument then to raise an argument of popular legitimacy. *See*, Alexander Volokh, *The Tale of Two Systems-Cost, Quality, and Accountability in Private Prisons*, 115(7) HARV. L. REV. 1841,1872 (2002).

[19] Article 13, Constitution of India, 1950.

employees of a private agency would infringe upon the inmates rights to liberty and human dignity. Legally speaking, both governments in India and in Israel are well within the powers of their respective executive branch to implement any policies with respect to privatization.[20] Provided, procedural requirements to prevent corruption and ensure efficiency has to be taken care of by the private entity, which in a way does not impose limitations on the government's power to privatize State-owned corporations. The same holds true for the delegation of powers to the private individuals. Both Indian as well as Israeli Constitution doesn't include any explicit provision on limiting the powers of Parliament. Many a times in India, executive branch of government has delegated governmental powers to private entities even without explicit legislative authorization.[21] The legitimacy of such privatization was subject only to the process based requirements like setting of sufficient guidelines by a relevant public authority, steps taken to prevent conflicts of interests in the specific context and implementation of supervisory powers.[22] Similar is the position of United States which does not define specific functions as either properly or exclusively those of the government, rather employs the due process clause, for protection against uncontrolled discretionary power, and requires the private body to be guided by rules promulgated by governmental agencies which is subject to review by a public body.

In Israel privatization is supplemented by *quasi-public* entities doctrine, under which any body authorized to employ governmental powers is subject to the norms of public laws, important among them are human rights laws and Israeli administrative courts, including the high Court of Justice.[23] In U.S however, the question as to the subjection of private exercise of the governmental power, was discussed in *Pischke* v. *Litscher*[24] which held, "We cannot think of any…provision in Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than

[20] There is explicitly mentioning of certain limitations to the power so been exercised, which is government has to publicly fund certain services like education, health care, insurance etc. as well as some social rights, that are implicit to right to human dignity. In Israel these rights are exclusively within the domain of government and cannot be exclusively transferred to private players. In India, government has opened up market for private players in these core social sectors and the same has received judicial permission too, since court says under Indian constitutional structure executive policies cannot be challenged in the court. *See generally,* Prakash Sharma, *Does Privatization serves the Public Interest? An Assessment of the Risks and Benefits of Prison Privatization,* 3 Lexigentia 80-97 (2016).

[21] *See* Gautam Gupta & Prakash Sharma, *Pretentious Privatization: Public Law Limitation of Government Functions*, 5(2) Bharti L. Rev. 100-112 (2016).

[22] *See* FHCJ 5361/00 *Falk* v. *Attorney General* [2005] Isr. S.C. 59(5) 145; HCJ 2505/90.

[23] See HCJ 294/91 *Jerusalem Burial Society* v. *Kastenbaum* [1991] Ist. S.C. 46(2) 464.

[24] 178 F.3d 497, 500 (7th Cir. 1999).

by a government...private exercises of government power are largely immune from constitutional scrutiny....expanding privatization poses a serious threat to the principle of constitutionally accountable government."[25] In Israel, the constitutional setup is so framed that the private exercise of government power is subject not only to effective supervision by the Executive Branch, but also to the judiciary (as they act as a guardian to the Constitution). Hence, the delegation of governmental powers to private persons hardly changes the formal norms to which the power holder is subject.[26] In India, executive do not have much control over them, to the extent it is subject to judicial scrutiny on the grounds of corruption or issues related with environmental law or consumer law. In the United States, private prisons assumed to meet the non-delegation challenge as long as a public body provides sufficiently detailed guidelines for running the prison, with an effective application of supervisory powers. This thereby leads to a situation of ambiguity,[27] raising justified doubts on the constitutionality of privatization, much in line with Indian situation.

The case rests entirely upon the concept of liberty, which is fair enough a justification but there is an angle of human rights too. The commodification of prison and use of force by private prisons to its inmates raises issues as to the rights of the inmates under private control. Court states "Imprisoning persons in a privately managed prison leads to a situation in which the clearly public purposes of the imprisonment are blurred and diluted by irrelevant considerations that arise from a private economic purpose, namely the desire of the private corporation operating the prison to make a financial profit. There is therefore an inherent and natural concern that imprisoning inmates in a privately managed prison...turns the prisoners into a means whereby the corporation that manages and operates the prison makes a financial profit, it should be noted that the very existence of a prison that operates on a profit-making basis reflects a lack of respect for the status of the inmates as human beings, and this violation of the human dignity of the inmates does not depend on the extent of the violation of human rights that actually occurs behind the prison walls."[28]

[25] *Ibid*.

[26] The position is similar in the Israeli law. *See*, Barak Medina, *Constitutional Limits to Privatization: the Israeli Supreme Court decision to invalidate Prison Privatization,* 8(4) ICON 693 (2010).

[27] In *Richardson* v. *Mc Knight*, 521 U.S. 399 (1997), the U.S. Supreme Court held that private prisons guards cannot claim qualified immunity on the other hand in *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61 (2001), court held that private entities are not subject to civil rights suits; *United States* v. *Butler*, 297 U.S. 1,71 (1936), court held conditional benefit can be unconstitutionally coercive. *See* also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102(7) Harv. L. Rev. 1413-1506 (1989).

[28] *Supra* n.15, para 51 says, "Imprisonment that is based on a private economic purpose turns the inmates simply by imprisoning them in a private prison, into a means whereby the ... operator of the prison can make a profit: thereby, not only is the liberty of the inmate violated, but also his human dignity."

Here the apprehension raised by the court though totally ignored the benefits of operating private prisons was justified in doing so. Benefits so arisen must not act as an outweighing factor, especially when the act itself is not within the effective control of both judiciary and executive as mentioned (in the case of India and US). It's not just about commodification but also about betterment of condition, can we expect a private player to invest all its earnings on betterment of condition rather than to concentrate on profit? Effective control by state over private entities will serve better, but does market allow it? Inmates can be treated as a mere means for profit making, but for this reason, State can be justified in having control over a function which it claims as a sovereign, and yet does its best to enhance the condition, even when no capital is available. Innovative ideas should never have rigid oppositions; a balanced and neutral way has to be carved out, without compromising on the rights available to the inmates as well as of the personnel (who will be under private entity).

The model opposed by the Israeli Apex Court was based much on the lines with United Kingdom model of public private partnership, which holds private entity accountable to public laws with high prescriptive contracts, multiple level of monitoring and output based evaluations. Further, it rejected the very proposal of allowing even a single pilot prison even before deciding to expand this policy to other incarceration facilities, and this was for the first time in the Israel's judicial review history instead of provisions, an entire Act was held invalid on the ground it violates basic laws of the State.[29] This was brave, appreciable step taken by Israel's Apex Court, more so on the basis it was held. No matter how much amount of intensive regulations and supervision is done (as happens in UK) and even on the application of heightened judicial scrutiny it will be insufficient in its all probability to mitigate risk of abuse. The argument of providing prisoners with improved living conditions was outweighed by the risk of violating the core of prisoners right to human dignity. Justice Procaccia

[29] A brief history of basic laws as formed under Israel's system needs a worth mentioning here. Following the failure to create a complete Constitution at the time of Israel's foundation in 1948, the Knesset (Israel's Parliament), serving both as legislative branch as well constituent assembly, decided to create a constitution in a piece meal process. Each Part is titled *Basic Law with a vision that when all chapters are enacted, they will be combined to form the Constitution.* Over the years Knesset enacted some eleven Basic-Laws, including in 1992, *the Basic Law of Human Dignity and Liberty*. However, Knesset left some ambiguity as to the legal status of these Basic Laws, before they are combined to form a Constitution. It neither includes an explicit supremacy clause nor enforcement mechanisms of their provision over legislation. It was in Civil Appeal 6892/93 *United Mizrahi Bank* v. *Migdal Cooperative Village* [1995] Isr. S.C. 49(4) 221, 416, case the Supreme court explained even through the Basic Law: Human Dignity and Liberty does not include an entrenchment clause, its provisions binds the legislature. The court held that all the basic Laws are the supreme law of the land, based on the view that the Knesset enjoys the powers of the Constitutional assembly, and every piece of legislation that is titled Basic Law is the product of employing constitutive powers.

explains it rightly:[30]

> The potential harm that is inherent in the privatisation of a sovereign authority in integral to it and of such a degree that it does not allow for a process of experimentation and arriving at conclusions in consequence thereof.

Besides the argument of improvement of living conditions, when rate of incarceration is on high due to various reasons and with serious limited budget looks disturbing. No doubt present conditions didn't meet the conditions as prescribed by law and would fall beyond the requirements set by human rights law, but this concern cannot justify privatization of prison, since at present at least State prisons are under strict scrutiny of judiciary who will access the private prison and given the current state of corruption in India, can we rely of private players for such a measure?

IV. Outsourcing of Public Services and Its Limits

Moving further with the argument of democratic legitimacy of imposition of sanctions and the symbolic effect it causes as to the status of States authority cannot be achieved once it is transferred to a private corporation. No doubt the *popular legitimacy* is subject to the constraints, with an aim to promote social interests rather than some private interest. It is therefore, argued that the imprisonment function is, or should be, non-delegable and the use of force must be democratically legitimate, thus becoming socially, morally and constitutionally legitimate. As privatization got under way, Radzinowicz states"In a democracy grounded on the rule of law and public accountability, the enforcement of penal legislation...should be the undiluted responsibility of the state."[31]

Christie epitomizes a quintessentially European approach to the role of the state, one where "in the continental culture the state is seen as much more than a service institution."[32] It is no surprise that the European state that has come nearest to implementing privatization, France, has adopted a model of prisons *semi privies* where the custodial functions remain in the exclusive domain of State authorities and only the hotel, health, welfare, and program activities have been privatized. It is an awkward model but conforms in the letter if not

[30] *Supra* n. 15, para 50.

[31] In a letter to the London Times dated 22 Sept., 1988 as quoted in S. Shaw, "The Short History of Prison Privatization", 87 Prison Service Journal 30-32 (1992).

[32] *See* U. Rosenthal and B. Hoogenboom, *Some Fundamental Questions on Privatisation and Commercialization of Crime Control*, in H. Jung (ed.), Privatization of Crime Control (Collected Studies in Criminological Research, vol. 27. Strasbourg: Council of Europe 1990) 20-21.

the spirit with the strict European approach.[33] We have seen the significant role of private even in the traditional public functions. Besides, private prisons possess substantially greater market accountability (arguably in some countries)[34] as they have to survive for their existence by winning new contracts and renewing old ones, they cannot afford to have adverse publicity as it would be hampering on to their stocks/capital etc. In U.S. decisions like *Richardson* v. *Mc Knight*[35] and *Correctional Services Corp*. v. *Malesko*,[36] Supreme court held that private prisons are as accountable if not more, then the public ones, and have set up high standards in that regards.

Various scholars endorse the non-delegable core function approach on the ground that on the basis of *social contract*, State has an obligation to maintain *exclusive control over prison*.[37] This means in order to remain legitimate and morally significant, the authority to govern behind bars, to deprive citizens of their liberty, to coerce (and even kill) them, must remain in the hands of government authorities. In this regard President Beinisch in *Academic Centre for law and Business* v. *Minister of Finance*, states:[38]

> Although, naturally, many changes and developments have occurred since the seventeenth century in the way in which the nature and functions of the state are regarded, it would appear that the basic political principle that the state …is responsible for public security and the enforcement of the criminal law has remained unchanged …, and it is a part of the social contract on which the modern democratic state is also based.

Any transfer of these sovereign functions would therefore undermine the justification that underlies the exercise of power by the State. Imprisonment

[33] It is not unique, however. The Mansfield Community Corrections Facility in Texas (which despite its name is a place of incarceration) operates with the same division of functions. For technical legal reasons rather than administrative choice, a somewhat similar model exists in South Australia. *See*, Prakash Sharma (2017), *supra* n. 3, p 217.

[34] B. Western, Punishment and Inequality in America (Russell Sage Foundation, New York, 2006).

[35] 521 U.S. 399 (1997).

[36] 122 S. Ct. 515 (2001).

[37] *See*. *supra* n. 15 at para 36, (President Beinisch states "Imprisoning persons in a privately managed prison leads to a situation in which the clearly public purposes of the imprisonment are blurred and diluted by irrelevant considerations that arise from a private economic purpose, namely the desire of the private corporation operating the prison to make a financial profit. There is therefore an inherent and natural concern that imprisoning inmates in a privately managed prison…turns the prisoners into a means whereby the corporation that manages and operates the prison makes a financial profit, the very existence of a prison that operates on a profit-making basis reflects a lack of respect for the status of the inmates as human beings, and this violation of the human dignity of the inmates does not depend on the extent of the violation of human rights that actually occurs behind the prison walls.").

[38] *Supra* n. 15, para 23.

through privately managed prison would further blurry and dilute prevailing conditions in existing prisons besides ethical and morally holds wrong, since private corporation's operation of prison would be for economic purpose alone which is for making financial profit. It would turn the prisoners into means through which the corporation manages and operates prison for profits. Regardless of which penological theory is in vogue, DiIulio's writes "the message that those who abuse liberty shall live without it is the brick and mortar of every correctional facility, a message which ought to be conveyed by the offended community as a law abiding citizens through its public agents to the incarcerated individual."[39] Is it a convincing argument? I think yes because, of the principle that it is the state that should decide not only on the sanction but also execute it, to ensure that it *discharges its basic responsibility as sovereign* for enforcing the criminal law and furthering the general public interest.[40] In *Tanada* v. *Angara*[41] Apex court of Philippines states:[42]

> While sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations. Unquestionably, the constitution did not envision a hermit type isolation of the country from the rest of the world. By their inherent nature, treaties really limit or restrict the absoluteness of sovereignty. By their voluntary act, nation may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequal, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their otherwise absolute rights.

There is a distinction between the allocation and administration of punishment. The first function is irrevocably non-delegable; in the sovereign state, private criminal justice systems are a contradiction in terms.[43] Commenting

[39] J. J. DiIulio, Governing Prisons: A Comparative Study of Correctional Management (Free Press, New York, 1987) p. 197. For discussions as to cost benefit analysis of prison privatisation, *see* Charles H. Logan, Private Prisons: Cons and Pros (Oxford University Press, New York, 1990) pp. 76-118. Georg Rusche and Otto Kirchheimer, Punishment and Social Structure (Transaction Publishers, London, 2003).

[40] 272 SCRA 18, May 2, 1997.

[41] *Ibid*.

[42] Further reading of the case *available at:* pretty-jaja.blogspot.in/2008/06/tanada-vs-angara-272-scra-18.html (Last accessed on April 30, 2017).

[43] In *Flagg Brothers, Inc*. v. *Brooks*, 436 U.S. 149 (1978), court have held that government can seek to avoid its constitutional obligation and pass it on to private delegation, here no standards as to how much of delegation can be allowed is explained. Further in *Shelley* v. *Kraemer*, 334 U.S. 1, 20 (1948), court held that states court's enforcement of racially restrictive covenant

towards the attitude of disrespect caused by transfer of States's power to private entity, President Beinisch states:[44]

> When the state transfers the power to imprison someone, with the invasive powers that go with it, to a private corporation that operates on a profit-making basis, this action—both in practice and on an ethical and symbolic level—expresses a divestment of a significant part of the state's responsibility for the fate of the inmates, by exposing them to a violation of their rights by a private profit-making enterprise. This conduct of the state violates the human dignity of the inmates of a privately managed prison, since the public purposes that underlie their imprisonment and give it legitimacy are undermined, and …their imprisonment becomes a means for a private corporation to make a profit. This symbolic significance derives, therefore, from the very existence of a private corporation that has been given powers to keep human beings behind bars while making a financial profit from their imprisonment.

Going with argument of prisoner's basic rights the very idea of transfer of sovereign power in the hands of private entity, no matter how much benefits it would generate (since this is debatable)—even in this market world, the basic rights should always outweigh the expected benefit of operating private correctional services. Therefore, even the administration is also not delegable, even with appropriate safeguards. Though it does not involve the imposition of additional State authorized punishment but, rather, a technical and morally neutral process to ensure that the allocated punishment is carried out according to law and due process, the question lies here as to the condition and status of personnel's deployed through private corporations.[45] The argument of allowing private players to take part in administrative functioning of prisons, looks suspecious because it serves rhetorically to insulate the two areas (the legitimacy of imprisonment and how to carry it out) from one another.[46] In Sparks's view, fundamental issues as to the proper scope and utilization of imprisonment and questions which are never to be put aside by society, are inextricably linked with questions of delivery (as it is bound to happen in a market economy); therefore, any arrangement should be opposed which permits them to be discussed and implemented as if they were discrete issues. There does not seem to be any insuperable intellectual or practical difficulty about challenging the depth and

constituted state action and violated Equal protection clause of Fourteenth Amendment. In *West* v. *Atkins*, 487 U.S. 42, 54 (1988), court held that delivery of medical treatment to state prisoner by physician employed under contract by state to be a state action.

44 *Supra* n. 15, para 39.

45 R. Sparks, *Can Prisons Be Legitimate? Penal Politics, Privatization and the Timeliness of an Old Idea*, in R. King and M. Maguire (eds.), Prisons in Context (Clarendon Press, Oxford, 1994) p. 23.

46 *Ibid*.

the scope of imprisonment and pursuing vigorously the question of prison conditions, regimes, and reform, but all that has to be done carefully. A more productive line of analysis is whether some of the tasks delegated to the private operators, while purporting to be merely the administration of punishment, are in reality its allocation. The empirical evidence is consistent with economic theory, which predicts that with privatization, costs falls and quality rises, but this happens in States where cost of inmates is high besides reasonable measures are taken.[47] The costs falls due to competition, will there be competition in India, where number of market players are available and ready to enter this less lucrative field, secondly, the quality rises with privatization measures is always debatable.[48] In U.S. studies do show that the concept of private prison does works,[49] idea is that private prisons can discipline public prisons into becoming more efficient and flexible, through a healthy competition.[50] But question still remains the same will there be an healthy competition, especially given the state of affairs we are in.

The distinction between public-private debates in the market economy has been blurred to the extent that many of the public functions, which were meant specifically for the public entities, are now been taken care by the private corporations. Market has actually dissolved this distinction, and even theorists and lawyers many a times face notorious difficulties in their efforts to draw the line between private and public.[51] The prevailing approach believes that there is no clear division, rather a mere continuum, between private and public body.

47 Arizona Rev. Stat., 41-1609.01 (G) (2001) (requiring the contractor to offer cost savings); (H) (requiring the contractor to offer services of at least equal quality). The Florida statute requires evaluation of both cost and quality, though only cost savings and the statute requires no quality improvements.

48 Expenditure of Israel, US, UK on Criminal Justice System: Privatization in Israel would have expected to bring about saving which would be estimated at approximately 20-25% of the cost of operating prison, the saving over the whole period of the concession is estimated at approximately 350 million NIS (close to 100 million US dollars), *see* Eyal Zamir & Barak Medina, Law, Economics and Morality (Oxford University Press, New York, 2010). In US the amount is $260 billion and it increases yearly, *see* Larry J. Siegel and John L. Worrall, Introduction to Criminal Justice (Wadsworth Publishing, Belmont, 2015) p. 9. UK spends £31.5 billion on public order and safety in 2012/13, see Richard Garside, Arianna Silvestri and Helen Mills, UK Justice Policy Review III (Centre for Crime and Justice Studies, London, 2014). Australia spends $14 billion, information *available at* http://www.aic.gov.au/publications/current%20series/facts/1-20/2013/7_resources.html (last accessed on 12 May, 2017).

49 *See*, Adrian T. Moore, Private Prisons: Quality Corrections at a Lower Cost (Reason Public Policy Institute, Policy Study No. 240, 1998) pp. 33-44.

50 Innovative approach to personnel management adopted by private prisons will be adopted by the remaining public prisons, thereby providing indirect benefits, *see* Prakash Sharma (2017), *supra* n. 3, p. 239.

51 Many a times the argument taken is with regard to the efficiency, *see* Prakash Sharma (2017), supra n. 3, p. 199 (Author while analyzing politics of government ownership and privatization notes that political considerations not only strengthen case for privatization, but in fact drive decision to privatize). *See* also John D. Donahue, The Privatization Decision (Basic Books, New York, 1989) p. 6.

The same distinction, which has no normative basis, is used merely for the purpose of descriptive in nature. In the simpler words, it is only when the State has to show its presence or claim or acquire something the issue of public private creeps in and nothing more. For the proponents of market it seems easy to classify the difference and accordingly jump to the conclusion that the decision whether an activity should be subject to some limitations or not is based on substantial reasoning rather than to any systematic, explained analysis on the distinction between private and public, and therefore this substantive consideration holds no justification since it does not have any source. Thereupon, they find no distinction in the setup established by them and the one by the State.

Further with the concept of *publicization of privatization*, wherein no distinction is made in the functioning of public or private functioning, which is also a means for incorporating public norms into private realm, explains otherwise.[52] Having said this one would be in no confusion over the authority of law over the acts and duties of private employee and a public employee but on liability and obligation the latter is in a better position to compensate for any infringement of rights on his/her part rather than the former one. As indicated already there appears a considerable amount of social and economic difference between a personal owned by a private entity and of the public. Proponents of market would hold that both public and private employees work to earn a living, and are interested in fulfilling their professional goals and developing their career, thus interested in the success of their institution. The test for any Constitution would therefore be to come with a solution which would claim privatization of public function unjustified not merely on the basis of principles like sovereign or core functions and laws like human and constitutional rights, but also on the basis of some settled decisions, not in piece-meal or abstract form but a common and uniform practice.

V. Conclusion

Privatization will continue to be a central phenomenon in the functioning of many governments around the world. However, the impact of privatization, especially with respect to essential core functions would definitely pose some serious repercussions on society. Any elimination altogether of institutions owned and run through State would not be in tune with the general principles and spirit of democratic Constitution. It is a two way process, where all must conform to the Constitution, and the Constitution must respect the sovereign will and welfare

[52] Jody Freeman (2003), *supra* n. 3, p. 1285. Jody suggests "privatization can be a means of '*publicization*,' through which private actors increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities to deliver goods and services that might otherwise be provided directly by the state."

of the people. Just like Israeli Apex court our courts must also come ahead and save the country from any policy that may well be wrong for long run, they need to show courage, and not bow to demands of market but to the needs of people of this country, on whose name the Constitution withholds its authority and the decisions are pronounced. The preference for market ordering and market values has now become part of broader cultural society, thanks to the political shift and faith in markets.

HUMAN RIGHTS EDUCATION: A RELIABLE INSTRUMENT TO PROMOTE AND PROTECT HUMAN RIGHTS

*Ezekial Jarain**

I. Introduction

While proclaiming the Universal Declaration of Human Rights (hereafter UDHR) as common standard of achievement for all peoples and all nations, the General Assembly of the United Nations called upon every individual and every organ of society to promote respect for these rights through teaching and education. It is hoped that spreading awareness about human rights would lead to their recognition and observance. Education in and for human rights can contribute to the reduction of human rights violations and can prevent human rights abuses. Very often ignorance of human rights gives rise to many prejudices and biases, which militate against the very existence of a human rights culture. In this article an attempt is made to discuss the role of human rights education in the promotion and protection of human rights. A brief summary of human rights education in post Independent India is given. It is suggested that 'Human Rights Education' (hereafter HRE) as a subject should necessarily be made compulsory in legal education.

II. What is Human Rights Education?

On the 10 December1948, the United Nation proclaimed the UDHR as a common standard of achievement for all peoples and all nations. To achieve this it laid down in the preamble, "that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."[1] Article 26 of the UDHR declares that one goal of education should be the strengthening of respect for human rights and fundamental freedoms.[2] Thus, human rights education is seen as a very crucial instrument in the promotion and protection of human rights.

In simple words, HRE may be defined as the right to know one's own human rights as well as those of other fellow beings. In a broader sense HRE

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1 The Universal Declaration of Human Rights, 1948.

2 *Ibid.*

and training comprises all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms and thus contributing, inter alia, to the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding and developing their attitudes and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights.[3] HRE and training encompasses:

i. Education about human rights, which includes providing knowledge and understanding of human rights norms and principles, the values that underpin them and the mechanisms for their protection;

ii. Education through human rights, which includes learning and teaching in a way that respects the rights of both educators and learners;

iii. Education for human rights, which includes empowering persons to enjoy and exercise their rights and to respect and uphold the rights of others.[4]

The plan of action for the United Nations decade for HRE[5] (1995-2004) contains a comprehensive definition of HRE. It stated that for the purposes of the decade, HRE shall be defined as training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes and directed to:

i. The strengthening of respect for human rights and fundamental freedoms;

ii. The full development of the human personality and the sense of its dignity;

iii. The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;

iv. The enabling of all persons to participate effectively in a free society;

v. The furtherance of the activities of the United Nations for the maintenance of peace.

As per the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education HRE means "education, training, awareness raising, information, practices and activities which aim, by equipping learners with knowledge, skills and understanding and developing their attitudes

3 United Nations Declaration on Human Rights Education and Training, 2011, Art. 2.

4 *Ibid.*

5 Plan of Action For The United Nations Decade For Human Rights Education, 1995-2004: Human Rights Education-Lessons For Life, *available at* http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/PlanofActionfortheUnitedNationsDecadeforHumanRightsEducation, 1995-2004(1996).aspx (last visited July, 2017).

and behaviour, to empower learners to contribute to the building and defence of a universal culture of human rights in society, with a view to the promotion and protection of human rights and fundamental freedoms."[6]

A. Objectives of HRE as set forth by the United Nations

An important international event that served as an impetus to the spread of HRE was the World Conference on Human Rights, 1993, held at Vienna. Attended by representatives of 171 States, the Conference made a solemn declaration that HRE, training and public information were essential for stable and harmonious relations among communities. The conference was marked by an unprecedented degree of participation by government delegates and the international human rights community. Some 7,000 participants, including academics, treaty bodies, national institutions and representatives of more than 800 non-governmental organizations gathered in Vienna to review and profit from their shared experiences.[7]Pursuant to the suggestion made by the World Conference, the General Assembly of the United Nations, in its resolution 49/184 of 23 December 1994, proclaimed the United Nations Decade for Human Rights Education beginning on the 1 January 1995.[8]

On the 10 December 2004, the General Assembly proclaimed the World Programme for HRE[9] to advance the implementation of HRE programmes in all sectors. The objectives of the World Programme for HRE are:

i. To promote the development of a culture of human rights;

ii. To promote a common understanding, based on international instruments, of basic principles and methodologies for HRE;

iii. To ensure a focus on HRE at the national, regional and international levels;

iv. To provide a common collective framework for action by all relevant actors;

v. To enhance partnership and cooperation at all levels;

vi. To survey, evaluate and support existing HRE programmes, to highlight successful practices, and to provide an incentive to continue and/or expand them and to develop new ones.

[6] The Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education, *available at*https://rm.coe.int/16803034e3 (last visited July 3, 2017).

[7] World Conference on Human Rights, 14-25 June 1993, Vienna, Austria, *available at* http://www.ohchr.org/EN/AboutUs/Pages/ViennaWC.aspx (last visited July 10, 2017).

[8] Report of the United Nations High Commissioner for Human Rights on the implementation of the Plan of Action for the United Nations Decade for Human Rights Education, *available at* http://www.un.org/documents/ga/docs/50/plenary/a50-698.htm (last visited September 17, 2017).

[9] General Assembly Proclaims World Programme for Human Rights Education, stressing its importance to realization of all fundamental freedoms, *available at* https://www.un.org/press/en/2004/ga10317.doc.htm (last visited September 17, 2017).

With these objectives as a general guidance we have witnessed the completion of two phases of **World Programme for HRE with the third one is ongoing.** The first phase (2005-2009) of the World Programme for HRE focused on HRE in the primary and secondary school systems;[10] The second phase (2010-2014) focused on HRE for higher education and on human rights training programmes for teachers and educators, civil servants, law enforcement officials and military personnel;[11] and the third phase (2015-2019), which is ongoing, focuses on strengthening the implementation of the first two phases and promoting human rights training for media professionals and journalists.[12]

B. Role of HRE in the promotion and protection of human rights

With the adoption of the UDHR on 10 December 1948, a new era of human rights was ushered in. Never before was such a global and concerted effort for protection and promotion of human rights undertaken. Selfless and committed human rights advocates will now confront human rights violations and abuses, which had been occurring for long in every part and corner of the earth, fearlessly.

Set as a "common standard of achievement for all peoples and all nations"[13] the adoption of the UDHR has now become a source of inspirations and legitimacy for many other human rights conventions and covenants. Few of these include International Convention on the Elimination of All Forms of Racial Discrimination, 1965[14]; The International Covenant on Civil and Political Rights, 1966[15]; International Covenant on Economic, Social and Cultural Rights, 1966[16];

[10] World Programme for Human Rights Education, First phase (2005-2009) *available at* http://www.ohchr.org/EN/Issues/Education/Training/WPHRE/FirstPhase/Pages/Firstphaseindex.aspx (last visited July 10, 2017).

[11] World Programme for Human Rights Education, Second phase (2010-2014) *available at* http://www.ohchr.org/EN/Issues/Education/Training/WPHRE/SecondPhase/Pages/Secondphaseindex.aspx (last visited July 10, 2017).

[12] World Programme for Human Rights Education, Third phase (2015-2019) *available at* http://www.ohchr.org/EN/Issues/Education/Training/WPHRE/ThirdPhase/Pages/ThirdPhaseIndex.aspx (last visited July 10, 2017).

[13] *Supra* n. 1.

[14] Through the Convention, States parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms. The Convention establishes a Committee on the Elimination of Racial Discrimination, which is to report annually to the General Assembly on, *inter alia*, measures undertaken by States parties to give effect to the provisions of the Convention, and which may handle disputes between States parties concerning the Convention. *See*, International Convention on the Elimination of All Forms of Racial Discrimination, *available at* http://www.ohchr.org/EN/Professional Interest/Pages/CERD.aspx (last visited January 3, 2018).

[15] The Covenant comprises of six parts. Part I starts out with the right of self-determination which is considered to be the foundational stone of all human rights (article 1). Part II (articles 2 to 5) contains a number of general principles like non-discrimination, equality, etc. Part III

etc. The challenging task is, however, to make the contents of these human rights instruments known to all stakeholders so that their purpose is achieved.

(i) HRE teaches people the value of human rights

Human rights instruments, either international or regional, will become relevant only if knowledge of their contents is transmitted far and wide. It is said that a person cannot desire something he is ignorant of. This is also true of human rights. For example, unless a person knows that everyone has the right to equality before law he will not defend himself or others when being discriminated against. Very often human rights abuses are consequences of ignorance of both perpetrators and victims. Thus, it is not difficult to understand the urgent necessity of educating people about human rights. HRE challenges learners to ask what human rights means to them personally.

On the adoption of the UDHR the General Assembly called upon every individual and every organ of society and every member states to strive for the promotion and protection of these fundamental rights and freedoms set forth in the UDHR. Through progressive measures, national and international, effort are to be made to secure their universal and effective recognition and observance.[17] Many decades later the UN Declaration on HRE and Training, 2011, reiterated the fundamental importance of HRE and training in contributing to the promotion, protection and effective realization of all human rights.[18] Learning and educating about human rights necessarily becomes the first and continuous step in this long and arduous journey of human rights protection and promotion. Eleanor Roosevelt[19], in her address delivered at the UN on the 10th anniversary of the Universal Declaration of Human Rights in 1958, made an

(articles 6 to 27) enunciates an extended list of rights, like the right to life and personal liberty, right against torture or other cruel, inhuman or degrading treatment or punishment, right to equality before law and equal protection of law, etc. Part IV (articles 28 to 45) deals with establishment of Human Rights Committee, which is responsible for the monitoring and implementation of the Covenant by its State parties. *See*, International Covenant on Civil and Political Rights, *available at* http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last visited on January 3,2018).

16 The Covenant aims to ensure the protection of economic, social and cultural rights including: the right to self-determination of all peoples (article 1); the right to non-discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (article 2); the equal right of men and women to enjoy the rights in the ICESCR (article 3); the right to work (articles 6–7); the right to form and join trade unions (article 8); the right to social security (article 9); protection and assistance to the family (article 10); the right to an adequate standard of living (article 11); the right to health (article 12); the right to education (articles 13–14); and the right to cultural freedoms (article 15). *See*, International Covenant on Economic, Social and Cultural Rights, 1966, *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx (last visited January 3, 2018).

17 *Supra*. n.1.

18 *Supra* n. 3.

appeal for education about them. She said, "Where, after all, do universal rights begin? In small places, close to home..……Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world. But to uphold their rights, such concerned citizens need first to know them. 'Progress in the larger' world must start with HRE in just those small places, close to home."[20] Educating people about human rights helps in sensitizing them on the need to promote and defend these rights in various environment of society. Through HRE people would learn among other things about the inherent dignity of all people and their right to be treated with respect.

(ii) HRE nurtures and strengthens human rights culture

The importance of HRE in promoting a global culture of human rights is becoming more widely recognized. Supporting human rights for all - regardless of ethnicity, language, religious beliefs or other differences - and the role of human rights education in this process, is now deemed essential to the security and welfare of all peoples. Educating people about human rights, in the least, makes them aware of their existence and has a positive influence on their behavior towards others. Through HRE learners are able to understand what their rights are in any given situation. Through it, their mindset is molded in a way that helps in the development, growth and strengthening of a 'human rights culture'.[21]

While human rights abuses weaken and destroy human rights culture, HRE strengthens it. Once people grasp human rights concepts, they begin to look for their realization in their own lives, examining their communities, families, and personal experience through a human rights lens. Through HRE people find these values not only affirmed, but can also lead them to the recognition of unrealized injustices and discriminations. This sensitization to human rights in everyday life underscores the importance of not only learning about human rights but also learning for human rights. People need to know how to bring human rights home, responding appropriately and effectively to violations in their own communities.[22] The United Nations High Commissioner for Human Rights, Louise Arbour, on the occasion of International Human Rights Day, 10

19 She was the first Chair of the United Nations Commission on Human Rights established in 1946. She oversaw the drafting of the Universal Declaration of Human Rights.

20 The Human Rights Education Handbook: Effective Practices for Learning, Action, and Change, *available at* http://hrlibrary.umn.edu/edumat/hreduseries/hrhandbook/copyright.html (last visited July 12, 2017)

21 By human rights culture mean to refer to the prevalence of a way of life wherein human rights values are fostered, respected, promoted, defended and upheld readily.

22 V.C. Pandey (ed.) Democracy and Education (Isha Books, Delhi, 2005) p. 272.

December 2004 said, "…for a society to develop and nurture a human rights culture, HRE is fundamental. It is a tool for promoting equality and enhancing people's participation in decision-making processes within democratic systems. It is an investment in the prevention of human rights abuses and violent conflicts…"[23] Article 1 of the UN Declaration on HRE and Training, 2011 emphasizes that "Human rights education and training is essential for the promotion of universal respect for and observance of all human rights and fundamental freedoms for all, in accordance with the principles of the universality, indivisibility and interdependence of human rights."[24]

(iii) HRE has a positive influence on development activities

While development activities are important for the growth of a nation they may not necessarily be sustainable ones, thereby affecting the human rights of both the present and future generations.[25] HRE can influence development in several ways. First, it helps the more effective monitoring of existing development activities in terms of their human rights impacts. Thus, illegitimate and perverse development, which violates rather than promotes human rights can be halted. Such development can be redesigned to limit the human, social and environmental damage caused. Secondly, HRE is vital to the struggles for justice for victims of development. HRE can help the public rally behind such victims in their arduous struggle for rehabilitation, redress, and justice. Thirdly, HRE can promote understanding of the rational of development as the betterment of human condition. This in turn can help catalyze people-initiated development. Fourthly, HRE can help secure effective participation in all stages of development processes, of project design, initiation, management, monitoring, evaluation, and redesign. Fifth, HRE can help secure the accountability of development actors with respect to projects, policies, and budgets and to acts of both commission and omission.[26]

(iv) HRE can remove prejudices and complexes in a caste-based society

India is a caste-based society, which brings with it many prejudices and complexes leading to many human rights violations, very often by the high castes

[23] Message of United Nations High Commissioner, Louise Arbour, for Human Rights on the occasion of International Human Rights Day, 10 December 2004, *available at* http://www2.ohchr.org/english/events/day2004/messagehc.htm. (Last visited July 20, 2017).

[24] *Supra* no. 3.

[25] The Brundtland Commission's report defined sustainable development as "development which meets the needs of current generations without compromising the ability of future generations to meet their own needs" *See*, Sustainable development—concept and action, *available at* http://www.unece.org/oes/nutshell/2004-2005/focus_sustainable_development.html (last visited on January 6, 2018).

[26] George J. Andreopoulos & Richard Pierre Claude (eds), HUMAN RIGHTS EDUCATION FOR THE TWENTY FIRST CENTURY (University of Pennsylvania Press, 1997) p. 52.

against the low castes. Though the Indian Constitution vide Article 15 prohibits discrimination based on caste, the reality of caste-based discrimination is still a major concern. Caste divisions in India are predominant in housing, marriage, employment, and general social interaction-divisions that are reinforced through the practice and threat of social ostracism, economic boycotts, and physical violence. In India, manual scavenging constitutes a caste-designated occupation that is mainly imposed upon *dalits*, particularly *dalit* women, who represent 95 per cent of manual scavengers. Despite the passing of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act in 2013[27], the practice reportedly persists, institutionalized through State practice, with local governments and municipalities employing manual scavengers. This rigid and stratified allocation of work results in *dalits* having not only limited job opportunities, but also lower wages, particularly in rural areas.[28]

Caste-motivated killings, rapes, and other crimes are regular in India. Recently a *dalit* woman and her unborn child were killed for the accidental contact she made with the bucket of a higher caste.[29] The police have systematically failed to protect *dalit* homes and *dalit* individuals from acts of looting, arson, sexual assault, torture, and other inhumane acts such as the tonsuring, stripping and parading of *dalit* women, and forcing *dalits* to drink urine and eat feces.[30]

Crimes against *dalits* or Scheduled Castes (SCs) are committed with impunity. As per the National Crime Records Bureau a total of 45,003 cases of crimes committed against SCs were registered in 2015. The highest incidents of crime against SCs were reported from Uttar Pradesh (8,358 cases) followed by Rajasthan (6,998 cases), Bihar (6,438 cases) and Andhra Pradesh (4,415 cases), they accounted for 18.6%, 15.5%, 14.3% and 9.8% of total such crimes registered during 2015 respectively. During 2015, crimes rate of 22.3 was reported under crimes committed on persons belonging to SCs.[31]

[27] S.5 of the Act prohibits the engagement or employment, either directly or indirectly, of a manual scavenger.

[28] Human Rights Council, Report of the Special Rapporteur on minority issues, *available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/013/73/PDF/G1601373.pdf?OpenElement (last visited August 2, 2017).

[29] In Uttar Pradesh, a Dalit woman, her unborn child killed for 'defiling' bucket, *available at* http://indianexpress.com/article/india/in-up-a-dalit-woman-her-unborn-child-killed-for-defiling-bucket-4906854/ (last visited September 27, 2017).

[30] Hidden Apartheid: Caste Discrimination against India's 'Untouchables',*available at* https://www.hrw.org/report/2007/02/12/hidden-apartheid/caste-discrimination-against-indias-untouchables (last visited August 10, 2017).

[31] National Crime Records Bureau, 2015, *available at* http://ncrb.gov.in/ (last visited August 2, 2017).

HRE can remove prejudices and complexes transmitted through the social environment and the accident of birth. By appealing to the universal principles of non-discrimination, inherent human dignity and equality, a sense of brotherhood can be nurtured and strengthened in the hearts of the learners.

(v) HRE can contribute to the protection of the rights of children

Children are the most vulnerable section of the society. Being fragile in mind and body they are prone to exploitation and victimization. Violence against children happens on a regular basis, at home, school, work places etc. As per the National Crime Records Bureau, a total of 94,172 cases of crimes against children were registered in the country during 2015 as compared to 89,423 cases during 2014, showing an increase of 5.3%. Maharashtra accounted for 14.8% of total crimes committed against children registered in the country. The next in order was Madhya Pradesh (13.7%), Uttar Pradesh (12.1%) and Delhi (10.1%).[32]

Under our Constitution children enjoy certain rights, which are meant to safeguard their wellbeing. In particular, children have the right to live with dignity in a wholesome environment conducive for their growth,[33] right to equal protection of law,[34] right to free education,[35] right against exploitation,[36] right to early childhood care[37] etc. Similarly the Convention on the Rights of Child, 1989 recognizes various rights of children.[38] It is obvious, however, that unless these rights are widely disseminated and defended they will not serve the purpose. Children themselves have the right to know about their human rights, which in many ways contribute to the nurturing of a human rights consciousness necessary for a development of human rights culture. If at a young age children are taught that both boys and girls are equal and have equal rights then many gender-based discrimination may not arise.

[32] *Ibid*.

[33] Constitution of India, 1950, Art, 21.

[34] *Id*., Art, 14.

[35] *Id*., Art. 21A.

[36] *Id*., Arts. 23 & 24.

[37] *Id*., Art. 45.

[38] The Convention recognizes the various rights of a child including the inherent right to life (Art. 6); right to protection by the State without discrimination (Art. 2); the right to be registered, to have a name from birth and to be granted a nationality (Art. 7); the right to live with his or her parents (Art. 9); the right to express an opinion (Art. 12); the right to freedom of expression (Article 13); the right to freedom of thought, conscience and religion (Article14); the right to protection of privacy (Art. 16); the right to special care, education and training in case of Children with a mental or physical disability (Article 23); the right to benefit from social security (Art. 26); the right to an adequate standard of living (Art. 27); the right to education (Art. 28); the right against child labour (Art. 32) etc. *See*, Convention on the Rights of Child, 1989, *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx (last visited January 4, 2018).

III. HRE and Gender Equality

Discrimination[39] against women is a stark reality in India. Women have been facing unjust discrimination at each and every stage of their lives. Discrimination starts with sex-selective abortions to lower nutrition intake and the neglect of health care among girls and women. As the per the Human Development Report 2016, published by the United Nations Development Programme, a girl between her first and fifth birthdays in India has a 30–50 percent greater chance of dying than a boy.[40] Male are better educated than women as shown by the Census of 2011-literacy rate of male is 82.14% while that of female is 65.46%.[41]Before the Hindu Succession (Amendment) Act, 2005, the daughters did not have a share in the joint family property. Women's labour force participation in India stood at 27.2 per cent in 2011-12.[42]

The unhappy state of women in India is also reflected by the rising crime against them. Crime statistics like the National Crime Records Bureau shows that the proportion of IPC crimes committed against women in total IPC crimes has increased from 9.4% in the year 2011 to 10.7% during the year 2015. Cruelty by husband or his relatives accounts the highest with 1, 13, 403 cases registered in 2015.[43]

Despite the various constitutional[44] and legal provisions guaranteeing the human rights of women, they continue to be a vulnerable lot of society. Partly, this situation is brought about due to the lack of awareness relating to human rights in general and those of women in particular. And the patriarchal system has no doubt contributed to the misconception that men are superior to women leading to the disdain of the rights of the latter by the former. Through HRE, misconceptions and biases towards women can be laid bare. By emphasizing on the equal rights of women as a family member, as equal partner

[39] Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women defines discrimination against **women** as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, or enjoyment or exercise by **women**, irrespective of their marital status, on a basis of equality of men and **women**, of human rights and fundamental freedoms in the political, economic, social, cultural, and civil or any other field. *See*, Convention on the Elimination of All Forms of Discrimination against Women, *available at* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm (last visited on January 4, 2018).

[40] Human Development Report 2016, *available at* http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf (last visited August 27, 2017)

[41] Literacy Rate of India 2011, *available at* http://indiafacts.in/india-census-2011/literacy-rate-india-2011/ (last visited September 13, 2017).

[42] Women's labour force participation in India: Why is it so low?, a*vailable at* http://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/—sro new_delhi/documents/genericdocument/wcms_342357.pdf ((Last visited September 13, 2017).

[43] *Supra* n. 31.

of development and as citizens endowed with same rights as male citizens, HRE can be very instrumental in bringing about an attitudinal change in the learners, both men and women.

IV. Overview of Hre in Post-Independent India

Post Independence, India's immediate challenge was to stay united as a nation. Constitution makers were fully aware that the great diversity and disparity that India has could become obstacles for its unity and progress. One way to bind India together was through the recognition and guarantee of basic human rights to all in the form of Fundamental Rights. The Fundamental Rights enshrined in our Constitution provide an assurance to the people of all sections of society that their rights and welfare are being taken seriously.

However, as witnessed by history itself constitutional provisions by themselves do not guarantee that human rights are observed and protected. The State,which is expected to uphold these rights often turned as violator itself. Gross human rights violations have been committed in the name of religion, caste, language, development etc. Thus creation of a citizenry conscious of their rights and duties and committed to the principles of liberty, equality, and fraternity embodied in our Constitution becomes indispensable for the full realization, promotion and protection of human rights. HRE is no doubt one effective instrument to form such citizens who would uphold the high ideals of our Constitution.

Efforts to promote HRE in post Independent India is evidenced in the recommendations of three major Commissions (University Education Commission, 1949, Secondary Education Commission, 1952, and Education Commission, 1964) set up to suggest reforms in the education system at different levels. For instance, the Report of Education Commission (1964-66) stated that one of the main functions of the universities was "to strive to promote equality and social justice and to reduce social and cultural differences through diffusion of education."[45] The National Policy on Education, 1986 and Programme of Action, 1992, laid emphasis on the removal of disparities and equalization of educational opportunity by attending to the specific needs of those who have

[44] Equality before law and equal protection of law (Art.14); non-discrimination on ground of sex (Art.15); equality of opportunity for employment and appointment under the state (Art.16); equal right of both men and women to an adequate means of livelihood (Art. 39); equal pay for equal work for both men and women (Art. 39); Reservation of seats in favour of women in *Panchayat* (Art. 243) and Municipality (Art. 243 T).

[45] Human Rights in Education Perspective and Imperatives, National Institute of Educational Planning and Administration, 2003 New Delhi, at p. 16, *available at* http://www.nuepa.org/new/Download/Publications/Human%20Rights%20in%20Edu-2003-K%20Sudha%20Rao.pdf (Last visited September 18, 2017).

been denied equality so far.[46]

In pursuance of the declaration of a United Nation Decade for HRE (1995-2004) by the General Assembly, the Government of India came up with an 'Action Plan-Human Rights Education' which among other things made proposals for introduction of Human Rights issues in the school curricula and introduction of courses of Human Rights at the Undergraduate and Post-graduate levels.

In the field of higher education several initiatives have been taken by the University Grants Commission (UGC) to promote HRE. In 1985, the UGC prepared guidelines for human rights teaching and research at all levels of education.[47] For the first time during the year 1997-98, the UGC sanctioned Rs 7.43 lakhs to eight universities for starting human rights courses.[48] These universities included Aligarh Muslim University, Jamia Millia Islamia University, Jawaharlal Nehru University, Cochin University, Andhra University, Saurashtra University, Nagpur University and Mumbai University. Many universities in India are now offering HRE as a certificate or diploma and postgraduate courses on human rights. In 1999 the UGC constituted a Curriculum Development Committee for HRE, under the Chairmanship of Justice V.S. Malimath, to develop model curricula for Human Rights and Duties Education in order to ensure a certain degree of uniformity in the course content and standard of teaching on human rights at various levels. It developed Curriculum for introduction of: Foundation Course in Human Rights and Duties, Certificate Course in Human Rights and Duties, Under-graduate Degree Course in Human Rights and Duties, Postgraduate Diploma Course in Human Rights and Duties and Post-Graduate Degree Course in Human Rights and Duties.[49]

A very important institution promoting HRE is the National Human Rights Commission (hereafter NHRC) constituted under Protection of Human Rights Act, 1993. Since its constitution it has been playing an active role to spread awareness on human rights. The NHRC asked the National Council for Education, Research & Training (NCERT) to undertake a review of the then existing text books with a view to eliminate from them those passages that were inimical to human rights. In 1996, the Commission, in collaboration with

[46] *Id.* at 18.

[47] UGC XI Plan Guidelines for Human Rights Education, *available at* https://www.ugc.ac.in/oldpdf/xiplanpdf/humanrights.pdf (Last visited September 20, 2017)

[48] Rumki Basu (ed.), Globalization and the Changing Role of the State (Sterling Publishers Pvt. Ltd, 2008) 225.

[49] UGC Model Curriculum for Human Rights *available at* http://www.ugc.ac.in/policy/modelcurr.html. (Last visited September 20, 2017).

the NCERT, brought out a source book on Human Rights.[50] The source book was prepared for the promotion of HRE in the country, particularly at the school level. Its purpose was to make human rights information available to teachers and students, policy makers, curriculum developers and other personnel involved in formulating and implementing educational programmes.The NHRC has extensively used the medium of the press to promote HRE to the masses. The Newsletters that it publishes provide a continuous flow of information on the work and preoccupations of the NHRC to a lengthening list of readers, both at home and abroad.[51] Not only were the newsletters of interest to human rights activists, non-governmental organizations, the academic community and the media but it was also increasingly read in political and administrative circles. NHRC has also published books relating to the Guidelines for police personnel on various Human Rights issues,[52] module on HRE for teaching professionals imparting education at primary, secondary, and higher secondary levels.[53]

V. Concluding Observations

HRE is universally accepted as an effective means to promote and protect human rights. Educating people about human rights instills in them a sense of responsibility and empowerment. Conscious of one's own rights and those of others people will learn to look at events and developments in society through the human rights perspective. Though many steps have been taken to incorporate HRE in the Indian education system, making it a compulsory subject will make greater emphasis on its importance especially in legal education. It may be mentioned here that subjects like Human Rights, Humanitarian and Refugee Law, and Gender Justice, which are directly dealing with human rights issues are optional subjects in the LL.B Course of University of Delhi.[54] Though there are compulsory subjects containing human rights topics, example Constitutional Law, Environmental Law and Public International Law, such human rights topics form only a very small portion of the subject.Teaching students about human rights would orient them towards the upholding and promoting of human rights values.They will be better equipped in dealing with human rights issues in the course of their career.

[50] *See*, National Human Rights Commission, Annual Report 1995-96, Para VI, *available at* http://nhrc.nic.in/ar95_96.htm (last visited January 6, 2018).

[51] *See*, NHRC News & Newsletters, *available at* http://nhrc.nic.in/ (last visited January 6, 2018).

[52] *See*, Guidelines for Police Personnel on Various Human Rights Issues, *available at* http://nhrc.nic.in/Documents/Publications/guideline_for_police_personnel_on_various_HR_issues_Eng.pdf (last visited January 6, 2018).

[53] *See*, Module on HRE for Teaching Professionals Imparting Education in Primary, Secondary, Higher Secondary levels, *available at* http://nhrc.nic.in/Documents/Publications/ModuleonHR.pdf (last visited January 6, 2018).

[54] Subjects and Courses of Study for LL.B, *available at* http://lawfaculty.du.ac.in/files/Subjects_and_Courses_of_Study_for_LL.pdf (last visited January 3, 2018).

PROTECTION OF ORPHAN WORKS IN THE CYBERSPACE – UNITED STATES AND INDIAN LEGAL PERSPECTIVE

*Dr. Cholaraja M.**

I. Introduction

Orphan Works, in terms of intellectual property, are copyright materials with no owner that can be identified or located by potential user of the work who wish to obtain rights to use the work. For example, the creator of the work may have been deceased or the publisher of the work may now be defunct, or there might be no data available to identify the author of the work. When such orphan work needs protection under the Copyright regime, confusion arises as to the category of work, scope of protection and kind of orphan work to be covered under the copyright laws. These challenges have to be tackled with due care and diligence, taking into account the situation prevailing in the era of Google digitisation cases and beyond. This paper is divided into two parts dealing with the United States and Indian legal perspective, and discusses the (i) meaning of orphan works and the legal position in the cyberspace and related issues, (ii) basic challenges with respect to orphan works, (iii) position as to why an orphan work is ill-equipped to deal with cyberspace, along with the basic problems including determination of public and private use and the enforcement of liability, (iv) the Indian scenario with respect to jurisdiction in cyberspace and finally, (v) the future of orphan works.

II. Orphan Works Protection in Cyberspace Under the United States Legal Perspective

A. General Introductory Comments

Digital technologies[1] breathe new value into old "works"[2] and at the same time "affects the operation and effectiveness of copyright law". The flip side of digital technology as an enabler is the threat of frauds leveraging on

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1 The almighty combination of digital signal processing, personal computers, and digital networks, usually called digital technologies affects how we entertain ourselves, how we communicate, how we transact, and how we create. So, one comprehensive set of rules would be insufficient to regulate all these aspects.

2 This article used the word 'work' as defined under Section 2 (y) of the Indian Copyright Act 1957, (hereinafter ICA) and the UK CDPA, 1956, Part I and Part II Sections 1 to 16. ICA does not consider broadcasting as a work. But UK CDPA, 1988, Section 1 says that, broadcasting is also a work just like literary, dramatic and musical works. Even UK copyright Act 1956 had recognized broadcasting as a work. Therefore the word "work" should be read as in the same context further.

technology that are ever increasing in intensity and sophistication,[3] because of the numerous intermediaries[4] work having involved in World Wide Web (WWW). Many scholars like Jeremy Orlebar[5], Shih Ray Ku, Raymond[6], Lesley Ellen Harris[7] and papers[8] have observed that, from Gutenberg's moveable type printing press to digital technologies brings never-ending challenges for copyright law to respond to.

In cyberspace,[9] author of a work has, reproduction right, modification rights, distribution rights, public performance rights, and public display rights.The copyright law provides a benefit to authors by ensuring that copiers will not free-ride on their investments in creativity and also provides exceptions in the form of "fair use."[10] One of the major objective of copyright laws is to ensure that authors will not have to share their profits with free-riders. It was rightly observed by the New South Wales court that 'One man may not reap where another has sown, nor gather where another has strewn'.[11] The unidentifiable nature of orphan works itself enables production of more free-riders down the line. These free-riders makes commercial gain out of the orphan works through advertisements but at the same time are claiming the defence under "fair use" provisions. The perfect example of the issue as mentioned above is the Google digitisation case in the United States.[12]

3 Federation of Indian Chambers of Commerce and Industry (FICCI), The India Risk Survey Report (2014), *available at* http://www.ficci.com/Sedocument/20276/report-India-Risk-Survey-2014.pdf (last visited on March 24, 2017).

4 Intermediaries means, between the user/authors who initiates the electronic communication or publishing of an electronic record (text, data, sound/voice, pictures, films, electronic deliverable, electronically touchable objects and other electronic creation that can be perceived by the senses) and the recipient, viewer, listener, audience, and consumer; there are numerous service providers called intermediaries. See, Section 2(w) of the Indian Information Technology Amendment Act, 2009.

5 Jeremy Orlebar, The Practical Media Dictionary (Oxford University Press, 2003).

6 Shih Ray Ku, Raymond, *The Creative Destruction of Copyright: Napster and the Economics of Digital Technology*, 69 U. Chi. L. Rev. 263, 270 (2002).

7 Lesley Ellen Harris, Licensing Digital Content: A Practical Guide for Librarians (Amer Library Assn Editions, 2009).

8 W. Ku and C.H. Chi, Survey on the Technological Aspects of Digital Rights Management (Proc. of the 7th Information Security Conference, Vol. 3225, pp. 391-403, 2004).

9 The word "Cyberspace" is not defined under any law. The internet, the only bais of cyberspace, is global in character and is a network of interconnected computers.

10 *Apple Computer, Inc.* v. *Microsoft Corp.*, 799 F. Supp. 1006, 1021 (N.D. Cal. 1992).

11 *J. I. Case Plow Works* v. *J. I. Case Threshing Mach. Co.*, 155 N.W. 128, 134 (Wis. 1915). Also *see*, *SmithKline Beecham Consumer Healthcare, L.P.* v. *Watson Pharm., Inc.*, 211 F.3d 21, 29 (2d Cir. 2000).

12 *See*, *Authors Guild, Inc.* v. *Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y. Nov.13, 2009); *Authors Guild* v. *Google, Inc. (Google I)* 770 F.Supp. 2d 666, 677 (S.D.N.Y. 2011); *Authors Guild, Inc.* v. *HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012); *Authors Guild, Inc.* v. *Google, Inc. (Google II)*, 954 F. Supp. 2d 282, 286-87 (S.D.N.Y. 2013); *Authors Guild, Inc.* v. *HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

(i) The Common and Critical Issues in Orphan works

The problem related to orphan works affects a broad cross-section of stakeholders, including members of the general public, archives, publishers, and filmmakers. Orphan works raises practical questions about how copyright owners should be compensated for the use of their works in commercial nature (the examples of Google books and HathiTrust mass digitization projects are of great importance here), and also raises legal questions about the applicability of exclusive rights,[13] limitations and exceptions under copyright law. Is the existing copyright framework sufficiently responsive to these concerns? If not, are there important public or private goals that might warrant legislative action in this area?

The United States copyright office determined in 2006 that, "the risk of liability for copyright infringement, however remote, is enough to prompt them not to make use of [an orphan] work" – and came up with the outcome that "it is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work."[14] The Report noted that the orphan works problem was exacerbated by a series of changes in the United States copyright law over the past thirty-plus years.[15]

In particular, as per the law, literary works, pictures, sound recordings and other creative works are protected from being copied without the permission of the copyright holder. Any work, which is communicated in cyberspace, is also entitled to protection by law. However, it is still unclear how the copyright law governs or will govern these materials as they appear on the Internet. The cyberspace poses two basic challenges for the Intellectual Property Right (hereinafter referred as IPR) administrator because, cyberspace does not have any particular territory or border and no one has the absolute power to control and regulate it. That is why, it is important to address the question as to how to control it and find a way to define its extent. The IPR administrator's special challenge lies in how to balance the rights of different players on the Internet like content providers, service providers, access providers and so on. Thus, finding, tracking, and controlling wrongdoers in cyberspace has been a major threat, especially, to orphan works. Therefore, issues relating to full-text searches,

[13] Copyright protection gives the author of work a certain "bundle of rights"to exclude other from reproducing the work in copies, to prepare derivative works based on the copyright work and to perform or display the work publicly. There are numerous other rights, which are specific to dramatic, literary works etc.

[14] U.S. copyright office, Report on Orphan Works (2006), *available at* http://copyright.gov/orphan/orphan-report-full.pdf(last visited on March 24, 2017).

[15] *Id*. at 41-44.

print-disabled access, and preservation too come under this ambit. As the problem related to orphan works becomes more acute, it threatens to undermine the increasing number of digitization projects.[16]

(ii) Need for Protection: Innovation, Information and Ideas

Creation, protection and utilisation are the three cardinal limbs of the IPR system. It was rightly observed by the learned Justice H. Laddie that "The whole of human development is derivative. We stand on the shoulders of the scientists, artists and craftsmen who precede us. We borrow and develop what they have done: not necessarily as parasites, but simply as the next generation. It is at the heart of what we know as progress. Borrowing and developing have always been acceptable."[17] Innovation is a central driver of economic growth, development and better jobs. It is the key that enables firms to compete in the global marketplace, and the process by which solutions are found to social and economic challenges.[18] Information became the primary *commodity* for any R&D activity. Intellectual property is all about human creativity. The impact of intellectual property rights has spread over every aspect of human life. It has got something in store for everyone ranging from philosophers, ethicist, scientist, politicians, artists, lawmakers, entertainers, business entrepreneurs, economists, professionals, labor, industrialists, students and common man.[19] Intellectual property rights are considered as reward for creative and skillfull work in execution of ideas. In fact it is more than a reward for conceiving and executing ideas[20].

As a result of the growth of digital technologies, creation of "works" has increased more than ever before in different forms including film, music, games, software producing agencies, e-publishing agencies and digital libraries. Because of its easy digitised storage, retrieval and dissemination for reading, seeing, watching and playing of works becomes much easier than in the past. At the same time, wrongdoers, in turn have started putting such digital

[16] Stef Van Gompel & P. Bernt Hugenholtz, *The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It, available at* http://www.ivir.nl/publicaties/download/501 (last visited on March 24, 2017).

[17] Louise Longdin, *Copyright and fair use in the digital age,* University of Auckland Vol.6 (1) Business Review (2004).

[18] *See*, World Intellectual Property Report: The Changing Face of Innovation (2011), *available at* http://www.wipo.int/export/sites/www/freepublications/en/intproperty/944/wipo_pub_944_2011.pdf(last visited on March 24, 2017).

[19] Catherine Colstan, Principles of Intellectual Property (Cavendish Publishing Limited, London, 1999).

[20] Meir Perez Pugatch, The International Political Economy of Intellectual Property Rights (Edward Elgar Publicattion, 2004).

technologies to wrong use and for wrong purposes.[21]

Promoting the progress of science and technology is very important for each and every nation. The United States constitutional mandate seeks to *promote the progress of science* through the copyright system. Copyright refers to the author's (creators of all sorts such as writers, photographers, artists, film producers, composers, and programmers) exclusive right to reproduce, prepare derivative works, distribute copies, and publicly perform and display their works. The United States judiciary from time to time, keeps and updates guidelines for the users and creators, as well as the government. The Supreme Court of the United States of America reaffirmed in 2012 that, facilitating the dissemination of creative expression is an important means of fulfilling the constitutional mandate to "promote the progress of science" through the copyright system.[22] But the Orphan works'story is very different one from the incentive model to promote and protect innovations. Before further discussion, it is very important to lay emphasis on what exactly does one mean by an orphan work?

B. Orphan Works - Defined

The US Copyright Office published its first Report on Orphan Works in January 2006. The Office has defined an "Orphan Work" as: any original work of authorship for which a good faith prospective user cannot readily identify and/or locate the copyright owner(s) in a situation where permission from the copyright owner(s) is necessary as a matter of law.[23] Thus, put in simpler terms, "Orphan works are copyright material with no owner that can be identified or located by someone wishing to obtain rights to use the work. For example, the copyright owner may be deceased, the publisher who owns the copyright may now be defunct, or there is no data that identifies the author of the work."[24] Orphan works are now seen as a significant problem around the world as it becomes difficult for the interested user to obtain required rights to use the work.[25] Khong D.W.K. states that, Orphan works means "copyrighted works

[21] Solange Ghernaouti, Cyber Power: Crime, Conflict and Security in Cyberspace (EPFL Press, Switzerland, 2013), has pointed out that "internet technologies are facilitators for many kinds of infringements: theft; sabotage of information; copyright infringements; breach of professional secrecy, digital privacy, or intellectual property; dissemination of illegal contents; competing attacks; industrial espionage; breach of trademark laws; dissemination of false information; denial of service; various frauds; money laundering – the list of possible offences goes on".

[22] *Golan* v. *Holder*, 132 S. Ct. 873, 887-88 (2012) (quoting U.S. CONST. art. I, § 8, cl. 8).

[23] U.S. copyright office, Report on Orphan Works (2006), *available at* http://copyright.gov/orphan/orphan-report-full.pdf(last visited on March 24, 2017).

[24] Giancarlo F. Frosio, *Google Books Rejected: Taking the Orphans to the Digital Public Library of Alexandria*, 28 Santaclaracomputer & High Tech. L.J. 81 (2011), *available at* http://digitalcommons.law.scu.edu/chtlj/vol28/iss1/3(last visited on March 24, 2017).

[25] Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), *available at*http://dera.ioe.ac.uk/16295/7/ipreview-finalreport_Redacted.pdf (last visited on March 24, 2017).

whose owners are difficult or even impossible to locate."[26] The inability to use orphan works means that their productive and beneficial uses are lost to both users and copyright holders. Thus, questions of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by the legislature than through an agreement among private, self-interested parties.[27] As per Ian Hargreaves orphan works are "the starkest failure of the copyright framework to adapt."[28]

C. The United States Copyright Act and its Effects

There is no specific exception in the US Copyright Act for the use of orphan works. Unless covered by an exception or licence, use of an orphan work may constitute copyright infringement. However, orphan works may be used when covered by existing fair dealing exceptions or a statutory licence. The Copyright Act has changed gradually but has also steadily relaxed the obligations of copyright owners to assert and manage their rights and has thereby removed formalities in the law that had provided users with readily accessible copyright information. Significant among those changes were the elimination of the registration and notice requirements, which resulted in less accurate and incomplete identifying information on works, and the automatic renewal of copyrighted works that were registered before the effective date of the 1976 Copyright Act. In 1992, automatic renewal term for works was added in the first term from 1 January 1978, making it no specific requirement for the owners to renew their rights.[29] Following the introduction of automatic renewal provisions, the Sonny Bono Copyright Term Extension Act of 1998 extended the duration of copyright and thus, the major changes made to the Copyright Act, increased the likelihood that some copyright owners would become un-locatable.

The US Copyright Office has long asserted that Congress amended the law for sound reasons, primarily to protect authors from technical traps in the law and to ensure the United States' compliance with international conventions. With the 1976 Act, the United States took several important steps towards assuming a more prominent role in the international copyright community. These changes harmonized the United States copyright law with the prevailing international copyright norms and moved the United States closer to compliance

[26] D.W.K. Khong, *The (Abandoned) Orphan-Works Provision of the Digital Economy Bill*, E.I.P.R. 560 (2010), quoted in, T. G. Agitha, *International Norms for Compulsory Licensing and the Indian Copyright Law*, 15(1) The Journal of World Intellectual Property 26-50 (2012).

[27] *See*, *Google I*, *supra* n. 12.

[28] *Supra* n. *25*.

[29] Copyright Amendments Act of 1992, § 102(a), 106 Stat. 264, 264 (codified as amended at 17 U.S.C. § 304(a)).

with the Berne Convention.[30] However, "the net result of these amendments has been that more and more copyright owners may go missing".[31]

(i) Orphan Works: the Role of the United States' Copyright Office

The US Copyright Office examined the topic of orphan works and mass digitization in separate publications issued in 2006 and 2011 respectively.[32] Thus, the US Copyright Office began an in-depth study of this issue and the related issue of orphan works on the 15th of June 2015.[33] As part of its subsequent "Orphan Works and Mass Digitization Report" the Office proposed the creation of a limited "pilot program" that would establish a legal framework known as extended collective licensing (ECL) for certain mass digitization activities. The Office noted the broad impact of both issues on the copyright system, discussed various potential responses, and, with respect to orphan works, proposed a legislative solution.

This Report addresses two circumstances in which the accomplishment of that goal may be hindered under the current law due to practical obstacles preventing good faith actors from securing permission to make productive uses of copyrighted works. Firstly, with respect to orphan works, referred to as "perhaps the single greatest impediment to creating new works" a user's ability to seek permission or to negotiate licensing terms is compromised by the fact that, despite his or her diligent efforts, the user cannot identify or locate the copyright owner. Secondly, in the case of mass digitization – which involves making reproductions of many works, as well as possible efforts to make the works publicly accessible – obtaining permission is essentially impossible, not necessarily because of lack of availability of identifying information or the inability to contact the copyright owner, but because of the sheer number of individual permissions required.[34]

III. The US Initiatives to Strengthen IPR Protection and Enforcement Internationally

The United States has worked to promote adequate and effective protection and enforcement of IPR through a variety of mechanisms.

[30] *Available at* http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf(last visited on March 24, 2017).

[31] U.S. Copyright Office on Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document (2011), *available at* http://copyright.gov/docs/massdigitization/USCOMass Digitization_October2011.pdf(last visited on March 24, 2017).

[32] U.S. Copyright Office, Report on Orphan Works (2006), *available at* http://copyright.gov/orphan/orphan-report-full.pdf(last visited on March 24, 2017).

[33] U.S. Copyright Office, Orphan Works and Mass Digitization, *available at* http://copyright.gov/orphan/reports/orphan-works2015.pdf (Last visited on March20, 2017).

[34] *Ibid*.

In the United States, it is difficult to separate the issue of mass digitization from two lawsuits arising out of the Google Books project, in which authors and book publishers have asserted violations of their exclusive rights and Google and libraries have asserted fair use.[35] Recent decisions in these cases have magnified the public debate surrounding the costs and benefits arising from digitization projects more generally and how best to license, except/or otherwise regulate them under the law. Meanwhile, a growing number of countries have adopted legislative responses to both orphan works and mass digitization, ranging from calibrated exceptions to government licenses to extended collective licensing. And, private entities have developed innovative new copyright information registries and other resources to more efficiently bring rights holders together with those seeking to use their works.

In 2004, Google began an ambitious project to digitize millions of books held by several major libraries, including many books still protected by copyright.[36] Google scanned and digitized more than 15 million books published both in the United States and universally and continues to scan books today. Before scanning and publishing, Google did not obtain prior permission from the authors or publishers of the books. Millions of these books were protected by copyright law at the time they were scanned, but neither Google nor the participating libraries obtained permission from the relevant copyright owners. Google provided its library partners with digital copies of these works and made them available to users for full-text searching.

The important issue here is that, the books were digitalised without the prior permission of the authors but Google took a different stand, urging that they were simply advertising and that they were simply collecting revenue from the advertising of those works. Google's search service allows end-users to view "snippets" from books that are subject to copyright protection and it allows end-users to view and download public domain books in their entirety. Google's search engine freely used, other's work without prior permission but the company collects revenue from advertising and they cleverly says that users can use the services freely. The Google search engine presented with the search results, including pages that reproduce and display images from copyrighted books. Users were permitted to view "snippets" of scanned books that were still protected by copyright and to download full copies of books that were in the public domain. A "snippets" was an excerpt consisting of one-eighth of a page.

[35] See, *Google I & Hathi Trust* (2012), *supra* n. 12.

[36] About Google Books, GOOGLE, *available at* http://books.google.com/intl/en/googlebooks/about/. (last visited on March 24, 2017).

Google implemented security measures to limit the portion of any book accessible through snippet views, including generating only three snippets in response to any given search and "blacklisting"(i.e., making unavailable) certain snippets and entire pages.[37]

Some authors and publishers objected to Google's actions. In 2005, the authors brought a class action lawsuit asserting that Google had committed wilful infringement, and publishers raised similar claims. In response, Google asserted a fair use defence. The parties entered into a proposed settlement on October 28th, 2008, and after Department of Justice (DOJ) and many others objected to the proposal, the parties filed a revised settlement proposal on November 13th, 2009. DOJ urged the court to reject this settlement, citing concerns about copyright law as well as antitrust and class action related issues. In addition, hundreds of private actors and the governments of France and Germany filed formal objections. A fairness hearing was held on February 18th, 2010.[38]

(i) Authors Guild v. *Google, Inc. (Google I)*

In 2011, the United States District Court for the Southern District of New York rejected a proposed settlement in *Authors Guild* v. *Google Inc.*[39] the copyright infringement litigation in which authors and publishers challenged the highly publicized "Google Books" project.[40] It is called "Google Books" case. In the Authors Guild case it was held that, "Google would provide payments to the registry on behalf of rights holders and, in turn, the registry would distribute the funds to registered rights holders. If no rights holder came forward to claim the funds after a certain amount of time, the funds could be used to cover the expense of searching for copyright owners or be donated to literacy-based charities".[41]

In March 2011, Judge Denny Chin rejected the amended settlement agreement. The court recognized that "the benefits of Google's book project are many," including making books more accessible to "libraries, schools, researchers, and disadvantaged populations," facilitating access for persons with disabilities, generating new audiences and sources of income for authors and publishers, and preserving older books currently "falling apart buried in library stacks."[42] In this case, the question of how mass book digitization fits

[37] *See, Google II,* supra n. 12.
[38] *Google I, supra* n. 12 at 671.
[39] *Ibid.*
[40] *Supra* n.36.
[41] *Authors Guild, supra* n. 12 at 671-72.
[42] *Id.* at 670.

within the existing copyright framework is a timely one. In a much-anticipated opinion, the federal court found that "the settlement would inappropriately implement a forward-looking business arrangement granting Google significant rights to exploit entire books without permission from copyright owners, while at the same time releasing claims well beyond those presented in the dispute."[43] As the court explained:

> The question of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agreement among private, self-interested parties. Indeed, the Supreme Court has held that "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." [And the Supreme Court has] noted that it was Congress' responsibility to adapt the copyright laws in response to changes in technology.[44]

In October 2012, the five major publisher plaintiffs settled with Google. According to public statements about the settlement, the publisher plaintiffs will be permitted to choose whether or not to include digitized books in the Google Books project.[45] Further details of the settlement have not been made public. Notably, the settlement does not require formal court approval because it only resolves the claims of the specific publisher plaintiffs. The settlement does not affect claims made by the Authors Guild or non-parties to the lawsuit.[46] Therefore, the settlement would not address orphan works in which copyrights are owned by anyone other than the publisher plaintiffs.

(ii) Authors Guild, Inc. v. *Hathi Trust (hereinafter Hathi Trust case)*

The Hathi Trust case is slightly different from the aforementioned "Google Books" case. In September 2011, the Authors Guild, along with two foreign authors' groups and a number of individual authors, sued a consortium of colleges, universities, and other nonprofit institutions known as Hathi Trust.[47]

[43] The amended settlement agreement covered photographs and other pictorial works contained in books only where a party holding a copyright interest in the image also held a copyright interest in the book. See Settlement Agreement §§ 1.13, 1.75.
[44] *Google I, supra* n. 12 at 677.
[45] *Publishers and Google Reach Settlement* (4th October 2012), *available at* http://www.publishers.org/press/85/(last visited on March 20, 2017).
[46] Several associations of photographers and other visual artists filed a separate action challenging the Google Books program in April 2010. That case was settled in September 2014. See Press Release, *National Press Photographers Ass'n Google, Photographers Settle Litigation Over Books* (Sep.5 2014), *available at* https://nppa.org/news/google-photographers-settle-litigation-over-books (last visited on March 20, 2017).
[47] *Authors Guild* (2012), *supra* n. 12.

Hathi Trust members had agreed to allow Google to scan the books in their collections for inclusion in the Hathi Trust Digital Library (HDL). For copyrighted works in the HDL, HathiTrust permitted three uses: (1) full-text searches by the general public, (2) full access for library patrons with certified print disabilities, and (3) creation of preservation copies under specified circumstances. In addition to those uses, the plaintiffs also challenged the University of Michigan's separate Orphan Works Project, under which out-of-print works whose copyright owners could not be located would be made accessible in digital format to library patrons. The complaint alleged, inter alia, that the plaintiffs were easily able to locate several of the authors whose works were deemed orphaned by Hathi Trust, and thus the project was not actually limited to orphan works. Shortly after the complaint was filed, the University suspended the Orphan Works Project indefinitely.[48]

In October 2012, the district court ruled in favour of Hathi Trust on issues relating to full-text searches, print-disabled access, and preservation.[49] The court found these activities to be largely transformative and ultimately protected by fair use, further opining that "the underlying rational of copyright law is enhanced" by the HDL.[50] The court did not reach the merits of the claims regarding the Orphan Works Project, however, finding instead that the issue was not ripe for adjudication in the light of the project's suspension.[51]

(iii) Authors Guild, Inc. v. *Google, Inc. (Google II)*

In November 2013, Judge Chin granted Google's motion for summary judgment on its fair use defence against the remaining claims by the Authors Guild.[52] After considering the four fair use factors enumerated in 17 U.S.C. $107, the court concluded that "Google Books provides significant public benefits", and that its book scanning project constitutes fair use.[53] The court found that Google's "use of book text to facilitate search through the display of snippets" was transformative in nature because it "transforms expressive text into a comprehensive word index that helps readers, scholars, researchers and others find books.[54] Such use, the court held, "does not supersede or supplant books because it is not a tool to be used to read books."[55] The court further held that, although Google copied books in their entirety, that fact did not weigh

[48] *Id*. at 449.
[49] *Id*. at 464.
[50] *Ibid*.
[51] *Id*. at 455-56.
[52] *Google II*,*supra* n. 12.
[53] *Id*. at 293-94.
[54] *Id*. at 291.
[55] *Ibid*.

strongly against a finding of fair use because "Google limits the amount of text it displays in response to a search."[56] For similar reasons, the court found that Google Books did not negatively impact the market for books, nothing that Google's policy of "blacklisting" certain pages and snippets would prevent any user from accessing an entire book through multiple searches.[57]

Users were permitted to view "snippets" of scanned books that were still protected by copyright and to download full copies of books that were in the public domain. A "snippet" was an excerpt of the book consisting one-eighth of a page. Google implemented security measures to limit the portion of any book accessible through snippet views, including generating only three snippets in response to any given search and "blacklisting" (i.e., making unavailable) certain snippets and entire pages.[58] Thus, while the court found the Google Books project to be fair use, it did not address whether a mass digitization project involving uses beyond the display of snippets would qualify for such protection. Nor did it separately address treatment of orphan works outside of the mass digitization context.

(iv) Authors Guild, Inc. v. *Hathi Trust II*

On appeal against the decision of district court in favour of Hathi Trust, the Second Circuit upheld the district court's finding that the creation of a full-text searchable database and the provision of access for the print-disabled were fair uses.[59] The court vacated the finding that Hathi Trust's preservation function was fair use and remanded for consideration of whether the plaintiffs had standing to challenge that aspect of HathiTrust activities.[60] In addition, the court affirmed the district court's ruling that the plaintiffs' challenge to the Orphan Works Project was not ripe for adjudication.[61]

All of the United States copyright stakeholders strongly suggest that it is time to revisit potential solutions in the United States. The goal in doing so is not to interfere with jurisprudence, but rather to ensure that the rules are clear and that all parties are on an equal footing. Indeed, with so many equities at stake, the complexity and breadth of the issues make them well suited for legislative action.[62] Indeed, the Google Books settlement demonstrated that "rights holders and rights users are capable of coming to the table and arriving

[56] *Id*. at 292.
[57] *Id*. at 292-93.
[58] *Google II*, *supra* n.12.
[59] *Authors Guild* (2014), *supra* n. 12..
[60] *Id*. at 104.
[61] *Id*. at 105.
[62] U.S. Copyright Office's, Orphan Works and Mass Digitization, *available at* http://copyright.gov/orphan/reports/orphan-works2015.pdf(last visited on March 20, 2017).

at a solution which serves the interests of all stakeholders and also promotes the goals of copyright law."[63] In the Statement of Interest it filed in the case, the United States raised concerns about the settlement primarily because it would have bestowed the benefits of mass digitization on only one party, not because of any fundamental concern about the functioning or legitimacy of an appropriately structured ECL program more generally.[64]

Simplifying the process of obtaining prior permission from authors and other rights holders would be immensely beneficial. Others may suggest that with guidance and encouragement from Congress, stakeholders could and should be encouraged to explore solutions within the marketplace, including private agreements or memoranda of understanding. The questions raised in this analysis are complex and will require additional review and deliberation.

IV. Orphan Works Protection in Cyberspace Under Indian Legal Perspective

Legal Frame work for IPR's in India and the concerned Administrative Ministries was earlier specified under The Government of India (Allocation of Business) Rules, 1962, which governed distribution of work amongst different Ministries/Departments of the Government of India. However, with the recent developments and government's commitment towards establishing a strong IPR regime in the country, now all the IPR related Laws are administered by the Ministry of Commerce and Industry through its agency, Department of Industrial Policy and Promotion. With this the functions of copyright office and its related subordinates were shifted from the Ministry of Human Resources to the Ministry of Commerce and Industries and positively the functioning of the office under its new administrative head has shown great improvement in terms of timeliness and digitalisation.

(i) Orphan Works in India

Indian Copyright Act (hereinafter referred to as ICA), at no place, has expressly defined or used the term "Orphan Work"[65], but the ICA has also

[63] The book publishers settled their claims against Google in 2012. The terms are confidential. *Authors Guild, Inc.*, Comments Submitted in Response to U.S. Copyright Office's Feb.10, 2014 notice of Inquiry at 9 (Authors Guild additional Comments).

[64] *See*, Statement of Interest of United States of America Regarding Proposed Amended Settlement Agreement at 2, *Authors Guild, Inc*. v. *Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y. Feb. 4, 2010), ECF No.922 (U.S Statement of Interest).

[65] T. G. Agitha, *International Norms for Compulsory Licensing and the Indian Copyright Law*, 15(1) Journal of World Intellectual Property 26-50 (2012).

covered the protection in respect of such works.[66] India's legal protection in respect of orphan works was first established in 1957 and was recently amended in 2012.[67] According to the ICA, a compulsory license[68] can be granted to an applicant who wishes to exploit an orphan work where the author is dead, unknown, cannot be traced or cannot be found.[69] It extends the scope to any work and not necessarily limited to those of Indian origin. Thus, compared to the definition of Orphan Works as given under the United States and the UK, the meaning is more relevant and extended in the Indian legal perspective.[70] ICA has also covered the published works as well as the unpublished works which originated in India. The amendment provision covered foreign works capable of being licensed compulsorily in case it is published elsewhere but withheld in India.[71]

Analysis of the relevant provision of the Act indicates that the following goals are meant to be achieved by issuance of compulsory licenses in respect of orphan works:

i. To make available Indian works which are unreasonably with held from public.
ii. To publish and bring to public those unpublished works whose authors are unknown or untraceable.
iii. To make available Indian or foreign works which are not available in India at all or at a reasonable price.
iv. To allow production and publication of translation of Indian and foreign works into Indian languages.

[66] But it does not mean to cover abandoned works. See more about abandoned work on D.W.K. Khong, *Orphan Works, Abandonware and the Missing Market for Copyrighted Goods*, 15 International Journal of Law and Information Technology, 54–89 (2007), *available at* http://ijlit.oxfordjournals.org/content/15/1/54.full.pdf+html (last visited on March 20, 2017).

[67] Received the assent of the President on the 7th June, 2012, *available at* http://copyright.gov.in/ (last visited on March 20, 2017).

[68] Compulsory/non-voluntary licensing is one method of assuring dissemination of information while giving due respect to the author's/owner's rights by compensating him. It balances the interests of owners and users by compelling the owner of copyright to grant licences on request, against the payment of equitable remuneration. *See*, L. M. C. R. Guibault, Copyright Limitations and Contracts - An Analysis of the Contractual Overridability of Limitations on Copyright (Kluwer Law International, London, 2002).

[69] *Ibid*.

[70] See the above definition of "Orphan Works" – Chapter II (B), ICA.

[71] Given how onerous our compulsory licensing sections are, especially sections 32 and 32A (which deal with translations, and with literary, scientific or artistic works), it is not a surprise that they have not been used even once. However, given the modifications to s.31 and s.31A, we might just see those starting to be used by publishers, and not just radio broadcasters. Analysis of the Copyright (Amendment) Bill 2012, *available at*http://cis-india.org/a2k/blogs/analysis-copyright-amendment-bill-2012(last visited on March 20, 2017).

v. To permit broadcasting of translations for teaching and dissemination of research results.

vi. To make available works to disabled persons.

vii. To provide for statutory licenses for cover versions.

viii. To provide for statutory licenses for radio broadcasts.

(ii) Compulsory Licence in Unpublished Indian Works under Indian law

As per Section 31A of the ICA,[72] where the author of any unpublished work is dead or unknown or cannot be traced or any work published or communicated to the public and the same is withheld from the public in India, or the owner of the copyright in such work cannot be found, then any person may apply to the Copyright Board for licence to publish or communicate to the public such work or a translation thereof.[73] Here, it is very important to note that the word "unpublished work" has been referred at seven different provisions under the ICA.[74] The Copyright (Amendment) Act, 2012 enhanced the scope of Section 31A (1) by extending it to cover all works and not just Indian works.

(iii) Conditions for obtaining Compulsory Licenses for Unpublished Indian Works

Before making such an application, the applicant shall publish his proposal in one issue of a daily newspaper in the English language having circulation in the major part of the country and where the application is for the publication of a translation in any language, such proposal must also be published in one issue of any daily newspaper in that language.[75] Every such application shall be made in such form as may be prescribed and shall be accompanied with a copy of the advertisement issued under Section 31A (2) and with such fee as may be prescribed.[76] The requirement of advertisement serves two purposes – first, the untraceable author owner may read it and come forward to discuss the potential use by the applicant and second, to invite any objections or reservations that any other person may have against such publication.[77]

[72] Section 31A, introduced on the basis of Berne Appendix, provides for issuing compulsory licences for unpublished Indian works in the case of which the author is dead or unknown or cannot be traced, or the owner of copyright cannot be found, to publish such work or translation thereof in any language.

[73] See, Sec. 31 A (1) of ICA

[74] See, ICA, Sec.2 (i) Indian work; Sec. 7, Nationality of author where the making of unpublished work is extended over considerable period; Sec13, (2) (ii) Works in which copyright subsists; Sec.16 No copyright except as provided in this Act; Sec.31A (Compulsory licence in unpublished Indian works; Sec. 40 (Power to extend copyright to foreign works) (b); Sec. 52 (p) Certain acts not to be infringement of copyright.

[75] ICA, Sec. 31A (2).

[76] ICA, Sec. 31A (3).

(iv) Compilations of Inquiry

Where an application is made to the Copyright Board under Section 31A, it may, after holding such inquiry as may be prescribed, direct the Registrar of Copyrights to grant to the applicant a licence to publish the work or a translation thereof in the language mentioned in the application subject to the payment of such royalty and subject to such other terms and conditions as the Copyright Board may determine, and thereupon the Registrar of Copyrights shall grant the licence to the applicant in accordance with the direction of the Copyright Board.[78]

(v) Limitation, Fees and Benefit of the Compulsory Licenses

Where a licence is granted under this provision, the Registrar of Copyrights may, by order, direct the applicant to deposit the amount of the royalty determined by the Copyright Board in the public account of India or in any other account specified by the Copyright Board so as to enable the owner of the copyright or, as the case may be, his heirs, executors or the legal representatives to claim such royalty at any time.[79]

Without prejudice to the foregoing provisions [Sec. 31A (6)], in case of an unpublished Indian work whose author is dead, the Central Government may, if it considers that the publication of the work is desirable in the national interest, require the heirs, executors or legal representatives of the author to publish such work within such period as may be specified by it. Where any work is not published within the period specified by the Central Government, the Copyright board may, on an application made by any person for permission to publish the work and after hearing the parties concerned, permit such publication on payment of such royalty as the Copyright Board may, in the circumstances of such case, determine in the prescribed manner.[80]

If the Board is satisfied that the licence for publication or communication to the public or translation in any language of the work, applied for may be granted to the applicant, or if there are more applicants than one, to such applicants, as, in the opinion of the Board, would best serve the interest of the general public, it shall direct the Register of Copyright to grant the licence

[77] The differences between assignment and licensing are, however, important for different reasons. For example, a failure to pay royalties due under the original agreement may, in the case of licence, enable a licence to be revoked but in the case of an assignment, cannot lead to recovery of the copyright which has been assigned. *See*,N.S. Gopalakrishnan & T.G. Agitha, PRINCIPLE OF INTELLECTUAL PROPERTY (Eastern Book Company, Lucknow, 2009), p. 345.

[78] ICA, Sec. 31A (4).

[79] ICA, Sec. 31A (5).

[80] ICA, Sec. 31A (7).

accordingly. Every such licence shall specify:

i. the period within which such work shall be published, translated or communicated to the public;

ii. the price at which the copies of such work are to be sold or charges to be collected for communicating the work to the public;

iii. the amount of royalty to be deposited and the account in which it has to be deposited;

iv. in case of translation of the work, the language in which the translation shall be produced and published; and

v. in case of communication to the public of the work the medium in which it is to be communicated to the public.[81]

(vi) The Copyright Board and its Role in Orphan Works

Copyright Board is the statutory body responsible for recognising and issuing of compulsory license in respect of an orphan work.[82] Before making an application, an applicant must publish their proposal. All categories of works including literary, dramatic, musical, artistic works, and sound recordings etc. are covered. Where due diligence is appropriately carried out, an applicant will then make an application to the Copyright Board. The application should also be accompanied by the relevant fee. The Copyright Board takes into consideration a number of factors in determining the manner of royalties/tariffs to be paid, e.g. the retail price and prevailing standards. The licence will be subject to the payment of a royalty and to terms and conditions as the Copyright Board may determine, e.g., the duration, royalty rate (having considered a retail price) and prevailing royalty standards, and recipient with the language for translation standards. The amount of royalty deposited by an applicant will be available for a copyright owner or their heirs, executors or the legal representatives.

A licence can be cancelled if the licensee has failed to produce and publish the work, has used fraud or misrepresentation, or has contravened any of the terms and conditions. The copyright collecting societies do not play a role in orphan works in India and there does not appear to be a register or database

[81] Rule 11(5) of Copyright Rules, 2013, *available at* http://copyright.gov.in/Documents/CopyrightRules1957.pdf(Last visited onMarch20, 2017).

[82] Administration of Copyright Societies: Sections 33, 34 and 35 relate to the registration and functioning of a copyright society. These have been amended to streamline the functioning of the copyright societies. All copyright societies will have to register afresh with the registration granted for a period of five years. Renewal is subject to the continued collective control of the copyright society being shared with the authors of works in their capacity as owners of copyright or of the right to receive royalty.

detailing suspected orphan works. Furthermore, there is no case law involving an infringement of use of orphan works or a reappearing author.

(vii) Special Provision for Access to the Disabled

Section 31B of the ICA provides for issuance of compulsory license in works for the benefit of the disabled in an expedited manner. The Copyright Board, on an application for a Compulsory License by any person working for the benefit of persons with disability on a profit basis or for business shall dispose such application within a period of two months from the date of receipt of application. The Compulsory License issued must specify the means and format of publication, the period during which the compulsory license may be exercised and the number of copies that may be issued including the rate or royalty.

V. Conclusion

Indian copyright law is one of the finest and effective laws in the world dealing with every corner of protection concerned.[83] The Indian Copyright Act as amended in 2012 is in full conformity with the international treaties including those of WIPO internet treaties, to which India is not a party.[84] The legislative and statutory measures are supplemented by appropriate administrative measures by the Governments both at the Central and State levels for enforcement of IPRs; this includes Inter-Ministerial Committee on Enforcement of IPR laws, Copyright Enforcement Advisory Council (CEAC), Enforcement Cells, Intellectual Property Appellate Board (IPAB), Automated Recording and Targeting System (ARTS) portal of Central Board of Excise and Customs (CBEC) and the recently introduced Cell for IPR Promotion and Management (CIPAM).

The IP protection is not an easy task especially when it comes to digital world where no author can be hundred percent guaranteed with protection for their work. There is a need for broad public-private partnerships and more cooperation and collaboration among brand owners and their intermediaries to stop criminals from introducing their harmful, dangerous and illegal goods into the supply chain. It's easy to stay on the straight and narrow.[85] Anyone who uses an orphan work must be conscious of how much hard work the author

[83] Indian copyright law shall mean any Act, Ordinance, Regulation, rule, order, bye-law or other instrument in force in India related to copyrights.

[84] Response to Hearing Testimony on India IPR, *available at* http://www.ficci.com/sector/24/add_Docs/Response-to-Hearing-Testimony-on-India-ipr.pd (last visited on March20, 2017).

[85] *See, Pirated Products Like Other Crimes, Piracy Doesn't Pay, available at* http://www.ncpc.org/topics/intellectual-property-theft/pirated-products (last visited on March20, 2017).

must have put into it. It is his moral duty to not steal away someone else's credit and in case he is unable to locate the original author, he must take the proper steps as accorded by law before using any of suchorphan work(s). One must be aware of their rights and liabilities with respect to such orphan works and special attention should be paid to the points given below:

i. When one thinks of using any work which does not belongs to them, it is significant to identify the respective owner to obtain rights to use the same.

ii. When such work appears to be coming under the category of orphan works, it is important for the user to adopt measures to obtain necessary rights/ licences as per the laws in force.

iii. One must not simply proceed to make copies of orphan works'in digital medium and distribute the same them out to anyone including his friends and relatives - even as gifts. This may clearly deprive the creator of the talent he possesses and those who depend on the creator to earn their income.

iv. Irrespective the owner of copyrighted work enforcing their rights, the users must feel obligated to protect the creator's interest, even if no one readily available to claiming rights in such works.

A sleeping man can be awoken, but not a man who pretends to sleep. Most of the users in the digital world belong to the latter category and they can never be woken up unless they were educated enough why and where to wake up. The foregoing sentence is suitable *in toto* in respect of protection required for orphan works. It is not alone the law or the judiciary that can help safeguarding the interest of the unidentified with respect to their skills and investments in their work.

CORPORATE GOVERNANCE REGIME IN INDIA: A TALE OF CONSTANT EMERGING CHALLENGES

Dr. Niraj Kumar& Ms. Mausam***

I. Introduction

Globalization and liberalization have brought in additional challenges to government across the globe. These new challenges largely arise from the increased role of the private sector in the developmental activities. These developmental activities were previously done by government agencies. The government withdrew its activities from certain areas which are categorized as commercial/ production-oriented in nature and encouraged private players to fill its shoes. These challenges have similar dimensions, be it the United States facing some of the biggest corporate frauds seen in the recent past, or in the least developed countries like Bangladesh facing corruption associated with the donor grants and aid programmes[1]. Therefore, corporate governance has evolved and grown significantly in last two decades.

II. Meaning and Definition of Corporate Governance

The Committee on Financial Aspects of Corporate Governance in the United Kingdom, popularly known as Cadbury Committee, defined the term corporate governance as "the system by which companies are directed and controlled. Corporate governance is concerned with holding the balance between economic and social goals and between individuals and communal goals…the aim is to align as nearly as possible the interests of individuals and corporations and society."[2]

Ten years later of Cadbury Report, Higgs Report emphasized on the other elements when it said, "corporate governance provides the architecture of accountability- the structure and processes to ensure companies are in the interest of their owners". Demb and Neubauer in their classic work, 'The Corporate Board: Confronting the Paradoxes', defines it as "the process by which corporations are made responsive to the rights and wishes of stakeholders."[3] This definition has emphasized in the process, which emphasized

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1 *See,*KallummalMurali, *Small Investor Protection and Issues in Corporate Governance: An IT-enabled Approach to the Decision Making Process of Firms*, in Jaivir Singh (ed.), Regulation, Institution, and Law (Social Science Press, 2007) p. 155.

2 Cadbury Sir Adrain, Corporate Governance and Chairmanship (Oxford University Press, 2003), 1.

3 Demb Ada &Neubauer F. Friedrich, The Corporate Board: Confronting the Paradoxes (Oxford University Press, 1992) p. 187.

that the board must meet expectations as per the changing demands. Arthur Levit, former chairman of the Securities Exchange Committee, in his book, 'Take on the Street', defines corporate governance as "the relationship between the investors, the management team and the board of directors of a company. Good corporate governance exists when these groups communicate openly and honestly." [4] But, all encompassing definition comes from the preamble of OCED Principle, which says: "corporate governance involves a set of relationship between a company's management, its board, its shareholders and stakeholders. Corporate governance also provides the structure through which the objectives of the companies are set, and the means of the attaining those objectives and monitoring performance are determined."[5]

These above-mentioned definition of corporate governance make clear two points: - *Firstly*, there are boundaries between companies and their board operators, and *secondly*, these boundaries are set by laws, regulations investors, shareholders, public opinion, and companies themselves.

The characteristics of corporate governance or the fundamental principles on which corporate governance is based, includes discipline, accountability, transparency, fairness, independence, responsibility, and social responsibility. These are seven characteristics on which corporate governance works. Though the origin could not be located correctly, some of the characteristics of corporate governance expressly recognised in CLSA Emerging Markets 2001. But these characteristics became popular after their appearance in famous King Report on Corporate Governance for South Africa 2002. King Report II expressly mentioned that: "successful governance in the world in the 21st century requires companies to adopt an inclusive and exclusive approach. The company must be open to institutional activism and there must be greater emphasis on the sustainable or nonfinancial aspects of its performance. Boards must apply the test of fairness, accountability, responsibility and transparency to all acts or omissions and be accountable to the company but also responsive and responsible towards the company's identified stakeholders. The correct balance between conformance with governance principles and performance in an entrepreneurial market economy must be found, but this will be specific to each company."[6]

4 Levit Authur, Take on the Street (Pantheon Books, New York, 2002).

5 OCED Principles of Corporate Governance, *available at* www.oced.org.

6 King Report on Corporate Governance for South Africa, 2002, *available at* www.mervynking.co.za.(last visited on October 16, 2017).

A. Significance of Corporate Governance

Firstly, due to privatization, many functions which were earlier in State's domain have been performed by corporate. And corporate are borrowing capitals generously either from government or public. Therefore, when the public fund is involved in corporate business, it requires good corporate governance.

Secondly, due to liberalization and technological advancement, it has become very easy to invest anywhere in the world. This has changed the rule of engagement or investment. A person invests his money only where he feels his money is safe and his investment will make a good profit. Safeguarding capital of investment requires rules of 'effective monitoring', which is one of the fundamentals of good corporate governance.

Thirdly, nowadays, promoters of corporate firms are getting sidelined. The financial intermediaries are making a huge investment in corporate. These financial intermediaries prefer companies managed by good professionals rather than traditional promoters. In practice, these professional managers are very much influenced by financial investors. This led to shifting of indirect control of corporate from promoter to institutional investors. This scattered stake holding also requires good corporate governance culture.

Fourthly, good corporate governance culture in a country plays a basic or most important role in attracting foreign capital at much lower costs. The reason is very simple, it creates a general goodwill for investment.

Lastly, collapses of prominent businesses, both in the financial and non-financial sectors, such as Polly Peck, BCCI, and later Baring, have led more emphasis on control of capital (e.g., to safeguarding assets etc). In India also, Satyam Saga, UTI scam, Harshad Mehta episode, Sahara, Mallya, Ranbaxy, and Tata episode are some of the examples of big name, whose wrongdoing sparked the issue of corporate governance.

B. Origin and Development of Corporate Governance

The concept of corporate governance has been with since companies began to take their present form. In 1600, East India Company was formed and its way of functioning gives an example of recognition of principles of corporate governance. Under the company, the directors were made directly accountable to the shareholders for capital expenditures and selection of important officials of the company.[7] This reference of East India Company is important to understand that the basic governance issues, power and accountability, has been

[7] *See, supra* n.2, p.3.

in existence since the beginning of the corporations.

In the nineteenth century, there were two important legislations of company law in the UK which are very relevant in terms of governance. The Joint Stock Company Act of 1844 required all new businesses with more than twenty- five participants to be incorporated. This gave them a legal status and personality of their own. At the same time, companies had to file their constitutions and annual accounts with the Registrar, thereby providing a degree of disclosure.[8]

Then, the Limited Liability Act of 1855, was enacted which limited the liability of shareholders to the amount of share capitals which they had invested, should their company become bankrupt. This protected their personal assets from the consequences of the corporation[9].

In the late 1980s and early 1990s several scandals and financial collapses surfaced which worried legislators, banks and shareholders. This led to a catena of measures getting introduced by the UK government to create an effective regulatory mechanism. In 1990 the government of UK announced the establishment of Financial Reporting Council (FRC). The FRC is the UK's independent regulator for corporate reporting and updating the UK Corporate Governance Code.

In May 1991, London Stock Exchange set up Cadbury Committee whose report was published in1992 in name of "Code of Best Practices". The report is considered as *magna carta* of corporate governance throughout the world. Main recommendations of this report includes all listed companies must comply with the code and non-compliance must be explained, separation of office of chairman and chief executive to avoid concentration of power, independent non-executive directors with more power and influences, major role of non-executive directors in audit, nomination and remuneration committee, duty of board to publish financial report, rotation of auditors, encouragement to institutional investors to make greater use of their voting right.

After publication of this report several other reports were published viz. Higgs Report (2003), Smith Review Report (2004), Hample Report. In 2003, a Combined Code on corporate governance was adopted which provided the splitting role of chairperson and CEO, the establishment of audit and nomination committee, the evaluation process of performance by board etc.[10]

[8] G.H. Grant, *The Evolution of Corporate Governance, available at*www.tcnj.edu.(last visited on October16, 2017).

[9] *Ibid.*

[10] Revision to the Corporate Governance Code and Guidance on Audit Committees, *available at* Http://www.frc.org.uk(last visited on October16, 2017).

This Code was revised in 2010 and known as UK Corporate Governance Code. Main changes made under the Code include, responsibility of the Chairman to ensure effective leadership, active involvement of directors including non-executive directors, independence of board and directors, periodic evaluation of performance of the company by independent people, proper risk management, mandatory reporting of source of company's revenue and profits, directors remuneration must be based on performance.[11]

United States as a society believed in the idea of free enterprises and celebrated capitalism. This provided an ideal environment for the growth of corporate governance. In early 20th century, two Acts were enacted in the United States, the Securities Act, 1933 and the Securities Exchange Act, 1934. Under these Acts, registration was made mandatory for companies offering public stock, financial disclosure and auditing were also made mandatory and deceitful standard and manipulative practices were prohibited.[12]

In the United States, the Sarbanes-Oxley Act, 2002 is very important for corporate governance. The passing of SOX should be seen against the backdrop of several huge corporate failures in the USA. The collapse, in particular, Enron and WorldCom, caused serious concern and became such a political issue that the United States government of the day [at that stage the Bush Administration] saw no option but to act quickly and rapidly. The key features of this Act includes:

i. Application to all issuers including foreign private issuers;
ii. Establishment of the public company accounting oversight board (PCAOB) to regulate registered public accounting firms and associated persons;
iii. Ensuring independence of auditors by prohibiting them from rendering certain non-audit services such as legal or expert service or human resource etc, rotation of auditors;
iv. Ensuring corporate responsibilities for the veracity of annual and periodic reports and provision for harsh punishment for violation of this responsibility;
v. Publication of all material financial and non –financial information in standard manner to avoid any confusion or misconception;
vi. The introduction of new criminal offences for destruction or alteration or concealment of documents.[13]

[11] *See*, Changes to the Combined Code, *available at* www.asgurst.com(last visited on October 16, 2017).
[12] K. Fred Skousen, Steve M. Glover & Douglas F.Prawitt, An Introduction to Corporate Governance (Thomson South-West, 2005)p. 48.
[13] *See*, Jane Bourne, *Accounting and Auditing Reforms: An Overview of Sarbanes-Oxley Act in America*, *available at* reference.sabinet.co.za.

III. Development of Corporate Governance in India

A. Corporate Governance in Ancient India

In India, there is amazing congruence between the structure of governance of those of ancient kingdoms of India and today's corporations. The ancient text and scripts are full of such commonalities. Kautilya mentioned fourfold duties of a king in *Arthashastra*, namely, '*Raksha'*(protection or risk management), '*Vriddhi'* (growth), '*Palana'* (maintenance) and '*Yogkshema'* (well being)[14]. These duties are very much similar to duties of CEO or board of management of modern corporation.

B. Corporate Governance in Modern India

Corporate governance reforms in India have involved a wide range of institutional and corporate initiatives that includes (a) improving of capital markets, (b) ensuring more effective protection of minority investors through promoting higher standards of information disclosure and enforcement, (c) reforming company board structure and operational systems to make the board directors more accountable to the shareholders and (d) reforming governance mechanisms of financial institutions. These initiatives have come from the government via government legislations, from SEBI in form of statutory regulations and through several self-disciplining and voluntary initiatives taken by the industry chambers and business associations, professional bodies and companies themselves.[15]

C. Formalising Governance code for Corporate Governance

The first formal attempt at formalising governance code for corporate governance came from the Confederation of Indian Industry, which in 1998 published the Desirable Code of Corporate Governance (CII, 1998). The CII document recommended several policies that could be adopted by Indian companies in line with international best practices, whether in private sector, the public sector, banks or financial institutions, all of which are corporate entities. This Code was voluntary in nature. Safeguarding of interests of investor, with special care to small investors, including higher transparency for business and industry, the felt need of movement towards international norms pertaining to information disclosure by corporate and all of above leading to a higher confidence of public at large in business and industry in light of greater integration of India in the world market were main rationale of this code.[16]

[14] Concept Paper on Corporate Governance Policy, 2012.
[15] *See*, Jayanti Sarkar & Subrata Sarkar, Corporate Governance in India (SAGE Publication, New Delhi, 2012) p. 103.
[16] *Id*. p. 82.

In 1999, the SEBI took a very important step to set a committee under chairmanship of Kumar Mangalam Birla (KMBCCG) to suggest measures to improve the standards of corporate governance of listed companies in India, particularly with respect to disclosure of material financial and non-financial information, responsibilities of independent and outsider directors on company boards, and to suggest safeguarding against insider trading. This Committee recommended that,[17]

i. Board to set qualified and independent audit committee to enhance the credibility of financial disclosures and to promote transparency.
ii. Audit Committee should have at least three directors with one being finance literate.
iii. Companies to provide consolidated statements in respect of all its subsidiaries in which they hold 51% or more of the share capital.
iv. Shareholders to show a greater degree of interest and involvement in the appointment of directors and the auditors.
v. Audit Committee should meet at least thrice in a year and Chairman of the Committee should be present in AGM.

After Enron debacle in 2001, U.S enacted stringent Sarbanes Oxley Act which also led Indian Government to wake up. The government of India appointed Naresh Chandra Committee to examine auditor- client relationship and the role of independent directors. This committee recommended audit firms rotation, audit committee to be set up by independent directors, companies to have at least 50 percent independent directors, and certain professional assignment should not be undertaken by auditors[18].

On the recommendations of KMBCCG, SEBI introduced 'Clause 49 of the Listing Agreement' in 2000. The defining feature of Clause 49 is that listed companies need to comply with a set of corporate governance regulations and disclose its compliance with these regulations in a separate section on corporate governance in their annual reports. The fundamental areas in which compliance is required are with respect to:

i. The board of directors,
ii. The audit committee,

[17] Meaning and concept of corporate governance, evolution of corporate governance in India and other part of world, need and essence of corporate governance and role of CAG in this regard, *see* Background Training Programme, *available at* rtialllahabad.cag.gov.in (last visited on October 16, 2017).

[18] *Ibid*.

iii. Subsidiary companies,
iv. Disclosures including those on RPTs,
v. CEO/CFO certification,
vi. Report on corporate governance; and
vii. Compliance.

Apart from the mandatory regulatory requirements, Clause 49 also contains some non-mandatory requirements such as the option of setting up a remuneration committee, shareholder rights, training of board members, audit qualifications, and so on. The compliance philosophy behind the Listing Regulations was mostly of the 'comply or else' approach to governance regulations, with certain key regulations being mandatory. While some other regulations, in Clause 49 were listed as non-mandatory, these did not fall strictly under the 'comply or explain' approach. Clause 49's requirements include[19]:

i. Minimum percentages of independent directors (50% or 33% depending on whether the Chairman was an executive director),
ii. Tightening up the definition of "independence",
iii. Mandating the number of board meetings per year,
iv. Developing a code of conduct,
v. Imposing limits on the number of directorships a director could simultaneously hold,
vi. Enhancing the power of the audit committee by requiring financial literacy, experience and independence of its members, and by expanding the scope of activities on which the audit committee had oversight,
vii. Certifications by the Chief Executive Officer (CEO) and Chief Financial Officer (CFO) of financials and overall responsibility for internal controls,
viii. Enhanced disclosure obligations (on many things including accounting treatment and related party transactions), and
ix. Enhanced requirements for holding companies when overseeing their subsidiaries.

Since the time Clause 49 came into effect in February 2000, its provisions have undergone periodic changes following intermittent assessment of its functioning. This was particularly so with respect to some of the key aspects of

[19] Kaishsh K. Dagar, *Ready Reckoner on Compliance with various Clauses/Provisions of Stock Exchange Listing Agreements and SEBI Regulation*, *available at*www.icsi.edu/cs/March2008/Articles/ReadyReckoner.pdf(last visited onOctober16, 2017).

governance – board constitution and disclosure rules[20]. The original regulation of February 2000 required that if there is non-executive chairman then at least one-third of board must constitute of independent director. It further provided that in case of executive Chairman the board must constitute of at least one-third of independent directors. The requirement was revised in April 2008 to provide for the situation where non-executive chairman happens to be promoter or is related to the promoter or management then it must follow the constitution provided in code of executive director.[21] The criteria for appreciating 'independence' of a director were also modified to bring it at par with best international practices by making it more objective.[22]

With regard to disclosure requirements too, these underwent major changes to ensure increasingly high quality of financial reporting. This has included the mandatory constitution of audit committee that are required to exercise 'oversight of the company's financial reporting process and the disclosure of financial information to ensure that the financial statement is correct, sufficient and credible'. Belatedly, the audit committee is required to review with the management the annual financial statements before submission to the board focusing, among other things, on changes in accounting policies and practices, major accounting entries based on 'exercise of judgement by management', compliance with accounting standards and any RPTs. The management, among its many responsibilities, has been made responsible to discuss financial performance of the company with respect to its operational performance, as well as disclose all personal 'material and commercial transactions' where there is conflict of interest with the company. Finally, for the first time, listed companies have been required to publish a separate section on corporate governance in the annual reports along with a detailed compliance report highlighting non-compliance, if any, of the mandatory requirements under Clause 49, citing reasons for the same and also highlighting adoption of any non-mandatory requirements.[23]

Another milestone in development of corporate governance culture in India is enactment of the Companies Act, 2013. This Act has borrowed the

[20] *See*, N.R. Narayana Murthy Committee Report, 2003.

[21] This regulation clearly stands out of line with the recommendations of the other committees, all of which have not seen much merit in making this distinction. For instance, the Naresh Chandra Committee, which has proposed that not less than 50 per cent of the board be constituted of independent directors [as in the case with the NYSE requirement] without making any separate and 'complex' distinction based on the executive status of the chairman.

[22] *See*, Shri Bhagwan Dahiya & Nandita Rathee, *Corporate Governance Developments in India*, in Christine A. Mallian (ed.), HANDBOOK ON INTERNATIONAL CORPORATE GOVERNANCE (Edward Elgar Publishing Ltd, 2011) p. 424.

[23] *Ibid*.

philosophy of American corporate governance. This Act has large influence of the Sarbanes-Oxley Act, 2002. This Act has also adopted many of the provisions of Clause 49 of the listing agreement. But most striking feature of this Act with respect to corporate governance is, provisions relating to 'independent director'. This Act clearly defines who independent director is, criteria for their appointment, tenure, remuneration and liability.[24] Schedule IV of the Act provides a code in which guidelines, role, functions and duties of independent directors are mentioned. The Code lays down very significant functions like safeguarding the interest of all stakeholders, particularly the minority holders, harmonizing the conflicting interest of the stakeholders, analyzing the performance of management, mediating in situations like the conflict between management and the shareholder's interest etc.[25] The importance of role of independent director in companies can be understood from the fact that they are expected to be independent from the management and act as the trustees of the shareholders.

In 2015, SEBI notified the 'Listing Obligations and Disclosure Requirements Regulations, 2015, which has two objectives, firstly, to align clauses of the Listing Agreements with the Companies Act, and secondly, to consolidate the conditions under other securities' listing agreements in one single regulation.[26] Main highlights of this regulations are: (i) disclosure of 'material' events and information by every listed companies which includes- acquisition of control, share or voting right, forms of inorganic structure like schemes of arrangements, sale or disposal of units, business divisions, subsidiaries, organic structuring of share capital like issuance, forfeiture, split-ups, consolidation, transfer restriction, revision of rotation etc; (ii) adoption of stricter like approach towards the composition of board, its committee and duties of directors[27]; (iii) duties of directors include, disclosure of every matter that directly affects the company, ensuring transparency while maintaining confidentiality, monitoring of governance practices, ensuring integrity of accounting and financial reporting, transparent nomination, harmonizing conflicting interests etc; (iv) provisions related to the Related Party Transactions (RTP) are made strict, such as now any RTP requires prior audit and board's approval.[28]

[24] *See*, Section 149, Companies Act, 2013.

[25] *See*, Schedule IV of the Companies Act, 2013.

[26] *See*, SEBI Listing Obligations and Disclosure Requirements Regulations, 2015, *available at* www.sebi.gov.in/sebi_data/attachdocs/1441284401427.pdf (last visited on October16, 2017).

[27] *See*, Regulation 17 and 18 of SEBI Listing Obligations and Disclosure Requirements Regulations, 2015.

[28] *Id.*, Regulation 23(2).

IV. Emerging Issues of Corporate Governance in India

A. Satyam and after

Nine years after coming into force of clause 49, the biggest debacle of corporate governance of India surfaced at Satyam Computer Services Limited. This is compared as 'Enron of India'. On 7 January 2009, Ramalinga Raju, the Chairman and controlling owner of Satyam Limited (SCSL) – a listed blue chip InfoTech company in India as well in the US – resigned from his post after publicly declaring that Satyam's accounts have been falsified for several years with his explicit involvement. In his confession, he accepted inflated (non-existent) cash and bank balance of Rs. 5,040 crore, an accrued interest of Rs. 376 crore which is non-existent, an understated liability of Rs. 1,230 crore on account of funds arranged by him, an over stated debtors position of Rs. 490 crore (as against Rs. 2651 reflected in the books)[29]. This entire episode raised several serious questions. The *first* is the criminal behaviour of promoter who committed mammoth fraud on shareholders by siphoning thousands crore of rupees out of Satyam without shareholder's knowledge. The *second* question relates to Satyam's auditors. This is the basics, when you are doing audit and client says, "I've got billion bucks in the bank", you check with the bank that it's there.[30] But auditors failed, without any justification. The *third* relates to the independent directors on Satyam's board. How did they acquiesce to the huge $ 1.6 billion proposed related-party transaction between Satyam and Maytas? Why did none think that the proposal was inappropriate? Collegiality of independent director with management had compromised on its role as watchdog. They cannot be allowed to remain silent when they are required to attract attention by barking.

B. Sahara: An unlisted behemoth

After Satyam Scam, another big names failure is Sahara. 'Sahara' an unlisted behemoth issued optionally fully convertible debentures (OFCDs) between 2008-11. Through a subscription by around 22 million people, they raised around 174 billion rupees. SEBI found this to be a fraudulent conduct and was able to get an order from Supreme Court of India against 'Sahara', asking them to refund the amount to the investors. The Court also asked 'Sahara' to pay back the amount with 15 percent interest. The SEBI was asked to take the onerous burden to identify the investors and make repayments. 'Sahara was asked to provide details of investors within a period of ten days.[31] This

[29] The Satyam Saga, Annexure 1, Business Standards, 2009.

[30] Anand Kumar, ASATYAM @ SATYAM (Diamond Books, 2009) p. 32.

[31] Anurag K. Agarwal, *Corporate Governance: Financial Regulators and Courts Need to be on the Same Page*, *available at* www.iimahd.ernet.in/assets/snippets/workingpaperspdf/20163082092013-03-03.pdf, visited on 16-10-2016.

case is another dent on the image of good corporate governance in our country.

C. Ranbaxy: Fraud in worldwide regulatory filings

Failure of corporate governance norms at Ranbaxy is just one more example. It was alleged that Ranbaxy committed systematic fraud in its worldwide regulatory filings. They submitted fuzzed data before regulators, thus exposed the shareholder's investment to huge reputation and compliance risk[32]. Ranbaxy case is very much similar to Satyam case, because here also three persons are in the dock, i.e., promoter, auditors and independent directors.

D. Vijay Mallya's 9000 crore fraud

Last year, business tycoon Vijay Mallya was very much in news, not for his business stunt, but for committing fraud of Rs. 9000 crore on banks and running away from India. Fall of Mallya also reveals a gross violation of corporate governance norms. It was alleged that United Spirit Limited (USL) provided financial support and diverted its funds to UB group companies clandestinely, without board's approval. This was done when Mr Mallya was in charge of USL[33]. Apart from this, accounts were improperly stated, audits were stage-managed, deducted tax was not deposited with revenue department, provident funds deductions and contributions were also not deposited with the authorities. According to Section 186 of the Companies Act, inter group loans are permissible. But such loan can be given only with board's approval. According to this section, the board can pass such loan with the consent of all directors if it is in the interest of the company.[34] If giving loan is not in the interest of the company, then the board should not take such decision. It is the responsibility of the Board to protect the interests of minority shareholders.

E. Tata and Infosys and Boardroom events

Tata and Infosys are also two iconic Indian brand names. They hold enormous brand equity. But in recent times, these two names were in the centre of news for bad reasons and events of boardrooms raised serious questions of corporate governance. In both cases, owners or founders or promoters were in a tussle with top managing bodies. At Tata Sons, the controlling shareholders

[32] Navita Mahajan, *Strategies That Led To Failure- Case Study of Corporate Governance, available at* 2063-1-2042-1-10-20160927-pdf. Also *see*, Rishikesha T. Krishnan, *Ranbaxy: Fall of an Icon, available at* www.thehindubusinessline.com/news/variely/ranbaxy-fall-of-an-icon/article4784955.ece(last visited on October 16, 2017).

[33] *See*, Asish K Bhattacharya, *United Spirit Limited- A Case of Corporate Governance Failure?, available at* indiacsr.in/united-spirit-limited-a-case-of-corporate-governance-failure (last visited on October16, 2017).

[34] *See*, Section 186, Companies Act, 2013.

(Tata trusts, which own 68% stake) had lost faith in its chairman to lead the group and subsequently replaced him[35]. Ousted chairperson Cyrus Mistry raised very serious question of corporate governance at Tata Trust. He alleged that the company had suffered huge loss due to Mr Ratan Tata's style of working or his strategies. His allegations include a loan of a large sum to Shiva group-close to Mr Tata, fraud at Air Asia, the implication of several members of Tata Group in 2G Spectrum scam, an affordable car whose production cost were higher than selling price etc. According to him, this is shareholder's money, not of Mr Tata…governance charter across the Tata Trust needs to become more "accountable and transparent"[36].

On the other hand, Mr Murthy, founder of Infosys, raised serious objections about higher compensation to executives,[37] acquisition strategies and appointment of independent directors. He publicly expressed his unhappiness over misuse of shareholder's money. Apart from this, allegations were also made about several executives being benefitted from acquisition of Israeli automation firm Panaya for USD 200 million. However, in initial investigation by SEBI, nothing wrong was found. In mid of August, conflict between board and founders escalated, and Vikas Sikka stepped down. Nandan Nilekani is made new CEO and he promised to bring transparency in board functioning. In the meantime, SEBI also said that it will look into the violation of corporate governance's norms at Infosys afresh.

V. Conclusion

There is no doubt about the fact that, in a little span of time (one and half decade), standards of Indian corporate governance have improved substantially. There have been constant attempts to bring its legal and regulatory framework at par with the international standards and practices. But this is one facet of the coin. The other facet of the same coin reveals some different story. The reality is that, in spite of strong legal and regulatory framework, gross violations of corporate governance norms are very common in India.

The above-mentioned cases of failure of corporate governance in India reveal some points. *Firstly*, the big brand name does not provide a guarantee of observance of corporate governance norms. *Secondly*, in family businesses

[35] *See*, K. T. Jagannathan & Sanjay Vijaya Kumar, *Corporate Governance: A Tale of Two Titans*, The Hindu, March 04, 2017.

[36] *See, Corporate Governance: Cyrus Mistry Now Wants Govt to Examine Tata Trust, available at* Indianexpress.com/article/business/companies/corporate-governance-cyrus-mistry-now-wants-govt-to-examine-tata-trust-4412621/ (last visited on October16, 2017).

[37] The severance package of Rs.17.38 crore to former CFO, David Kennedy's compensation $868,250 million, Vikas Sikka's annual package of Rs.49 crore. *See*, *The Infosys Problem: Sikka's Pay, Corporate Governance and Upset Founders*, Business Standards, February 10, 2017.

such as Tata, Sahara, Satyam or USL, implementation and monitoring of corporate governance is a difficult task. *Thirdly*, right from Satyam to Ranbaxy, auditors are always in the dock, but still out of control. Ensuring the independence of auditor is most challenging and important job for regulatory authority. *Fourthly,* concern relates to the role of independent directors in the company. There is an old saying 'to whose bread you eat, you sing his song'. But in the case of independent directors, it is totally opposite. They take money from investments of shareholders but act in the interest of management. Satyam, Sahara, Tata, Infosys or Ranbaxy, all have independent directors of high repute. Independent directors of all these companies have earned big name, reputation, and creditability in their concerned field. But they failed to set an example of good 'independent' director. Now only time will tell what action regulatory authority will take against them if found guilty. *Fifth***,** Last but not the least, relates to the regulatory authority (SEBI). In spite of empowered with vast monitoring powers, it fails. It comes into action for damage control. Cases of books of companies having wrong entries, stage- managed audits, fake filed information are coming before it right from Satyam, but it still failed in Ranbaxy. It shows that the authority is required to be more prompt, diligent and conscious of going through the companies records.

Environment of corporate governance in India is not in good state, because how board and promoters are behaving, is not a good direction in which healthy business practices should be conducted. Therefore, it is high time for management of companies and regulatory authority to ensure that board of the company is independent to ensure higher level of transparency in the functioning of the company, audits are truthful, meaningful and independent and independent directors are not show pieces of company.

SUPREME COURT CATALYSING OVERHAULING OF ANTI-CORRUPTION INSTITUTIONS - SPECIAL CASE OF CBI

*Gulshan Kumar**

I. Introduction

Each country of the world irrespective of its development level whether under developed, developing or developed and irrespective of its political philosophy whether tilted towards capitalism or communism is afflicted with the grave malady of corruption. Whether it's the national or international agencies like world bank, IMF, Transparency International etc , all are obsessed with the same idea of how to eradicate corruption which acts and spreads like a cancer thereby continuously weakening the immune system of a country by making dent on the social, economic, political and cultural fabric of a nation. It is so rampant in each civilisation permeating through every public or private activities that it has become a way of life**.** Supreme Court perceives corruption as a violation of human right and a threat to nation's economy.

One of the most precipitating factor which is giving due recognition to the endeavours of Supreme Court in eradicating grand corruption is the soaring public discontent against this curse. The kind of landmark judgments and orders in curbing the menace of corruption is not only manifesting the constitutional legitimacy but also popular legitimacy of judicial activism. While tracing the legacy of social action litigation since 1980s, Public Interest Litigation has come a long way passing through the phases of enriching human right jurisprudence and matters of social concern to anti-corruption litigation with considerable visibility after 2000. A congenial environment of wafer thin majorities of facile coalition government in 1990s with their incapacity and unresponsive attitude to curb scandals involving high officials provided a viable avenue for the Supreme Court to show impactful activism against conscience shocking grand corruptions. It was supported by public spirited lawyers and awakened civil society which played a crucial role to exhort Apex Court's activism.

II. Role of Supreme Courts and Its Expanding Jurisdiction to Curb Corruption

The *modus operandi* of Supreme Court in its fight against corruption can be categorized into three legal remedies. *Firstly*, stringent and insightful directions and orders to bring systemic overhauling of anti-corruption institutions

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to augment their capacity, efficacy and impartiality through suitable appointment procedure, methods of working and giving due recognition to their instructional capacity. *Secondly*, by invoking new judicial techniques like continuous mandamus as suitable alteration to its existing writ of mandamus for ongoing judicial oversight of investigation into high profile corruption cases to bring them at their logical end. *Thirdly*, sticking to its traditional legal remedy of quashing the executive actions if vitiated by vice of illegality without pronouncing any compensatory orders.[1]

A. Structural and functional overhauling of CBI

For every successful criminal prosecution to meet its logical end of convicting the accused, investigation, which largely comprises of collection of incriminating evidences, must be fair, impartial and devoid of any external influences. Where the question involves the investigation by premier investigation agency of the country like CBI, then it itself instil a public confidence of an impartial inquiry irrespective of the high and mighty who committed the offence. But this untarnished image of CBI has suffered a serious jolt shaking the conscience of the people at large when instances of its acting on behalf of political masters came to the light and lamented by the Supreme Court as parrot in the cage in popularly called Coalgate scam.

The Apex court has emphasized upon three pronged strategy to strengthen the CBI at structural and functional level. *Firstly*, the Court enunciated a new method of judicial scrutiny by suitably altering the traditional writ of mandamus to the writ of continuous mandamus. This procedural innovation empowered the court to keep a continuous vigil on the course of investigation by the agency through issuing of mandamus orders during the investigation to keep it on the track. Supreme Court draws constitutional legitimacy for issuing such interim orders from Article 32 of the Constitution read with Article 142 which explicitly empowers the Supreme Court to do complete justice. By executing this innovative writ, Supreme Court asserted and assumed power to itself for monitoring the investigation till a police report pertaining to such investigation is filed under section 173 of Criminal Procedure Code, 1973. Frequent issuing of interim orders kept the CBI to be accountable at each stage of investigation. At the same time, it assures an impartial and effective inquiry as it acts as a bulwark against any political or administrative pressure on investigating officer.

[1] Arghya Sengupta, Anti-Corruption Litigation in the Supreme Court of India (Open Society Foundation, March, 2016).

Secondly, the Supreme Court tried to make the judicial proceedings truly participatory by allowing the counsel for the petitioner and interested parties to be appointed as amicus curiae to make their representations in brief to the court. *Thirdly*, it emphasized the urgent need to overhaul the structural and functional aspect of CBI as an institution and gave judicial directions by expansive interpretation of Article 32 and 142 of the Constitution to do complete Justice.

(i) Tailoring Structural Reforms

Though structural alteration of CBI should come from the legislature or executive but Supreme Court found the constitutional justification to reform CBI on the principle that where the executive fails to fill the lacuna in legislation then judiciary must come forward to provide a reliable solution till it gets a formal enactment from the legislatures.[2]

The inactive and indolent altitude of apex crime investigative agencies like CBI which was reeling under the political pressure and not more than a weapon used in the hands of ruling government succumb the rivals came into question in a much hyped case, *Vineet Narain* v. *Union of India*[3] also popularly known as Jain hawala diary case, involving high and mighty in a politician, official and criminal nexus threatening national security, sovereignty and public breach of trust. A public interest litigation was filed by an investigative journalist alleging the future of CBI to nab the culprit on after seizure of diaries containing high profit nexus between politicians, bureaucrats and terrorist organization compromising national security. Justice J. S. Verma who authored the judgment, came down heavily on futile attempt of CBI in its prosecution by adopting an indolent attitude in its investigations.

The real issue to be contested was whether the court under its review jurisdiction can interfere in the ongoing investigation through judicial oversight especially when these agencies are accountable to the executive. Supreme Court taking cognizance of the matter explicitly remarked the inability and servitude of crime prosecuting agencies in matters where high profile people are involved. Despite the overall control and responsibilities of functioning of these investigative agencies is subjected to executive direction but a dire need to insulate these agencies ever from their controlling authorities was emphasized.

Supreme Court came out with stringent directions to the government for the overhauling of investigating agencies like CVC, CBI and Enforcement Directorate. The Apex court envisioned the path breaking structural reforms in

[2] *Supra* n.1.
[3] AIR 1998 SC 889.

these agencies and asked the government to make them autonomous body devoid of any executive influence. Supreme Court was very conscious of the need to liberate the CBI from influence of whims and fancies of the government therefore it directed the government to drastically reform the structure and functioning of the premier investigation agency. To make the CBI free from clutches of executive and to infuse probity in its functioning, director of the CBI should be selected from the panel of experienced IPS officers in criminal investigation with impeccable integrity and recommended by committee headed by Central Vigilance Commissioner and Home Secretary and Secretary (Personnel) as members. Opinion of the incumbent CBI Director should be taken care of. Final call of the selection shall be done by cabinet committee of appointment.

Supreme Court directed the government to accord statutory status to CVC and making it a multi-member body. Head of this institution should be screened through a panel of high integrity civil servants prepared by cabinet secretary and to be recommended by a committee comprising Prime Minister, Minister of Home Affairs and Leader of Opposition in Lok Sabha. Such recommended candidate shall be appointed by President. CVC should be entrusted with the responsibility of supervising the functioning of CBI to maintain its independent investigation.

Supreme court also made observations regarding Enforcement Directorate to make it more effective by selection of the director on recommendation of multi member committee comprising Central Vigilance Commissioner as a head and Home Secretary along with Secretary (personnel) and Revenue Secretary as members . He should be appointed for minimum two years and there should not be any premature information given to the press.

(ii) Removing Functional Hiccups

For a fair, impartial and independent investigation of crime where suspects constitute a coterie of high profile influential, a dire need was felt to obliterate functional hiccups of CBI. Apex Court lamented on the functioning of CBI in *Vineet Narain Case* and urged that to function effectively and without fear. Director of the CBI should be given a stability of tenure of two years from the date of joining irrespective of his superannuation. He should not be transferred except any other important task assigned to him. He should be free to appoint heads of investigation teams under him. The procedure of investigation, search, seizure or arrest must be complied with criminal manuals of Criminal Procedure Code , 1973 and any deviation from it should attract disciplinary action.

To make the functioning of CBI more transparent and responsive to people, a document containing its working should be made public within three months of start of investigation and genuine grievances of the public should be redressed without compromising the operational requirements of the agency. Supreme Court was very strict on time frame provided for sanctioning for prosecution by the government to be within three months with additional one month in exceptional cases after consultation of Attorney General or any law officer of his office.

B. Purposive Statutory Interpretation liberates CBI of mandatory prior approval

The major obstacle which the premier investigation agency was suffering from in its functioning was the prior approval of the government to initiate an investigation. This became handy weapon for the ruling governments to deliberately delay the inquiry whenever there were influential people involved. To eradicate the malaise of corruption, another procedural reform for the effective investigation against person holding high public offices was the obliteration of single directive which was done by the Honourable Supreme Court in *Vineet Narain Case.*[4] Apex Court held that where the allegation of corruption against any privileged officer is direct and substantiated by *prima facie* evidence then differentiation of persons depending on their status lacks rational basis. Therefore, requirement of single directive need not be stressed in such cases but where allegations of corruption seem to be suspicious and with corrupt motive, then this statutory safeguard of single directive can be invoked.

However the government was quick to respond as it led to dilution of its authority to control the investigation by CBI which could be used as a targeted weapon against their political opponents and consequently added section 6A as a mandatory requirement for CBI to investigate a case against person above the rank of joint secretary. Whether the CBI as a premier investigation agency is insulated enough in its working from those who are close to this establishment, R.K. Raghavan, the former Director of CBI, answered it in negative. He described CBI as an appendage of the executive because of the restrictions imposed on it which tie its hands. The foremost restriction is, it finds itself crippled and lacks jurisdictional authority to investigate suo-motto any crime which involves any government officer above the rank of joint secretary as per Section 6A of Delhi Special Police Establishment Act, 1946[5] which mandates the prior sanction

[4] *Vineet Narain* v. *Union of India,* AIR 1998 SC 889.

[5] Delhi Special Police Establishment Act,1946, s.6A.

of central government before initiating investigation which more often is deliberately withheld or at least delayed. [6]

In *Subramanian Swamy* v. *Director, Central Bureau of Investigation and another*[7]**,** judgment authored by Chief Justice of India , R.M. Lodha on May 6, 2014 reiterated the earlier position of *Vineet Narain case* by declaring single directive of the central government regarding CBI investigation invalid. Defining corruption as the enemy of nation and holding the position that public offices cannot be the workshop for personal gains, Apex Court strengthened the CBI by declaring that it does not require prior sanction of the government before conducting investigation against those who are at the higher echelons of the administrative hierarchy. It said :

> Section 6-A(1), which requires approval of the Central Government to conduct any inquiry or investigation into any offence alleged to have been committed under the PC Act, 1988 where such allegation relates to (a) the employee of the Central Government of the level of Joint Secretary and above and (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, government companies, societies and local authorities owned or controlled by the Government, is invalid and violative of Article 14 of the Constitution. As a necessary corollary, the provision contained in Section 26 (c) of the Act 45 of 2003 to that extent is also declared invalid.

In an another landmark decision of Supreme Court in *Manohar Lal case*[8], CBI's functioning got smoothened by removing the major hiccup requirement of prior sanction of government in case involving government servant above the rank of joint secretary under section 6A of Delhi Specials Police Establishment Act. This filtration mechanism has been done away with in all court monitored CBI investigation. CBI's functionality got another boost after the Supreme Court verdict in a similar case justifying the High Court's order of CBI investigation without approval of state government as mandated by Section 6 of the Act.[9] In this case Supreme Court dismissed the argument and held that section 6 of Special Police Act itself confer jurisdiction on CBI to investigation an offence committed within territorial jurisdiction of the State with its prior approval. Section 6 in no way curtail or dilute the power of judicial review exercised by High Court and irrespective of existing statutory restriction

[6] R.K. Raghavan, *CBI not Subordinate to CVC, Supreme Court Order not a Reflection on its Working,* The Tribune, Feb. 4, 2012.

[7] (2014) 8 SCC 682.

[8] *Manohar Lal Sharma* v. *Principal Secy.* (2014)2SCC53.

[9] *State of W.B.* v. *Committee for Protection of Democratic Rights* (2010) 3 SCC 571.

imposed by this section on court, High court is not bound in its exercise of judicial review powers and can fairly order CBI inquiry even without approval of State government.

Similarly, setting aside the mandatory requirement under section 6A of prior sanctioning of government, Apex Court justified its reasoning on the basis that the purpose of section 6A is to protect the persons at decision making level from malicious prosecution or vexatious enquires and to check frivolous complaints and the same purpose can be served by approaching the Court which monitored such CBI investigation by the victim officer to protect himself. Court monitored investigation ensures an effective check on CBI to misuse its investigating powers. Once the court orders the CBI to inform it about the progress in investigation regularly which though an exceptional order in extraordinary situation where large public interest is at stake, then procedural formalities like section 6A cannot impede the legitimate exercise of constitutional power by Supreme Court under Article 32, 136 and 142 of the constitution.

Apex court draw a parity of reasoning by stating that when inspite of mandatory requirement under section 6 of the Act, High Court is within its jurisdiction to order CBI injury into a case happened to be in its territorial's jurisdiction without the approval of State government, then section 6A on the same principle cannot be invoked to inhibit exercise of power by Supreme Court within its constitutional limit. Besides court monitored investigation not only put a check on ulterior motive of CBI to unnecessarily harass or implicate innocent senior officer but also check the misuse of delaying tactics or deliberately prolonging the investigation.

C. Asserting Power to order CBI Inquiry –Guarding Public Interest

Another weapon in the armoury of Supreme Court to strengthen CBI and to shed its dependence on government is its assertion and assuming power of executive to order CBI inquiry and to lead the impartial investigation to its desired end by continuous judicial scrutiny of the course of investigation and its progress albeit the power to be used sparingly.

In *Committee for Protection of Democratic Rights* case[10], contention raised regarding jurisdictional overreach by the High Court in ordering CBI inquiry into a cognizable offence committed within the territorial jurisdiction of a state without invoking the prior approval of that state government was dismissed by Supreme Court. Apex court explicitly declared that High Court's power was exercised within the constitutional jurisdictional limit and finds its legitimating

[10] *Ibid.*

basis under Article 226 of the Constitution. The allegation of infringing the federal structure of the Constitution and violation of constitutional principle of separation of power was without any basis. Constitutional Courts, i.e., Supreme Court and High Court, possess not only powers and jurisdiction but also are under constitutional mandate to protect fundamental right zealously and vigilantly.

However the Apex Court was very quick to define the contours of this power in ordering CBI investigation and advocated a self-imposed ban on such exercise of powers otherwise CBI will be flooded with cases of routine nature and credibility of this premier agency will be at stake due to unsatisfactory investigations. Though court was reluctant to prescribe any inflexible guidelines where courts of high and highest judicature can order such inquiry by CBI but it should be used sparingly. This extraordinary power under Article 32 and 226 must be used cautiously and only in extraordinary circumstances when there is a need to infuse credibility and instil confidence of people in investigation or where crime committed has national and international ramifications and in situation to do complete justice and ensuring protection of fundamental rights. This sparing exercise of power by the High Court is an earlier reiteration of the Supreme Court in *Minor irrigation case*[11] where Apex court directed the High Court to order CBI investigation only when there is prima facie material on record requiring the CBI investigation.

Supreme Court delineated the purpose of ordering CBI inquiry into an alleged crime by stating that justification of such inquiry rest on the retaining of public confidence in an independent and impartial inquiry. Court monitored investigations are progressed properly to its logical conclusion as such investigation exhibits the absence of biasness and subjectivity.[12]

D. Court Monitored CBI Investigations- Bulwark against Extraneous Influences

Faulty investigation to screen the offenders resulting in low conviction rate stressed the need to judicially monitor such investigation. Law Commission of Indian in its 239th report[13] particularly dealt with the concern of expeditions investigations against influential public personalities. The commission deliberated on the factors of delay in trial and culled out reasons for such delay like general apathetic attitude of the police in registration of FIR, Investigating officer reeling under the pressure and adopting a pusillanimous attitude when culprit is member

[11] *Minor Irrigation & Rural Engg. Services, U.P.* v. *Sahngoo Ram Arya* (2002) 5 SCC 521.

[12] *Manohar Lal Sharma* v. *Principal Secy.* (2014) 2 SCC 53.

[13] Law Commission, *Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities,* Law Commission Report No 239 (March, 2012) paras 2.1-2.7.

of ruling government, large scale corruption in police department to slow the process, lack of expertise, requirement of sanction for prosecution by the government etc. Such delaying tactics often put a considerable impediment in trial as it ensures sufficient time to the accused to win over or intimidate the prosecution witnesses.

To ward of this tendency of investigative agencies like CBI to stifle the prosecution, Supreme Court has adopted a lenient attitude towards allowing a continuous judicial monitoring of investigations. Such judicial oversight on the one hand instil a fear in investigative agency not to adopt a callous altitude and on the other hand it garners the public supports and try to repose the popular faith in criminal justice system.

Though to keep check on grand corruption cases, under Prevention of Corruption Act, constitution of special courts are prescribed to reduce inordinate delays in investigation process but before it reaches to the judicial forum, the state police or CBI has already caused a considerable delay which thwarts the justice delivery system. Therefore, court intervention throughout investigation period by interim orders becomes imperative.

In catena of decisions, Apex Court justified the judicial scrutiny of investigation for securing public interest. In *State of Bihar* v. *Ranchi Zila Samta Party*[14], petitioner accused the police to deliberately slow down the investigation into a huge animal husbandry scam where public funds were embezzled. Laxity in filing report against accused and constant external interference from political masters almost halted the investigation process. Patna High Court transferred the case to CBI which was upheld by the Supreme Court and ordered the CBI to report to the Chief Justice of Patna High Court from time to time . Apex court justified its orders on the principle that if investigation shakes the confidence of people in criminal justice system then judicial monitoring of such investigation is a matter of public interest and can be asked for through public interest litigation. Court also observed the unavoidable political influences over local police thereby requires his transfer of case to an independent body like CBI. *Vineet Narain case* was another landmark manifestation where judicial monitored investigation was carried out along with structural and function reforms in the CBI with objective to make it insulated from clutches of ruling central governments.

Judicial oversight of investigations into large scams have acquired an institutional feature of anti corruption agencies. Supreme Court has even widened the scope of investigation by CBI which is already underway to address problem

[14] AIR 1996 SC 1515.

of stifling prosecution by relatives of public office holders where the Chief Minister of Karnataka B. S. Yeddyurappa and his relatives were involved in illegal sale of land to a mining company which offered an educational institution owned by his relatives a large sum of donation.[15] Supreme Court observed that local police would be unable to make impartial and fair investigation as they are answerable to the Chief Minister of the State. Apex court justified the judicial intervention in investigation process on the ground that it would ensure rule of law over abuse of process of law.

In *coal block allocation case*[16], Supreme Court delineated the broader contours of judicial intervention in investigation process. It clarified that judicial scrutiny of investigation will be applicable in all cases public interest is jeopardized and it would include in its compass cases where investigation of corruption is hindered by extraneous circumstances including the investigating authority lack of enthusiasm owing to pressure and reluctance on the part of the government to carry out investigation. But to invitee Courts jurisdiction for judicial oversight of investigation, petitioner must provide reasonable circumstantial evidence which depicts hindrance in investigation.

The issue raised in this case was whether prior approvals of central government as required in the statute must be obtained by CBI before prosecuting a case. Supreme Court answered this question in negative as such prior sanction is required with the objective to prevent honest public servants from frivolous or motivated allegations of corruption and when the investigation itself is monitored by the court then it impliedly takes care of such safeguard.

Although Supreme Court was very quick to differentiate court monitored investigation from court supervised investigation as the later involves directly executing the task itself which is explicitly barred by law. Monitoring involves proper direction and get acquainted with the facts and circumstances of investigation to curb delaying tactics of influential people and indolent altitude of investigation agency and to assure fair and time bound completion of investigation.[17]

Apex court also delineated the instances which invoke judicial interference in an ongoing investigation. Court presumes the bonafides of police functioning and should not ordinarily interfere in investigation . But in exceptional circumstances where court finds the misuse of investigating powers and malicious investigation generated out of personal animosity and non bonafide function of

[15] *Samaj Parivartan Samudaya* v. *State of Karnataka,* (2012) 7 SCC 407.
[16] *Manohar Lal Sharma* v. *Principal Secy.,* (2014) 2 SCC 53.
[17] *Ibid*.

police, then court to protect personal and proprietary right of citizen, does interfere in police investigation.

III. CBI Still "Caged Parror"

Though supreme court came out with extensive guidelines for the premier investigating agencies having far reaching consequences on their structural machinery and functional autonomy, such directions seems futile and having no impact on their working in the wake of recent large scale scams leading to the loss of lakhs of crores of rupees to the public exchequer. It jeopardised the national interest and threatened the very base of economy. The shoddy probe of CBI in these high profile cases and even to the extent that CBI is sarcastically termed as parrot in the cage by Supreme Court in infamous Coalgate scandal clearly puts a question mark on the credibility of Supreme Court's directing authority.

Denouncing the India's premier investigation agency as caged parrot and its master's voice by Justice R. M. Lodha in *Coalgate scam case*, Apex Court clearly indicated the susceptibility of CBI to external influence in its investigation. Supreme Courts observation clearly vindicated the opposite party's allegation of misusing CBI as to cover up the wrongdoing of the ruling government, to keep weak coalition partners in line by threatening them to get their parliamentary votes and to keep away political opponents from raising their voices.[18]

The ruling government of present day become the master of CBI and use this so called autonomous and independent agency to subdue the political opponents who try to raise their voice. Be it the threat of disproportionate asset case against Mulayam Singh Yadav and Mayawati or opening of CBI investigation in fodder scam against Lalu Prasad Yadav, the timing and manner of using CBI has made it a whip to carry out nefarious activities of the ruling government. The deafening silence of not appealing against charge sheeted Karnataka Chief Minister by CBI when let off by the court, misuse of bofors scandals by the successive government clearly indicate that CBI has lost its sheen.[19] Even some of the directors of CBI brought disrepute to the organisation who were selected by subverting or tweaking the fair selection procedure and were posted as the protégé of political elite.

[18] Ross Colvin & Satarupa Bhattacharjya, *A "caged parrot" - Supreme Court describes CBI*, Reuters, May 10, 2013.

[19] Prashant Bhushan,*The CBI has to be placed under an independent body to investigate cases without government interference*, The Hindu, July 14, 2017.

Misuse of the power given to CBI Director Ranjit Sinha through unfair means of meeting the accused involved in Coalgate scam and distorting the investigation process finally led the Supreme Court directing him to recues himself from the case. Observers draw the similarity of instances of castigating CBI of compromising its independence as was held in *Jain hawala diary case* when the then CBI director Joginder Singh was accused of hobnobbing with some politicians involved in that case. Judicial endeavours to make CBI an independent agency insulated from ruling government in *Vineet Narain case* through continuous monitoring of investigation seemed to be a futile exercise.[20]

Theoretically, CBI seems to be an independent body with motto "industry, impartiality and integrity". But administratively, it is accountable to Department of Personnel and Training which falls under the supervision of Prime Minister Office. However, in operational matters, agency gets direction from various bosses including courts and anti-graft CVC. The problem with CBI is not only structural but also procedural as well as crippling effect of statutory requirements which though has been eased by the interpretative jurisdiction of the Supreme Court.

The handicap of prior sanctioning of the government as a mandated requirement starts with the very first stage of investigation till appellate stage. The mandated prior sanctioning of central government before initiating any investigation against those handling the affairs of government above the rank of joint secretary responsible for decision making process of the government which has been toned down by the Supreme Court. Even after guilt is established by CBI, prosecution requires nod of the government though such malady has also been cured by Apex Court which directed government not to sit over the requests for sanction for eternity and must dispose of such request within three months. At the appellate stage, where CBI failed to prove the charges in lower court beyond reasonable doubt, it requires the government's sanction to go for appeal which more often denied due to extraneous considerations.[21]

There should be an independent commission to probe the functioning of CBI to test its independence and integrity. Instead of probing each case since its inception, only 10 high profile cases which it investigated should be probed considering the ruling political parties of that time. CBI has incarnated itself not as a caged parrot but in real as a faithful hound dog of authority. CBI, Income Tax Department and Enforcement Directorate are there blood hound dogs which the government uses to silence agitating voices and to make opponent succumb

[20] V. Venkatesan, *Shackles on CBI*, Frontline, May 31, 2013.

[21] R.K. Raghavan, *CBI not Subordinate to CVC, Supreme Court Order not a Reflection on its Working*, The Tribune, Feb. 4, 2012.

to its pressure. Factors which lead to failure of CBI in getting convictions must be probed from the angle of political pressure and corruption in the institution itself etc.[22]

IV. Reforms in CBI

Despite the Supreme Court always coming to rescue the CBI and striving to accord maximum autonomy, it has not performed up to the mark. There is dire need to assert the functional autonomy by the CBI itself. Three wings of CBI which cater to individual area of concern like anticorruption wing, to check economic offences wing and to curb heinous crimes wing, all are integrated and must cooperate with each other as most of the crime spreads to all the three jurisdictional Wings. Apex Court too urged for cooperation of different investigation agencies in a coordinated manner to curb the menace of corruption. CBI & Enforcement Directorate shall share information and work in a coordinated manner so as not to hamper their investigation in any manner. Courts ordered CBI to have full autonomy in its investigation without being influenced by any person or state instrumentality irrespective of their high profile status or rank of person to be investigated or probed. This was the another instance of court monitored investigation where CBI and Enforcement Directorate was directed to submit their progress in investigation in a sealed cover envelope.[23]

Another major reform it requires is to accord statutory status with comprehensive central legislation by substituting the existing handicapped Delhi Special Police Establishment Act, 1946 which crippled its wings as it is mandated to get previous sanction of the state government before it proceeds its investigation in any state. This reform was also endorsed by L.P. Singh committee and 19th report of the Parliamentary standing committee (2007). 2nd Administration Reform Commission also advocated for enactment of new statute to completely govern CBI. 24th Report of Parliamentary Standing committee 2008 unanimously exhort the necessity to strengthen CBI in its legal framework, infrastructure and resources and augmented the idea of conferring powers to take suo-motto cognizance of offences.[24]

There is dire need to insulate the CBI from political interference and to delink it from the administrative control of Government. So long as the powers

[22] Madhav Nalapat, *CBI not a Caged Parrot but a Hound Dog of Authority,* The Sunday Guardian, *available at* http://www.sunday-guardian.com/analysis/cbi-not-a-caged-parrot-but-a-hound-dog-of-authority(last visited Nov. 15, 2016).

[23] *Centre for Public Interest Litigation and Others* v. *Union of India and Others* (2011)1SCC 560.

[24] Prakash Singh,*Trifling with CBI, available at* http://cbi.nic.in/articles/pdf/article_dg_bsf_trifling.pdf(last visited Nov.12, 2017).

of transfer and posting of their favourite officials on deputation to CBI will continue, it would be impossible to make its functioning autonomous.[25] CBI must be accorded a statutory status and required legal mandate coupled with requisite manpower of its own can bring it back to the recovery path.To ensure CBI as an impartial, robust and credible agency, a transparent mechanism for the selection of directors and their fixed tenure must be chalked out. Their induction on deputation to CBI should be in transparent manner.[26]

V. Conclusion

To conclude, there is no fault in the organisation itself as its prestige of being a premier investigation agency of India to which every citizen of India look at with faith of successful investigation can not be lowered. Even today despite of its structural and functional hiccups, this agency is looked at with reverence and even the Apex Court makes no delay in ordering CBI inquiry whenever a case of larger public interest or public faith is involved and CBI has earned it with its skilled and impeccable personnel. There is a need of an efficient leadership and a feeling of faith in this organisations to remove its identity tags of being caged parrot.

[25] *Supra* n. *19.*

[26] Navneet Rajan Wasan, *It would not be Fair to Damn an Organisation for its Ignominious recent Performance and Ignore its Long Term Record,* The Hindu, July 14, 2017.

THE FUNCTIONARIES UNDER THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005: A CRITICAL ANALYSIS

*Dr. Alok Sharma**

I. Introduction

Freedom from any kind of violence is the first element of women's capability for survival and empowerment. However, it is unfortunate that domestic violence against women is a universally accepted reality, which is even justified under certain circumstances.[1] It appears that domestic violence remains concealed in the pretended notions of love, duty, and gender thereby legitimated in its various manifestations. Women in homes are made to suffer in various ways ranging from simple repression to cruelty, hostility, exploitation and subjugation.

At the international level, many initiatives have been taken by the United Nations(UN) regarding violence against women (VAW) in general and domestic violence in particular. At the national level also, the Constitution of India provides for equality and dignity of women in its various provisions. It also provides specifically under Article 15(3) for the affirmative actions to be taken in favour of women so that they can get the substantive equality. It is in this context the Protection of Women from Domestic Violence Act, 2005 (hereinafter the Act) was enacted by the Indian Parliament.

The Act has put in place a comprehensive machinery to ensure the proper implementation of its provisions. It has envisaged the appointment of many functionaries to aid the victims of domestic violence in availing of various reliefs provided for under the Act. The functionaries include the Magistrates, the Protection Officers (generally women), the Service Providers, and lastly police. The reason being that the Act recognises that women hesitate to approach the police to report and resolve the issues involving domestic violence which police generally considers as family matters. Thus, the approach adopted in the Act is victim-oriented and does not depend on police action only however simultaneously, it does not preclude the possibility of getting relief under criminal law through police.

Nevertheless, the most important question arises whether the domestic violence victims are really getting any benefits after creating such important

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1 *See,* Saravanan, Sheela, *Violence Against Women in India, A Literature Review,* Institute of Social Studies Trust (ISST), March 2000.

and special functionaries or like other pro-women enactments remains on paper only. In this paper, an attempt is made to touch upon this aspect of availability and efficiency of these functionaries created under the Act with special reference to the capital of the nation.

II. Evil of Domestic Violence

Prior to 19th century, women led somewhat insecure lives in practically all societies of the world. All the ancient legal systems acknowledged the right of husbands to chastise their wives even using force. Women were completely dependent on men and the standard of their lives related to that of their fathers, husbands and sons.[2] They were confined within the household, so they did not have any political rights and had limited civil rights. In Indian context, it has a peculiar dimension that it is not only inflicted by husband alone but also by other members of his family especially the mother-in-law.

Various social, cultural, political and legal factors are responsible for infliction of domestic violence on women. It continues unabated. After marriage, they are told that they must stay in their marital homes till their death. Instead of being appreciated and cared for, women in their marital homes are made to struggle, serve and satisfy their husbands and in-laws and while doing it if she does anything wrong she invokes rage of her husband and is maltreated. They are the sufferers of domestic violence, deserted or abandoned by their husbands and forced to live in their parental house and generally they do not get any help from police.

The observance of polygamy in some religious and socio-economic groups is a different type of violence that women from these groups must deal with. Notwithstanding the special protections specified for them under Indian Constitution, they continue to be shamed, ill-treated, tormented and deprived of the basic right to live a life with dignity and respect within their marital family.[3] They also face many devastating consequences of domestic violence against them viz., impact on health; on family and children; and on development and economy of the country.

2 *Narada* argues *"the creator has made women dependent as women even of good family fall into ruin by independence."* Although *Yaj–II-175,* said *"woman should be loved but added protected."* Quoted from V.K. Dewan, Law Relating to Offences Against Women (Orient Law House, New Delhi, 1996) p. 33; *Manu* clearly said that a woman needed to be taken care of throughout her life, *"Her father guards her in childhood, her husband guards her in youth, and her sons guard her in old age. A woman is not fit for independence."*Quoted from Wendy Doniger & Brian K. Smith,The Law of Manu (Penguin Books, India, 2014) pp. 197–198.

3 Lawyers Collective, *Domestic Violence and Law, Report of Colloquium on Justice for Women – Empowerment through Law*, Lawyers Collective Women's Rights Initiative (Butterworths, New Delhi, 2000)pp. xiv, xv.

In 2014, National Crime Records Bureau of India has included data on domestic violence under the Act for the first time and reported total 426 cases with rate of 0.1 during 2014.[4] Kerala (140 cases) followed by Bihar (112 cases), Uttar Pradesh (66 cases), Madhya Pradesh (53 cases) and Rajasthan (17 cases) have reported the maximum such cases during 2014.[5] A total of 461 cases were registered during 2015 with the rate of 0.1, showing an increase of 8.2% (from 426 cases in 2014 to 461 cases in 2015) during 2015 over 2014.[6] Bihar (161 cases) followed by Kerala (132 cases), Madhya Pradesh (91 cases), Himachal Pradesh (15 cases), Rajasthan (14 cases) and Haryana (11 cases) have reported the maximum such cases during 2015, these six States together accounted for 92.0% of total such cases reported in the country during 2015.[7] However, it seems that the women who are the victims of domestic violence are either not reporting such cases or unable to report them.

III. Initiatives Against Domestic Violence

At the international level, many initiatives have been taken by the UN regarding VAW in general and domestic violence in particular. The most important of them were Recommendation 19 (GR 19) issued by the Committee on Convention on the Elimination of Discrimination Against Women and the UN Declaration on Elimination of Violence Against Women that called on States parties to take immediate steps to end gender-based violence in family, in community and by State. They called on the States parties to enact national plans of action; to train and sensitize their criminal justice systems; to provide social support to victims and survivors and to collect data and information of VAW in their societies.[8] Therefore, international instruments have forced the nations to enact or modify the legislation on prevention of domestic violence.

As far as India is concerned, in view of Article 51-C[9] and Article 253[10] of the Indian Constitution, the Indian Parliament had enacted the Domestic Violence Act pursuant to the recommendations of the UN Committee on CEDAW and incorporates all provisions of Specific Recommendations that

[4] National Crime Records Bureau of India, Crime in India 2014, *available at* http://ncrb.gov.in (last visited on August 2, 2016).

[5] *Id.* at 91.

[6] *Available at* http://ncrb.nic.in/StatPublications/CII/CII2015/chapters/Chapter%205-15.11.16.pdf (last visited on October 10, 2017).

[7] *Id.* at 91.

[8] Radhika Coomaraswamy, *Human Security and Gender Violence*, 40 Economic and Political Weekly, October 29, 2005, p. 4729.

[9] Indian government has an obligation to follow international norms and standards.

[10] It confers on the Indian Parliament power to enact laws in pursuance of international conventions and treaties.

form part of GR 19 of 1992.[11] The Act is in conformity with the UN Model Legislation on Domestic Violence that provides comprehensive guidelines for States parties in drafting legislation on domestic violence.[12] Therefore, standard set in the international instruments have been the main source of inspiration for enactment of the Act.

IV. The Protection of Women from Domestic Violence Act, 2005

A. Introduction

The Act[13] is an endeavour on the part of Parliament to recognize and strengthen women's right to home without violence. It is the first step towards bringing women's human rights into their private lives. It provides a civil remedy for protection of women from domestic violence and to prevent its incidence in the society.[14] Domestic violence is considered as a silent crime, which was not defined in Indian legal discourse prior to 2005. The Act is a landmark legislation in this regard as it provides a statutory definition of domestic violence in a comprehensive manner by including not merely physical abuse but also multiple kind of abuses viz., emotional, economic and sexual, in which violence within family is manifested and affects women.

Further, under section 37 of the Act, the Central Government made the requisite Rules, for the proper implementation of the Act. These Rules have laid down complete procedure to deal with trial of domestic violence complaints filed under the Act, judiciously and promptly so that the women victims are not put to harassment. The Act also takes into consideration some other issues for the convenience of the victims. The Act seeks to generate an impact by providing

[11] Statement of Objects and Reasons.-
Domestic violence is undoubtedly a human right issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in its General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.

[12] Article 11: "All acts of gender based physical and psychological abuse by a family member against women in the family, ranging from simple assault to aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliating verbal abuse, forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry or related violence, female genital mutilation, violence through prostitution, against household workers and attempts to commit such acts shall be termed 'domestic violence'."

[13] The Protection of Women from Domestic Violence Act, 2005 was brought into force on 26.10.2006.

[14] Preamble: "An Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto."

an uncomplicated manner of approaching the legal system by creating special machinery under it.

Hence, it provides for an alternative system i.e. the system of Protection Officers (PO) and Service Providers (SP) that is easier for the victims of domestic violence to understand and provides an atmosphere of security. The PO is supposed to be a friend, well-wisher and accessible to ensure the victims that they get timely reliefs. Thus, the purpose of theAct is laudable. Following is the critical analysis of the availability and efficiency of the functionaries created under the Act to check the success of the Act in the desired area.

B. The Functionaries under the Act

The Act in Chapter III has created a comprehensive machinery to ensure the effective and speedy implementation of its provisions and has appointed many functionaries to assist the aggrieved persons in availing the reliefs provided by the Act. Section 5 of the Act imposes a common duty on all the functionaries (police officers, service providers and Magistrate) to inform the aggrieved persons of their available rights, reliefs and services under the Act. The various available functionaries are as follows

(i) Central Government and State Governments

The Government is the administrative authority to enforce the Act, therefore, there are many duties which are assigned to the Central Government as well as to the State Government. Under Section 37 the Central Government may make rules for carrying out provisions of the Act. Under Section 11 every State Government is required to take all measures to ensure that the Act is given wide publicity through public media at regular intervals; to give periodic sensitization and awareness to all functionaries (government officers, police and the judiciary); effective coordination between services provided by all ministries and departments concerned and conduct periodic review; and Protocols for functionaries (including courts) are prepared and put in place. Further, State governments have to appoint POs and register SPs; list of SPs must be given to POs and published in newspapers and government websites.

(ii) Metropolitan Magistrate

The most important functionary under the Act is the Metropolitan Magistrates[15] as the primary responsibility to implement the Act rests on them.

[15] Section 2(i): "Magistrate" means the Judicial Magistrate of the first class, or as the case may be, the Metropolitan Magistrate, exercising jurisdiction under the Code of Criminal Procedure, 1973 in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place.

It is important to note that for determining whether any act/omission/commission or conduct of respondent is domestic violence or not is left to the wisdom of Magistrate.[16] An effort has been made under the Act to simplify and make effective methods of filing domestic violence complaints and obtain reliefs, for example an application to seek any relief for aggrieved person can be filed by aggrieved person herself or a Protection Officer or any other person to the Magistrate who can grant relief after considering the Domestic Incident Report (DIR)[17] filed by PO or SP. The reliefs sought for may include issuance of an order for payment of compensation or damages for acts of domestic violence[18]; protection order[19]; residence order[20]; monetary relief[21]; custody order[22]; and compensation order[23]. To provide speedy justice the Magistrate shall fix the first date of hearing in 3 days from date of receipt of application and dispose it in a period of 60 days from date of its first hearing.[24]

Under Section 13, the Magistrate gives notice of date of hearing to Protection Officer to serve or get it served within 2 days or any reasonable time from the date of receipt. Further, as the emphasis of the Act is also on reconciliation, the Magistrate can direct respondent or aggrieved person, either singly or jointly under Section 14 to go through counseling with any member of SP and fix next date of hearing within 2 months. Due to same spirit under Section 15, the Magistrate can take assistance of a Welfare Expert, preferably a woman. If the Magistrate considers it proper, Section 16 permits her to conduct proceedings in camera and under Section 24 she may provide copies of her orders free of cost to the parties, police, and SP. However, interestingly, Protection Officers are not included here which is a lacuna as Protection Officer has no information about the progress in any case. Further Rules 6 and 7 provide for filing of application and affidavit to obtain *ex parte* orders

[16] Section 3, Explanation II: For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.

[17] Rule 5. - Domestic incident reports.- (1) Upon receipt of a complaint of domestic violence, the Protection Officer shall prepare a domestic incident report in Form 1 and submit the same to the Magistrate and forward copies thereof to the police officer in charge of the police station within the local limits of jurisdiction of which the domestic violence alleged to have been committed has taken place and to the service providers in that area.
(2) Upon a request of any aggrieved person, a service provider may record a domestic incident report in Form I and forward a copy thereof to the Magistrate and the Protection Officer having jurisdiction in the area where the domestic violence is alleged to have taken place.

[18] Section 22.

[19] Section 18.

[20] Section 19.

[21] Section 20.

[22] Section 21.

[23] Section 12(1) and (2).

[24] Section 12(4) and (5).

respectively to the Magistrate.

(iii) Protection Officer

The second most important functionary who is the backbone of the Act is the Protection Officer.[25] The entire machinery of the Act hinges on the Protection Officers, who shall act as a link between the judicial machinery and the victims. The appointment of Protection Officer is based on the idea that women require more than police alone therefore, a Protection Officer is needed to enable a multiagency and synchronized response so that women would be facilitated in accessing various social services.[26] The State Government shall appoint them and they should be preferably women having requisite qualifications and experience. They are under control and supervision of Magistrate and have to perform duties imposed on them by the Magistrate and the Government.The rules also lay down the procedure for receiving information about commission of domestic violence.

Any woman who is the victim of domestic violence may initiate proceedings before the Magistrate, or any such proceedings may be initiated by the Protection Officer who may be informed of such domestic violence by any person who has reason to believe that it has occurred. After receipt of such a complaint, the Protection Officer shall prepare a Domestic Incident Report which shall be forwarded to the police officer of that concerned area and the service providers in such area. It shall also be sent to the Magistrate for taking cognizance of the matter.

Therefore, the Act prescribes many duties and functions of Protection Officer. It says that the Protection Officer will assist the Magistrate in the discharge of his functions; submit DIR to the Magistrate upon receipt of complaint of domestic violence; make an application to the Magistrate for aggrieved person claiming issuance of a protection order; ensure that aggrieved person is provided legal aid; maintain a list of all SP providing legal aid, counseling, shelter homes and medical facilities; make available a safe shelter home if aggrieved person so requires; get the aggrieved person medically examined; ensure that order for monetary relief under section 20 is complied with and executed; and perform other duties.[27]

In addition to these duties, Rule 8 also prescribes many duties of

[25] Section 2(n): "Protection Officer" means an officer appointed by the State Government under sub-section (1) of section 8."

[26] Indira Jaisingh, *Bringing Rights Home: Review of the Campaign for a Law on Domestic Violence*, 44 Economic and Political Weekly, *October* 31, 2009, *p.51.*

[27] Section 9(1).

Protection Officer including to provide aggrieved person information about her rights; to prepare a "Safety Plan"; to inform SP that their services may be required; to invite applications from them seeking particulars of their members to be appointed as Counsellors or Welfare Experts; to scrutinize their applications and forward list of available Counsellors to the Magistrate; to revise this list once in three years and forward revised list to Magistrate; to provide all possible assistance to aggrieved person and her children; to liaise between the aggrieved person and others; and to protect the aggrieved persons from domestic violence.

The Rules further prescribes certain other duties of Protection Officer.[28] However, Protection Officer is not a police officer and does not have any authority to forcibly seize any article or take over possession of any premises. Further, Protection Officer cannot probe into cognizable offences and are not expected to confiscate weapon(s) involved in domestic violence.The Protection Officer and members of SP are considered as public servants under section 21, Indian Penal Code[29] and no legal proceeding can be instituted against them for any damage caused or its likelihood which is done or intended to be done in *good faith.*[30] Further, Protection Officers can be penalized for failing/refusing to discharge their duties[31] with a proviso that prior sanction of State Government is required.[32]

(iv) Service Provider

Service Provider,[33] generally NGO, is another additional functionary to aid and assist the Courts, the Protection Officer and aggrieved person. They have been identified by Government. They belonged to five subcategories providing different services. A Service Provider is any organisation whose objective is the protection of women and is involved in providing legal aid, medical or financial assistance to women.Thus, a voluntary association registered under Societies Registration Act; a company registered under Companies Act or any organization whose objective is protecting the rights and interests of women by

[28] Rule 10: The Protection Officer, if directed to do so in writing, by the Magistrate shall conduct a home visit of the shared household premises and make preliminary enquiry if the court requires clarification, in regard to granting ex-parte interim relief to the aggrieved person; after making appropriate inquiry, file a report on the emoluments, assets, bank accounts or any other documents; restore the possession of the personal effects including gifts and jewellery of the aggrieved person and the shared household to the aggrieved person; assist the aggrieved person to regain custody of children and secure rights to visit them under his supervision; assist the court in enforcement of orders in the proceedings under the Act; take the assistance of the police in confiscating any weapon involved in the alleged Domestic Violence.

[29] Section 30.

[30] Section 35.

[31] Section 33.

[32] Section 34.

[33] Section 2(r): service provider means an entity registered under sub-section (1) of section 10.

any lawful means including providing of legal aid, medical, financial or other assistance can be appointed by the State Government as a service provider for the purposes of this Act.[34] Rule 11(3) provides detailed guidelines and requirements for their registration. The Act prescribes their duties and powers to record of DIR; to get aggrieved person medically examined; and to provide shelter in shelter homes.[35] Further, Counsellors[36] shall also be appointed from these organizations for reconciliation between the parties. They are protected for all *bona fide* actions done in exercise of their powers under the Act to prevent commission of domestic violence.[37]

(v) Police Officials

Apparently, there is not much role assigned to the police officials under the Act, but it is found that role of police is mentioned in many provisions of the Act. As police is existing functionary of the State so large majority of victims approach the police stations to file their complaints. From this stage the role and functions of police begin. Firstly, if the information reveals commission of any cognizable offence like grievous hurt, dowry death, Section 498A etc. then police must perform their normal duties and take appropriate action of investigation, arrest etc.[38] Secondly, Section 5 requires them to tell the victim about her rights and reliefs available under the Act. Thirdly, they can refer the victim to the Protection Officer for recording of DIR and further actions. Fourthly, they must take cognizance of breach of Protection Order and file a charge sheet. Fifthly, they must comply with all the orders issued by the court requiring their assistance and lastly, police are entitled to get the copies of all the documents filed by various functionaries under the Act and copies of all orders passed by the court so that they are aware of the progress of the cases. However, in practice police expressed the opinion that they have no role to play under the Act and thus they do not follow their duties.

V. The Critical Analysis of Availability and Effectiveness of The Functionaries Under The Act

While a commendable effort has been made to create an alternative, speedy and effective mechanism for the protection of the aggrieved persons

[34] Section 10(1) of the Act and Rule 11(1).

[35] Section 10(2).

[36] Rule 2 (c)"Counsellor" means a member of a service provider competent to give counselling under sub-section (1) of section 14;

[37] Section 10(3).

[38] Section 5 and Section 36. Act not in derogation of any other law.—
The provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force.

nonetheless there are certain lacunas in the implementation of the Act regarding the functionaries under the Act which has potentially hazardous implications. There are many severe issues related to the infrastructure and facilities requisite for the proper implementation of the Act. Although the Act has endeavored to put in place adequate machinery for its implementation but the deficiency of the functionaries under the Act is impeding its successful implementation.

The Metropolitan Magistrates are the central functionary under the Act as its success depends on how they implement it. For this purpose, they have ample freedom even up to coin their own procedure for trial of certain cases under the Act. However, they rarely coin their procedure to speed up the trial of such cases. The MMs rarely conduct the proceedings in camera. The most unfortunate thing is that they have failed to follow the dicta of the Act as to the time framework for trial of the cases, may be due to heavy workload. There is lot of delay in trial of the cases as the MMs fix the first date of hearing from one and half month to one year and the cases are pending even after 3-4 years. Another grave problem is the implementation of their orders as they are rarely implemented because the Act has not expressly provided for any procedure to be followed in this regard. Therefore, this prevailing situation is quite problematic and pathetic for aggrieved persons.

Further, the courts issue *interim* orders frequently but *ex parte* orders sparingly. The MMs do not generally alter, modify or revoke their orders. The MMs try the breach of protection order as an offence under the Act but imposed punishment of fine only. The MMs do not decide these cases upon the sole testimony of the aggrieved persons and do not frame charges under other sections of Indian Penal Code, 1860 or Dowry Prohibition Act, 1961. The MMs rarely direct the POs to perform any functions for proper implementation of the Act owing to the practical difficulties they face. The MMs have never been assisted by any SPs or Welfare Experts in discharge of their functions as they do not know anything about them. In their absence, the MMs refer matters to the mediation cell in the court for counselling. Therefore, MMs are not able to perform their requisite functions.

The Protection Officer is the second most important functionary especially created under the Act which is mainly responsible for its effective implementation. They are appointed by concerned governments, but all the requirements prescribed for their appointments have not been strictly followed. The department has not appointed any POs on the permanent basis and managing its work by contractually appointed POs who are working in the pathetic conditions. Further, Protection Officers appointed are usually fresh graduates

from non-legal fields and appointed on ad-hoc basis. The MMs and Police officials have undergone compulsory periodic trainings provided by Government for awareness and sensitization on the issues pertaining to the Act but none of the POs undergo any such training because of which they have no information about the DIR or other provisions of the Act at the time of their appointments. They do not have any infrastructure and support staff to assist them. As a result, DIRs are generally sketchy, and possibility of manipulation cannot be ruled out.

The POs have the primary duty to assist the court and the aggrieved persons; receive their complaints; prepare DIRs; and assist them to get legal aid, monetary relief, medical facilities and shelter facilities etc. However, the POs do not make any applications to the MMs on behalf of the aggrieved persons rather advocates file it generally. They were intimidated while serving summons on the respondents and police also do not cooperate or recognize their authority. Therefore, POs do not serve the notice of hearing on the respondents except in rare cases and it has been sent through the process agency/SHO concerned/Nazarat Branch.They also receive reports of breach of protection orders from the aggrieved persons but do not help them much due to their own limitations. Therefore, it appears that except preparing the DIR they do not perform any other functions. Further, they neither get any support from SPs nor from police as they help them only if they have court's orders in that regard.

The Service Providers are generally NGOs but only a few states have listed few of them. However, no SPs have been registered but only identified by the concerned department. The Service Providers, generally have not been provided any training about the Act therefore, they are not aware about their duties and functions under the Act. Similarly, medical and shelter facilities are not available in many states. Insufficiency of funds, lack of transparency in resource allocation, and under-spending of money allocated are common complaints.[39]

Police, the other functionary, do not consider the fact that they have any role to play under the Act. Police do not deal with the breach of protection order as a cognizable and non-bailable offence as provided by the Act and thus do not arrest abuser in such cases of breach of protection order. Police only act when directed by the court to do so. However, the POs and SPs take police assistance in emergency situations of infliction of domestic violence and the

[39] Lawyers Collective, THE FIFTH MONITORING AND EVALUATION REPORT 2012, *available at* lawyerscollective.org (last visited on September 10, 2014).

police accompany them to the place of occurrence, but police do some preliminary inquiry only and do not take any concrete action as directed by the Act.

The Governments do not provide any periodic training to various functionaries for awareness and sensitization about the Act despite being obliged by the Act. Further, Government is not maintaining proper coordination among different functionaries under the Act. Therefore, it appears as if the government is not serious enough to implement the Act in true spirit.

There is a complete lack of coordination among various functionaries under the Act despite being provided for cooperation. The MMs do not have any list of SPs and thus SPs do not get any orders for counselling from the MMs. It is the duty of the POs to do all these formalities and then coordinate among different functionaries, but they do not perform even a single duty required by the Act except filing of DIR and that too in mechanical ways. The main purpose of creation of the POs under the Act was to coordinate among MMs, SPs, Police and aggrieved persons but they had failed miserably. Another reason for lack of coordination among them was non-following of the prescribed guidelines under the Act by them. The resulting impact is the pathetic conditions of the aggrieved persons.

VI. CONCLUSION

It can be said that violence against women is a world phenomenon. It operates to maintain and reinforce women's subordination. Many countries including India enacted legislations prohibiting domestic violence and protecting women from multiple manifestations of its occurrence. The Act has reduced procedural formalities thereby making it easier for the victims to approach the system as it provides for an inbuilt mechanism to facilitate the entire system of access to justice.

However, the implementation of the Act is not uniform across the country due to lack of infrastructure, requisite functionaries, funds and facilities. The *Mahila* courts are heavily overburdened resulting in delay in trial of these cases. Moreover, due to shortage of courts there is high pendency of cases and the prescribed time frame has not been implemented at all thereby victims are not getting any requisite reliefs more than a decade after the Act came into existence, Protection Officers are yet to be appointed in every district as proposed by the Act and only a few states have appointed full time/permanent Protection Officers with independent charge. The Protection Officers are responsible for filing DIRs, helping the aggrieved person in accessing medical aid, legal aid etc. and if they are not available how these functions can be performed. Moreover, they neither

have any experience nor any training to handle and discharge their functions. The lack of general information about the POs and their inadequate numbers were considered as a serious handicap to victims accessing the law. Similarly, SPs have not been registered but notified in some cases. Therefore, the availability and effectiveness of the various functionaries under the Act is not satisfactory at all rather completely failed.

It can be rightly said that merely enacting laws cannot provide justice to the victims in a patriarchal orthodox society. The State must provide all requisites to implement the Act. Lots of funds, personnel, and courts are required to implement the Act as expected. Further, what is more important is the intention of the State to implement it. Thus, if the State is considerate about protecting women at home, it should create appropriate institutions and mechanisms, with proper monitoring, to realize the desired aim of violence free homes. In addition, it is to generate awareness about the Act and inspire people to abide by the laws apart from improving the infrastructure comprehensively for the justice delivery system. However, it is true that the Act does ensure that women are not completely at the receiving end but have at least some weapon to fight back.

SENSITIZING THE SAFETY CONCERN OF ELDERLY PEOPLE IN INDIA: A DESIDERATUM

*Santosh Kumar Sharma**

I. Introduction

Ageing is a natural process, which occurs in each individual's life. It strengthens and emaciates the human body at different stages of life. This phase of life is a matter of great value and responsibility to the society. Value of being aged is the experience, knowledge and maturity to take the right decision. This is the phase of life where society has to pay back in terms of the health, care and security of the elderly[1] people for their contribution. The percentage of the global population aged 60 years or above has rapidly increased from 8.5 % in 1980 to 12.3% in 2015 and projected to rise 21.5% in 2050.[2] The demographic profile depicts that in the years 2000-2050 the overall population in India will grow by 55 per cent while the population in their 60 plus will increase by 326% and those in the age group of 80 plus will increase from 6 million in 2000 to 48 million that will be 700% in 2050.[3] Government has taken several steps to take care health and economic needs for elderly people. The aim is to form a society that does not treat older people as a liability. Having said this elderly people are one of the most vulnerable groups to be victim of crime.[4] This fact is established by the burgeoning crime rate against elderly people.

II. Burgeoning Crimes against the Elderly People: Recent Trends

Elderly people face many problems because of the general perception that this is the age of dependence and every need has to be fulfilled by others. Only those elderly people are secure and happy who are physically fit and financially independent. Why elderly people are vulnerable to be victim of crime? As per population census 2011, population of elderly persons or senior citizens was 1024.6 Lakhs. National Crime Record Bureau (hereafter NCRB) in its

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1 The term 'elderly' is used to refer to population segments such as cohort's aged (say) 60 and above. Though in present time, more accepted terms are 'older persons' 'senior citizens'. The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 defines 'senior citizen' as Indian citizen who has completed 60 years. Though the age for several social schemes is counted differently even age is relaxed on the basis of gender in certain matters of concessions.

2 *Available at* http://www.un.org/en/development/desa/population/publications/pdf/popfacts/PopFacts_2014-4Rev1.pdf (last visited September 5, 2016).

3 *See*, National policy on Senior Citizens, 2011 Draft,*available at* http://socialjustice.nic.in/writereaddata/UploadFile/dnpsc.pdf (last visited September 12, 2017).

4 Chris Phillispson, Ageing (Polity Press, 2013).

latest report 2015 has presented an alarming picture on the increasing crimes against the elderly people.[5] During the year 2015 a total 20532 crimes under various sections of the Indian Penal Code, 1860 (hereafter IPC) were registered against the elderly people. During 2014 total cases were 18,714.[6]

On a careful reading of the statistics on crimes it appears that the prime motive of targeting elderly people is offences against property. The elderly people are victimized being the soft target for the people desperate for money. Delhi as usual is leading the crime rate against senior citizens also from 89 in 2014 to 108 in 2015.[7] It is common to associate old age with not so abled to protect themself and their property, which make them soft target against crimes.

In an empirical research, elderly people were asked whether they feel that senior citizens are soft targets. More than half of the elderly people felt that it is so. Majority of the elderly people felt so because of weakness as the main reason of crimes against them.[8] Some of the reasons,which are responsible for the burgeoning crimes against the elderly people in India, are:

i. Solitary living of the elderly people, due to prevailing concept of unitary families in metro cities or due to youths of the family are settled abroad.

ii. The elderly people are considered as burden on the family economically and they are not fit socially due to generational gap.

iii. Inability due to physical and mental weakness to protect themselves.

iv. Their easily mingling with others who come to them to spend some time with them and ready to listen them.

v. Non-availability of options to choose their maids and escort from few.

vi. Their irritating behavior and ego compel them to live alone as nobody wants to be with them.

vii. Gullibility.

5 NCRB is collecting data for elderly people under a separate chapter 'Crimes against Senior Citizens' only since 2014. Prior to this the crimes related to this class of citizens used to be covered generally. Senior citizens were not treated a class in themselves. *See*, NCRB, Crimes in India-2015 (Ministry of Home Affairs, 2015), *available at* http://ncrb.gov.in/ (last visited September 12, 2017).

6 *Ibid*.

7 Crimes registered against Senior Citizens is shown graphs wise in the Reports, *available at* http://ncrb.nic.in/ (last visited September 12, 2017), under the head crimes in India, 2015 and 2014.These graphs are displaying different crimes committed against senior citizens, their status, states leading and offenders arrested etc. This is a fact well known that prior to this exclusive coverage of crime against senior citizens, these cases used to be covered under the other relevant chapters of the reports i.e. offences against woman etc.

8 The fieldwork for the study was carried out by Help Age India, during May 2011 in 9 cities upon 60+ elderly people and published, A Report on Elder Abuse and Crime in India, *available at* https://www.helpageindia.org (last visited September 12, 2017).

The safety issues of the elderly become complex if two or more factors are clubbed. Like if, the elderly people are living in isolation, none of their family member is there to take care of and they are suffering from some medical issues, such elderly people become the most vulnerable to crime and consequently softly targeted. Similarly old age is also having its different stages: sixty to seventy, and seventy to eighty. Hence, as much they proceed in age, so much they need more and specific attention.

III. Laws to Protect the Elderly People

Problems of elderly people were considered during the colonial period also but not as a class apart. They took certain steps, which were basically for the social security.[9] Most of these laws were related to social security. Indian composite culture and family set up was considered conducive for the elderly people. Elderly people were considered as asset to the family and offences against the elderly people were rare. Our cultural values have made us believe that our parents are the living Gods to us. Elderly people's blessings are considered as the blessings of God. It was not a concern to have specific laws to prevent crimes against the elderly people because this was almost negligible. Another reason we can see that why India did not carried out elderly specific policies either for social security or for crimes against the elderly people, may be because of these were not so considerable issues in terms of population and problems.

However at international level the question of ageing became an issue after commencement of United Nations Declaration of Human Rights (hereafter UDHR). This was initiated by Argentina in 1948 and by Malta in 1969 but successfully it got the voice only when General Assembly of the United Nations asked the Secretary General to prepare a detailed report with appropriate guidelines at international and national level. In 1978 General Assembly decided to hold first world conference on ageing,which was held in Vienna from July 26 to August 6, 1982.[10] First time an international plan of action on ageing was adopted. As a follow up action, Secretary General in 1992 adopted a proclamation to declare the year 1999 as 'International year for older persons' and 1st October as a 'The international day for the older persons'.[11] The Second World

[9] The Pension Act, 1871, The Workmen's Compensation Act, 1897, the Adarkar Commission Report 1944 are few of them.

[10] Recommendation 18 at the World Assembly on Ageing at Vienna, Austria, 1982 (Approved by the United Nations General Assembly in 1982 vide resolution 37/51 and in 1991 resolution 46/91) reads as:Government should: ensure that food and household products, installations and equipment conform to standards of safety that take into account the vulnerability of the aged; encourage the safe use of medications, household chemicals and other products by requiring manufacturers to indicate necessary warnings and instructions for use.

[11] K. Gergen, Social Construction in Context (Sage Publication, London, 2001).

Conference on ageing took place in Madrid in 2004 for declaration and action plan on ageing.

Elderly people specific efforts in India and to make specific policies to bring them into mainstream of social welfare started in 1986 but these could only be fructified in concrete manner in 1999 when first National Policy on Older persons was framed. As per the census data 2011and United Nations reports,[12] India is among the youngest country in the world. We boast of having the largest number of youth population in the world. This may be positive outcome of the sustained efforts in health care, which is improving our life expectancy. India took specific step in the direction of taking issues of the elderly people in 1999 by adopting National Policy on Older Persons.[13] Thereafter, another draft policy on senior citizens has been prepared. Also Ministry of Social Justice and Empowerment, which is the nodal agency for senior citizens, has taken following steps to deal with the concerns of senior citizens:

i. Adoption of National Policy on Older Persons, 1999 (Draft Policy On Senior Citizens, 2011).
ii. Setting up of inter-ministerial committees.
iii. *Vayoshrestha Samman*
iv. Training of manpower for care of senior citizens.
v. Concessions and facilities in various government services, Railways, Banking etc.
vi. Establishment of National Council for senior Citizens.
vii. Other Ministries have also taken steps to look into issues of the senior citizens.
viii. Many schemes of insurance launched by the Government undertaking and private players in that field.

Economic Security Measure taken by the Governmentare:

i. Indira Gandhi National Old age Pension Scheme
ii. Social Pensions by State Government
iii. The Unorganized Workers' Social Security Act, 2008
iv. Post retirement benefits for the employees' of Central Government and State Government.

The Constitution of India is the supreme law of the land. It has guaranteed fundamental rights to all citizens even many of them irrespective of

[12] India has 356 million youth i,e, 28 percent of the total population, *available at* https://www.unfpa.org (last visited September 13, 2017).

[13] It was a step considered in right direction in pursuance of the UN General Assembly Resolution 47/5 to observe 1999 as International Year of Older Persons.

citizenship. Article 14-18 is enshrining the Rule of Law. Article 14 strikes at the root of discrimination. State must ensure equality before law and by any action of the state equally situated persons must not be discriminated. There is hardly any iota of doubt to accept that senior citizens are a class in themselves. Law, which is inherently not able to provide justice and failed to protect them from being exposed to crimes just because of their vulnerability due to being old age, necessarily violates their fundamental right. So, treating elderly people along with others while their interest, needs and state responsibility towards them are greater in comparison of others is violation of elderly people's fundamental right. Meaning thereby state should treat them class apart to provide them security.

Part IV of the Constitution is devoted to the socio economic rights. These are progressive in nature. Article 41 specifically mentions that the state shall, within the limits of its economic capacity and development, make effective provision for securing the right to public assistance in cases of old age, unemployment, sickness, disablement and other cases of underserved want. Entry 24 of list III of schedule VII deals with the welfare of labour including work conditions, provident funds, workers compensation, invalidity/ disability, old-age pensions and maternity benefits, Entry 23 deals with social security and social insurance employment and unemployment. These entries must be read with other entries, which are empowering the legislatures to enact laws on the issue related to security of the people. 'Police' and 'Public order' are state subjects. There is no restriction if States enact specific laws to tackle the safety and security concerns of the elderly people. Those states, which are leading the table of crimes, committed against elderly people must utilize these entries to take up the issues. State of Himachal Pradesh is first state in India, which passed a special legislation to deal with the issues of the elderly people.[14]

Parliament enacted the Maintenance and Welfare of Parent and Senior Citizens Act, 2007.[15] Senior Citizen is defined as 'any citizen of India who has attained the age of sixty years or above'.[16] As the name suggests this is basically a law to give them social security. It includes Parents as well as other senior citizens. For parents being sixty years is not the condition. However this is special legislation and to implement the scheme and to achieve the objective of law a tribunal has to be established in every state under the Act.[17] Further, leaving or abandoning senior citizen by a person having care and protection of

[14] The Himachal Pradesh Maintenance of Parents and Dependents Act, 2001.
[15] Act No. 56 of 2007.
[16] *Id.*, section 2(h).
[17] *Id.*, section 7.

such senior citizen has been made punishable offence.[18] The National Council for Senior Citizens' in its first meeting held in August 2016 discussed as following:[19]

i. Review of the policy for senior citizens at central and state levels.
ii. Review of the programme being implemented by different Ministries for the welfare of senior citizens, such asIntegrated programme for Older Persons (IPOP), Indira Gandhi Old Age Pension Scheme (IGNOAPS) which is a component of National Social Assistance Programme (NSAP), National Programme for Health Care of the Elderly (NPHCE)etc.
iii. Review of the working of Maintenance and Welfare of Parents and Senior Citizens Act, 2007.
iv. Review of measures taken by government for the physical safety and security of senior citizens.
v. Review of measures for the economic well being and financial security in old age, with special reference to pension plans, reverse mortgage scheme etc.
vi. Discussion on senior citizens welfare fund.
vii. Review of health care facilities with special reference to geriatric care, respite/palliative care, home care and health insurance.
viii. Review of concessions and other facilities available to senior citizens.
ix. Review of effectiveness of public administration in safeguarding the interest of senior citizens in the society.
x. Evaluation of the extent of awareness and sensitization of younger generation regarding the special needs and right of senior citizens.

The National Council for Senior Citizens is required to review the measures taken by Government for the physical safety and security of senior citizens. This is one of the mandate[20] to constitute this council, to advise the central and states government on the gamut of issues related to senior citizens, related to the welfare as well as for the enhancement for the quality of life with special reference to the following:

[18] *Id.*, section 24, says "whoever having the care and protection of Senior citizens leaves, such senior citizens in any place with the intention of wholly abandoning such senior citizens, shall be punishable with imprisonment of either description for a term which may extend to three months or fine which may extend to five thousand rupees or with both" and under Section 25 such offence has been declared as cognizable and bailable.
[19] *Available at* http://pib.nic.in/newsite/PrintRelease.aspx?relid=149363 (last visited September 14, 2017).
[20] *Available at* http://pib.nic.in/newsite/PrintRelease.aspx?relid=124561 (last visited September 14, 2017).

i. Policies, Programme and legislative measures
ii. Promotion of physical and financial security, health and independent and productive living
iii. Awareness generation and community mobilization.

Security arrangements generally available in most of the metros in India are:[21]

i. Senior citizens security cell, even Delhi police has planned to issue identification card to senior citizens.
ii. Round the clock dedicated helpline for elderly people.
iii. Special measures to verify all the attendants and maids in service of senior citizens. (However, many of the elderly are hiring their maids and servants without having their verification, which has resulted into commission of crimes by them).
iv. Sensitizing NGOs and other society welfare groups regarding specific attention towards the elderly people living in their locality.
v. Counseling of the elderly people.

IV. Approach of the Judiciary Towards Senior Citizens

Elderly people are forming a group in themselves and because of age, there resistance power decays so is the relevance of self-defense to them. This easy accomplishment of criminal design against elderly people is one of the dominant factors in recording higher number of offences against property rather than body. IPC does not have any specific provision to deal with the crimes against elderly people but like any other class of people. But in changed perspectives of crimes, this must be reconsidered and elderly people must be treated as vulnerable class. Punishment of the same crime which, if it is committed against the elderly people be enhanced. However, we have not many recorded cases, which are specifically dealing with elderly people. Most of the cases have been brought forth are on the interpretations of the provisions of the 2007 Act.[22] In one of the matter, the Kerala High Court held:[23]

> To get the benefit under the Act, parents must be without means or with inadequate means and the children must have refused to maintain him or her. The filial obligation has nothing to do with the children's possessing the parent's property or their succeeding to it in future……..so, we reckon that entire scheme of the Act does not contemplate or provide for resolving property disputes between or among the family members…this Act cannot annihilate the rights of the other members of the family, however laudable or salutary the Act's objective is.

[21] Project Report submitted by Group of Economic and Social Studies to Bureau of Police Research and Development in 2009 *available at* http://www.bprd.nic.in/WriteReadData/userfiles/file/20160918023535796086 4Summary.pdf (last visited September 14, 2017).
[22] The Maintenance and Welfare of Parents and Senior Citizens Act, 2007
[23] *Janardhanan* v. *The Maintenance Tribunal Appellate Authority and District Collector,* 2017(4) KLT454.

Rule 19 framed by the State of Kerala in pursuance of the Act, empowers the District Magistrate to protect the life and property of the elderly citizens living in the District, so that they can live with dignity and security. Under Section 9 of the Act, district magistrate is the appellate tribunal. In a similar matter, the Bombay High Court, considering the order of vacating the premises by the middle aged son in favour of his elderly parents, constructed and owned by them, observed that:[24]

> Keeping in view the growing problems of the elders, the legislature has made earnest endeavour to introduce an Act in the interest of senior citizens and parents who are old and infirm. It was also noticed by the Legislature that apart from the economic stringencies, due to lack of source of income, senior citizens and parents were also exposed to emotional neglect and social insecurity. The procedure to ventilate the grievances were made simpler. It is also provided in the Act that if the children or relatives, so ordered, fails without sufficient cause to comply with the order, the Tribunal may, for every breach of the order, issue a warrant for levying fine and sentence such person to imprisonment, which may extend to one month or only payment of maintenance.

The Division Bench of Punjab and Haryana High Court outlined the objectives of the Act. It observed:[25]

> In order to appreciate and answer the aforesaid questions in the context of the factual matrix, it is necessary to analyze the relevant provisions of the said Act. The Statement of Objects and Reasons set out that the traditional norms and values of the Indian Society which lay stress on providing care for elderly getting diluted due to the withering of the joint family system, the elders are facing emotional neglect and lack of physical and financial support. Thus, aging has become a major social challenge and despite the provisions of the Code of Criminal Procedure, 1973 for maintenance, it was deemed necessary that there should be simple, inexpensive and speedy provisions to claim maintenance for the parents. The Act is not restricted to only providing maintenance but cast an

[24] *Santosh Surendra Patil* v. *Surendra Narasgopnda Patil,* 2017(3) Bom CR(Cri)690.
[25] *Justice Shanti Sarup Dewan, Chief Justice (Retired)* v. *Union Territory, Chandigarh,* 2014 (5) RCR (Civil) 656.

obligation on the persons who inherit the property of their aged relatives to maintain such aged relatives. One of the major aims was to provide for the institutionalization of a suitable mechanism for the protection of 'life and property of older persons.

V. Road Ahead to Nip the Trouble in the Bud

Sensitizing the safety issues of the elderly people is need of the hour. Two points are well known. *Firstly,* elderly people require special attention. It is a recent realization in India and government has come out to tackle their issues through policy and legislation in India, *Secondly* - Most of the measure hitherto been taken are civil in nature. The elderly people have not been considered so far from their protection or safety point of view. Reasons were obvious; their negligible percent in the total population and the Indian concept of being older was always a matter of respect, care and their parental image. But now as their population is rapidly increasing and societal norms towards them have changed, so law, being the dynamic one, must update itself with these changing demands to be relevant and deliver the justice. How we can control burgeoning crimes against the elderly people.

Rapid increase in the population of the elderly people requires to take their issues seriously. Most of the initiatives taken by the government are related to social security, health, care and economic perspective. But increasing number of crimes against elderly people because of their inability to protect them successfully, compel us to think elderly people as a class in themselves. A special law be passed to treat the offences committed against the elderly people and therefore to treat them differently. For this purpose either the punishment, under the existing provisions if, they are invoked due to committed against elderly people, be increased and fine be imposed to give the quantum of fine to the victim or special law should be passed to cover all the offences which are actually being registered against elderly people. To sensitize the issues of safety and security of the elderly people, we must take following measures in the existing framework of law:

i. Offence against the elderly people should be tried speedily and for the same fast track court should be established. Complexities of law of evidence should be relaxed to deal with the crimes committed against the elderly people.

ii. In offences against elderly people, FIR should be registered at the place of the victim. Victim's statement should be recorded in congenial atmosphere of the victims.

iii. Free legal service should effectively be provided to the victim. At state and district level, functioning Legal Services Authorities should establish special service desk for senior citizens.

iv. Each State should have an exclusive cell for senior citizens. In some of the cities like Delhi it is working since 2004.[26]

v. Each state should have its Senior citizens helpline No. 24X7. It may be initially different but later on all India basis it can be same helpline No. Presently, in Delhi helpline No. for senior citizen is 1291, in Mumbai 1090. Many other metros have their own specific helpline numbers for senior citizens.

vi. All Police stations should have special officer in charge of the matters related to the crimes against elderly people especially in all metros. Gradually it should be applied in all police stations.

vii. Every Police station should maintain record of those elderly persons who are living alone. Such registration can be made compulsory by making the kith and kin of that older person responsible to do that registration.

viii. Any domestic help should be employed by elderly people only once verification is conducted by the police

ix. Those NGOs, who are devoted for the cause of elderly people may be engaged for sensitizing the issue of their safety and security.

x. At every level from top to bottom, manpower should be trained to tackle the issues of elderly people. Panchayati raj institutions office bearers, health care center and other volunteers can be tapped for the purpose.

xi. Recently a Bill has been passed by the Legislature of Assam, which is providing for deduction of a proportion from the salaries of those government employees who have failed to maintain their parents. It has been termed as PRANAM.[27]

VI. Conclusion

The draft National Policy on Senior Citizens 2011 explicitly undertakes on the concerns of safety and security of senior citizens. It says provisions would be made for stringent punishment for abuse of the elderly. Crimes against elderly, especially widows would be tackled severely and community awareness would be invoked. Police would be directed to keep a friendly visit and monitoring

[26] Dwaipayan Ghosh, *Special police unit to protect the elderly*, Times of India, Kolkata edition, January 3, 2015.

[27] The Assam Employees Parents Responsibility and Norms for Accountability and Monitoring Bill, 2017.

of such senior citizens. Protective measures would be taken. Had these steps been taken seriously many of the crimes committed would have been averted. In sum and substance, crimes against elderly people are different from the crimes committed against other segment of the society. They are soft targets for the desperate people. Sensitizing responsible agencies and the people about the problems of elderly people may change a lot. Our culture still holds them high in respect and care.

PROTECTION OF GEOGRAPHICAL INDICATIONS: A NEED TO REVISE TRIPS ARTICLE 23

Archa Vashishtha[*]*

I. Introduction

Geographical Indications (GI) indicates that particular goods originate from a country region or locality and have some special characteristic, qualities or reputation which is attributable to its place of origin. These special characteristics quality may be due to various factors e.g. natural factors such as raw material, soil, craftsmanship, regional climate etc., or the methods of manufacture or production.[1]

It can be said that the term GI is relatively new but it is an important concept. The term "Geographical Indications" was first introduced by World Intellectual Property Organisation (WIPO), during the discussion of a Treaty for The Protection of Names and Symbols Indicating Geographical Origin.[2] Unlike other IPRs, Geographical Indications aim to protect the smaller community and world at large. Smaller community being the residents of the place where a particular product is grown and manufactured and people earn their livelihood by it. The world at large could be deceived by the sale of the products not being produced their but having those geographical indications.[3]

Prior to the Agreement on Trade Related Aspects of Intellectual Property Rights(TRIPS Agreement) the term used to describe GI's was "Appellation of Origin (AO)" and "Indication of Source (IS)". These terms were used for the first time in the Paris Convention for the Protection of Industrial Property 1883, but these terms were not defined anywhere. Finally a definition of these terms was given in the Lisbon Agreement for the Protection of Appellation of Origin and their International Registration (1958). *Appellation of Origin* was defined in the Lisbon Agreement as the "geographical name of a country, region which serves to designate a product originating therein, the quality and characteristics of which are due exclusively and essentially to the geographical environment including natural and human factors."[4] The term

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1 Hemanth Kumar, *Protection of Geographical Indications in India*, in Sreenivasulu N.S.(ed.), Intellectual Property Rights (Regal Publications,New Delhi, 2007) pp. 187-205, 205.

2 Sachin Chaturvedi, *India, the European Unions and Geographical Indication: Convergence of Interests and Challenges Ahead*, RIS Discussion paper, pp. 1-16, 4.

3 *Supra* n.1.

4 Art.2(1) of Lisbon Agreement for the protection of Appellation of Origin and their international registration.

Indication of Source was not defined even in the Lisbon Agreement. Indication of source can be defined as an "indication referring to a country or a place in that country or a place of origin of a product. It may normally be preceded by words such as made in…."[5]

GI's are dealt with in Section 3 Part II of the TRIPS Agreement. Article 22.1 of the TRIPS Agreement defines Geographical Indication as "Indications which identify a good as originating in the territory of a member (of the WTO), or a region or locality in that territory, where a given quality reputation or other characteristic of the good is essentially attributable to its geographical origin."

The concept of geographical indications as evolved during the TRIPS Agreement attempts to cover both the previous concept i.e. Appellation of Origin and Indication of Source. However, there are certain differences between AO and GIs as defined under the TRIPS Agreement. This definition of GI does not cover all Indications of Source. The product identified with the GI, must not only originate from a specific geographical place but also has a quality, reputation or other characteristics which is essentially attributable to the geographical origin. The definition of geographical indication confine only to the quality and the characteristic of the product attributable to its geographical origin and not to the reputation of the product.[6]

II. Protection of Geographical Indications Under the Trips Agreement

It can be said that the importance of GIs emerged only with the advent of the TRIPS Agreement, which came into effect on 1st January 1995. This Agreement obligated WTO members to provide legal means to prevent the use of geographical indications that misleads the public as to the geographical origin of the goods or constitute an act of unfair competition. Article 22 to 24 of Part II of Section 3 of TRIPS Agreement prescribes minimum standards of protection of geographical indications that WTO members must provide.[7] The reason for according special protection to GIs was the special concern of European wine growers that was expressed during the negotiations of Uruguay Round.[8] Article 22 of the TRIPS Agreement obligates the member states to provide the means for interested parties to prevent:

i. The use of any means in the designation and presentation of a good that indicates or suggests that the goods in question originates in

5 *Supra* n. 2, p. 5.

6 *Ibid*.

7 Suresh C. Srivastva, *Geographical Indications under TRIPS Agreement and Legal Framework in India*, 9 Journal of Intellectual Property Rights 9-23 (2004).

8 V.K. Ahuja, *Protection of Geographical Indications: National and International Perspective*, 46 Journal of Indian Law Institute 269-283 (2004).

geographical area other than the true place of origin in a manner which misleads the public as to geographical origin of the goods, and

ii. Any use which constitutes an act of unfair competition within the meaning of Art. 10 bis of the Paris Convention.[9]

TRIPS Agreement authorises a member state to refuse or invalidate the registration of a trademark which contains or consist of geographical indication of such a nature that is likely to mislead the public as to the place of origin of the goods. Member states can do this on the request of any interested party or if their legislation so permits.[10]

Article 22(4) which explains the scope of Article 22(3), provides that Article 22(3) shall also apply to a geographical indication which although literally true as to the territory, region or locality in which the good originate falsely represents the public that the good originates in that territory.

Article 23 is one of the most controversial provisions of the TRIPS Agreement. There are two reasons for controversy surrounding this article. First controversial part is the additional protection provided to wines and spirits. As per Article 23, wines and spirits should be protected even when there is no chance of misleading public or unfair competition. Article 23 imposes an obligation upon member countries to legislate to prevent use of geographical indication regarding wines and spirits, which do not originate in the place indicated.

Second Controversial part of Article 23 of the TRIPS Agreement relates to multilateral system of registration of geographical indications. According to Article 23(4), TRIPS has an inbuilt agenda for negotiations to be undertaken in the council for TRIPS for the establishment of multilateral system of notification and registration of geographical indications for wines. There is uncertainty surrounding this article, whether this article should be applied to wines only or to spirits as well, however this uncertainty was taken care of by paragraph 18 of The Doha Declaration which refers to "wines and spirits" in the context of multilateral register. Now with the demand of extension of Article 23 like protection to all GIs, there is a demand by member states that an extended multilateral system of registration and notification for all goods should be provided.[11] In this article we will deal only with the first part of article 23 which deals with special protection given to wines and spirits.

[9] Art. 10 *bis* of Paris Convention for the Protection of Industrial Property.
[10] Article 22(3) of TRIPS Agreement.
[11] Latha R. Nair & Rajendra Kumar, GEOGRAPHICAL INDICATIONS - A SEARCH FOR IDENTITY 137-38 (Lexis Nexis Butterowrths, 2005) pp. 137-138.

Article 24 provides certain minimum exceptions to the protection accorded to geographical indications. However members are free to implement in their law more extensive protection than is provided by TRIPS Agreement, thereby leaving it open to them to dispense with these exceptions. The only caveat is that such protection must not contravene the provisions of the TRIPS Agreement.[12]

A. TRIPS Article 23 Controversy

There was a time when everything under the sun was freely accessible to everyone, and today we are living in an age where even certain names could be registered and rightfully appropriated in the name of IPRs, which everyone may feel are freely available. The privatization and commercialization has increased discontent in the society and have also increased consciousness among masses about their rights and duties, and that is one of the reason why discrimination on what so ever ground is resisted. Two things placed in similar situations should be equally treated is a well-known principle. The application of this principle is being demanded by many countries in the matter of geographical indications also.

The definition of GI is uniform for all products under the TRIPS Agreement, but it provides a hierarchy in the level of protection available to wines and spirits on one hand and other geographical indications on the other hand. The general framework under article 22 of the TRIPS Agreement is the consumer confusion as a main condition for the protection of geographical indications. In effect this condition depends on the proof of two factors:

i. Reputation of geographical indication concerned in the country of disputed use; and
ii. Confusion/ deception as to geographical indication.[13]

This means that use of GIs in a manner which misleads the public as to the geographical origin is not permitted. For example, a usage such as Kholapuri Chappal as a geographical indication would not be actionable unless it is shown that Kholapuri Chappal as a geographical indication is well known in India, and that such use will be misleading. On the other hand under article 23 a usage such as 'Indian Champagne", in spite of the delocalizing agent such as India would be actionable and incorrect. The difference lies in the nature of products, the second category being wines and spirits avails special protection.[14]

[12] *Id.* at 22.
[13] *Id.* at 131.
[14] *Ibid.*

This difference in the level of protection has led to a great debate. This debate in the WTO is effectively polarized between the two camps. On the one hand there is EC and its supporters who are seeking to achieve broad protection for a wide range of GIs (agricultural and other products). In addition to the extended members of the European Union, members of this group include India, Kenya, Mauritius, Nigeria, Pakistan and many others. The other side of the debate is represented by a group of members who are opposed to the extension of additional protection beyond wines and spirits. This group includes Argentina, Australia, Canada, Chile, US and many other countries.

Opposing the EU's proposal for extension, the joint proposal of these member countries is that the existing protection under article 23 of the TRIPS Agreement is adequate. They caution that providing enhanced protection will be a burden and would disrupt existing legitimate marketing practices.[15] This group further argue that there is no provision in the TRIPS Agreement that could give the legal basis for negotiating such extension. They say that arguments in favour of extension are not made by judging which group of products deserves additional protection but are rather based on logical analysis and reflects the underlying fact that TRIPS Agreement forms part of finely negotiated trade agreement.[16]Arguments put against extension have been discussed in detail.

B. Arguments Against Extension

(i) Historical Factors

According to this argument the dual level of protection in the TRIPS Agreement is a result of the negotiating compromise reached in the broader context of the Uruguay Round negotiations. The compromise of Article 23 operates to confer exclusive rights over a particular term to one group of producers effectively depriving others of the right to use that term. It is argued that Article 22 which protects against such use of GIs which misleads the public or form an act of unfair competition provides adequate recourse for producer to seek protection of legitimate GIs. Moreover it is not required that governments should take unduly burden some steps to administer appropriate and effective protection. This approach does not seek to diminish the value of GIs, particularly as a means of promoting trade opportunities, rather it recognizes, in full, this position. In background of global markets and the need for existing, as well new and emerging markets, to be accessed in cost effective ways, maintaining Article 22

[15] *Available at* http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm (last visited August 10, 2017).

[16] *Avaiable at* http://www.iprsonline.org/resources/docs/Grant_GIs_paper_Africa.pdf (last visited August 10, 2017).

level protection creates the optimal balance and trading conditions, rather than providing more complex mechanism for the protection of GIs.[17]

(ii) Administrative Costs

Extension of Article 23 will create additional obligation on its members and the new obligation will require the need to implement new laws and administrative mechanism. This will put additional burden on both the developed and the developing countries as it will require considerable costs in terms of money and resources of governments. Moreover it will impact those countries also who do not wish to protect their own GIs. This could involve considerable burden, particularly in view of the fact that some countries like European Union, have many hundreds of geographical Indications.[18]

(iii) Trade Implications on Producers

This argument tries to analyze the impact of extension on the producers that use particular terms to present and market products. Extending the scope of Article 23 (1) to cover other products will undoubtedly be accompanied by claims from certain producer groups that they have the exclusive rights to use particular terms and any exclusive right to one producer will deprive the right of another producer. This will lead to additional burden on producers as they might have to deal with claims that a term that they use should exclusively be reserved for producers from another country or region. Apart from costs for defending court actions, costs would also be incurred if they are forced to rename the terms as they will be required to rename and relabel their products. The negative impact of increased protection is likely to be felt most acutely by producers in new and emerging dairy and processed food industries, amongst others, in which the use of geographically significant terms is particularly prevalent. As these industries may find potentially lucrative export markets closed to their products.[19]

(iv) Consumer Costs

According to this argument, extension of Article 23 will increase the search and transaction costs for consumers, at least in the short to medium term, and potentially prices as well. As extension will lead consumer confusion because of the disappearance of terms customarily used to identify products. Moreover there is increased risk of producer conflict over individual GIs.[20]

[17] *Avialbale at* Communication no. IP/C/W289 submitted to WTO dated 29th July 2001. http://www.iprsonline.org/submissions/geographical.htm (last visited August 10, 2017).

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*

Any Member which did not provide the extended Article 23(1) protection for other Members' GIs could be taken to dispute settlement at the WTO. Experience shows that such disputes can be difficult and burdensome to resolve. Members should therefore be sure that they have a full understanding of, and the resources should be fully available to implement Article 23(1) protection in relation to all goods before they enter into any agreement to take on new obligations.[21]

All WTO members are neither wine growers nor consumers of wines, but all of them consume a variety of agricultural products.So at first glance, it seems appropriate to extend the scope of Article 23 to all geographical indications as it will benefit all WTO members it should however, be noted that additional protection provided for geographical indications for wines and spirits resulted from the Uruguay Round of Multilateral Trade Negotiations, during which concessions were provided in exchange for that additional protection. All WTO members are now being asked to assume additional obligations without receiving any counter balancing concessions. Further in one of the communications submitted to WIPO, members against extension submitted:

> One Member may only have a few geographical indications for domestic products in which it is interested, but would be obliged to provide the means to protect hundreds or thousands of geographical indications from Members with formal systems for such indications. For example, EC member States have registered nearly 600 names for foodstuffs, beer and other beverages under the EC geographical indication regulations and could be expected to seek protection for these in any negotiation. This imbalance is exacerbated by the fact that, under the current EC regulations, the EC does not appear to provide protection for non EC geographical indications (i.e., place names of other WTO Members), except on the basis of bilateral agreements, or if the EC has determined that a country has a system for geographical indications that is equivalent to the detailed system of the EC. So the members are required to evaluate. Further it says that balance of concession is not satisfactorily addressed even with respect to existing obligations, and, if extension were agreed to, it would create an additional dichotomy between the benefits of those WTO Members with many geographical indications would receive and the costs to those Members with few geographical indications.[22]

[21] *Id.* at para 28.

[22] Communication No. IP/C/W/360 submitted on 26th July 2002 to WTO para 4, *available at* http://www.iprsonline.org/submissions/geographical.htm (last visited August 13, 2017).

(v) The Definition of "Geographical Indications" is Still a Barrier

Some WTO member might not consider name of the country to be eligible for protection as GI, some members may not consider fanciful names to be eligible for protection as GI and may be some members may require that the term identify the present name of a geopolitical entity so as to make eligible for a GI. As it has been left on the member countries, the terms protected under GIs differs in every member state. Thus it is unlikely that extension of Article 23 to geographical indications for other goods would not provide the promised protection for all terms in all WTO Members as the terms member are wishing to protect as GI are not protected in some of the member countries.[23]

(vi) Article 22 is Sufficient but not Used

According to this argument the products to which Article 23 does not apply are provided sufficient protection under Article 22 (2) but it is used only by few. Article 22 provides for protection against misleading uses of geographical indications. The Article 22 standard can ensure that geographical indications do not become generic. Further in mid-17th and 20th century many terms became generic because of emigration of people due to various political, economic and other conditions. But under TRIPS Agreement, however, if a more recent geographical term becomes generic, it would be because the owner of the geographical indication is not using the means available to prevent unauthorized use of that geographical indication, which is the obligation of the owner of a geographical indication. As we could gather from the preamble of the TRIPS Agreement, intellectual property rights are private rights.

For example GIs such as STILTON for cheese, PARMA for ham, ROQUEFORT for cheese, and SWISS for chocolate already received Article 22-level protection, and the owners of these geographical indications have taken steps to prevent unauthorized uses of their geographical indications in the United States. The United States legal system currently offers the legal means to prevent unauthorized or misleading use of a geographical indication.[24]

(vii) Article 24 Protection Precludes Protection for Many Promised Terms

It is argued that the benefits sought by extension of Article 23 may not be achieved, as the terms that are sought for protection do not qualify for GI under the Article 22 definition, or will not be covered by Article 23 because they already fall within one of the exceptions of Article 24. For example, many delegations at the TRIPS Council have indicated certain terms for which they

[23] *Ibid.*

[24] *Ibid.*

would like Article 23 level protection; however, many of these terms are already generic in some other countries. Extension of Article 23 will not provide protection for these terms because they would fall under the Article 24(6) exception for terms of customary usage and Members would not be obligated to protect them.[25] For example Basmati Rice is not protected as a geographical indication in the country of origin, then under Article 24(9), other WTO Members would not be obligated to extend protection. Therefore, the term would not benefit from extension of Article 23 to geographical indications for products other than wines and spirits. Further, some WTO Members might not consider BASMATI to be a term eligible for protection as a geographical indication since it does not identify an actual place to which the particular quality and characteristics of the rice are attributable. Additional issues might be raised if exclusive protection for the proposed geographical indication was requested by more than one WTO Member.

(viii) Exceptions Apply on Per Member Basis

Exceptions under Article 24 (6) applies on a per member basis which means that even if a term is generic in one member country it can be protected as a GI in other countries. Therefore, the producers in the WTO Member where the term is generic would not be able to export that product using the generic term to other markets.[26]

C. Arguments in Favour of Extension of Article 23

Many communications were made to the WTO by members favouring GI extension. Moreover it was only in September 2000, with the tabling of proposal for the GI Extension that the TRIPS debate on the GI extension was formally initiated.[27]

In 2000 members of the Central European Free Trade Agreement (CEFTA) with Lavita, and Estonia (Poland speaking on their behalf) made a strong call for negotiations on geographical indications aimed at expanding the higher level of protection currently given to wines and spirits to other products.[28] They were supported by Turkey, India, Switzerland, Pakistan, Mauritius, Sri Lanka, Egypt, Cuba and the EU. Many in this group argued that a mandate to negotiate extension of product coverage exists in the TRIPS Agreement. (Article 24)

[25] *Ibid*.

[26] *Ibid*.

[27] Dwijen Rangnekar, *Demanding Stronger Protection for GI: The Relationship Between Local Knowledge, Information and Reputation* (United Nations University, INTECH, Discussion Paper Series, 2004-11) pp.1-42,19.

Various member countries said that extension is just to ensure that all GIs will be used only for the products originating in that region. Also it is argued that there is no commercial or legal reason to differentiate between GI, moreover in no other form of intellectual property has TRIPS made such differentiation.[29] Letus discuss various points put forward in favour of extension of Article 23.

(i) Historical Reasons

The difference in the level of protection provided to wines and spirits and to other geographical indication has its roots at the time before Uruguay Round. It is believed that the importance of wines and spirits as geographical indication is recognized from long. On the other hand, the recognition for the crucial significance which the protected origins can play in the trading value of all sorts of other goods, also came but more slowly. Moreover when the Uruguay Round began many countries have the view that additional protection for geographical indications was only required for wines and spirits which resulted in more emphasis being placed on these items during negotiations. Though there were some other members that consistently pointed on the existence of some other products which can be imitated or counterfeited and insisted on additional protection to other products as well. This is the reason why section 3 part II of the TRIPS Agreement was agreed upon as a compromise in the Uruguay Round. However, a specific provision is included in Article 24 which envisions further protection on increasing the protection of geographical indications.[30]

(ii) Misleading Test

This argument explains the insufficient level of protection provided to geographical indications other than wines and spirits. The requirement of misleading test in Art 22 of the TRIPS Agreement creates an uncertainty regarding the protection of geographical indications at an international level as it is left on the discretion of national courts and administrative authorities to decide whether the public is being misled by the use of particular geographical indication and to enforce their decision. So the discretionary element of misleading public differs from country to country and this leads to legal uncertainty regarding the protection of GIs at the international level. This kind of legal uncertainty effects the good functioning of international trade in goods having geographical

[28] Communication inMay 2000.

[29] Communication No.TN/C/W/14/ dated 9th July 2003 Introduction submitted to WTO, *available at* http://www.iprsonline.org/submissions/geographical.htm (last visited August 10, 2017).

[30] Communication No. IP/C/W247/Rev.1 dated 17th May 2001Submitted to WTO, *available at* http://www.iprsonline.org/submissions/geographical.htm(last visited August 10, 2017).

value. This can be avoided only by providing same level of protection as provided to wines and spirits under Article 23.[31]

(iii) Potential Cost of Extending Protection

Even the least developed countries in accordance with Article 66(1) are obliged to provide protection to wines and spirits as well as to other GIs under Article 22, so what is required is just extending the scope of already granted protection to wines and spirits to other GIs as well. This will provide for a more coherent and transparent solution for the protection of geographical indications.

The essential difference between Article 22 and Article 23 is that Article 23 does not require proof of an act of unfair competition in order to prevent the use of a geographical indication or the use of accompanying expressions such as "style", "type", "kind", "imitation" or the like. So, extending Article 23 would not require creation of new protection mechanism but would simply mean that a geographical indication could only be used for products actually originating from the place indicated by the geographical indication, relying on consumer confusion in order to determine whether use is misleading or not. Further it is argued that to take public opinion as the decisive criterion in granting protection results in unpredictable and uncertain protection, dependent on time and place. Such protection can lead to arbitrary decisions and this uncertainty could be removed by extending the scope of Article 23. It should also be noted that by extension those entitled to prosecute the misuse of a geographical indication will not have to use time consuming and costly legal proof. Moreover the authorities would simply have to look into whether the product actually originates from the place indicated. This will not only facilitate the reduction of workload on judicial and administrative authorities but will also have cost advantage for the enforcement of GIs against general misuse.[32]

(iv) Potential Implications of Extension on Consumers

GIs are meant to inform the consumers about the true origin of the products, and to prevent them from being misled as to true origin of the products. By extension consumers will no longer be influenced in their choice by the use of geographical indications in combination with a de localising indication for products which try to free-ride upon the reputation of a geographical indication.

[31] *Ibid*.

[32] Communication No. IP/C/W308/Rev.1 dated 2nd October 2001, submitted to WTO http://www.iprsonline.org/submissions/geographical.htm (last visited August 10, 2017).

Further as far as the argument of relabel and disappearance of product is concerned, Article 24 prevents indications which have been used in good faith and in a customary manner over some time and for specific products from being abandoned. This shows the flexibility provided under the TRIPS Agreement. Further it is submitted in one of the communications submitted to WIPO that:

One of the key reasons for advocating extension is a desire to prevent more geographical indications from becoming generic through their use in translated form or by the use of a corrective or de localising indication for products which are not from the place of origin mentioned by the geographical indication used or do not possess the particularities and quality characteristics owed to that origin. In document IP/C/W/289 it is maintained that such use and the fair imitation of a product often enhances the intrinsic value of a geographical indication or the genuine product. This reasoning is rejected. Again, such a line of argument seems to lead to dangerous waters when applied to other fields of intellectual property rights. There is no valid argument why it should be different for geographical indications. The example of "feta" cheese cited in document IP/C/W/289 may serve as an example of the potential danger of a famous geographical indication becoming a generic if it is widely used with a de localising indication.[33]

(v) Potential Cost of Extension on Trade

The costs of extension especially where the use of geographical indications is particularly relevant, such as dairy and food processing industries, could find access to lucrative trade opportunities in new and emerging markets closed to their products. This could also incur costs due to the need to re-name or re-label their products. Further it is pointed that the use of a geographical indication for products not from the place of origin indicated and not qualifying for one of the exceptions in Article 24 should be prevented. Otherwise, free-riding is encouraged. It is the '*raison d'être*' of the intellectual property rights system to protect such property effectively and to prevent free-riding, usurpation or misuse. The protection of geographical indications would restrict trade and could be applied to other intellectual property rights as well. The question is simply what kind of trade is being referred to, and is it not legitimate to restrict trade which free-rides on the efforts and success worked for by others?[34] Quality products or products with distinctive, sought-after characteristics will always make a name for them and be a success in the market. The concern that

[33] *Id.* at para 18.

[34] *Id.* at para 21.

geographical indications could be used as a protectionist instrument to restrict trade, whether in agriculture or any other area, is unfounded.

Moreover extending the protection of geographical indications for wines and spirits to include geographical indications for other products would benefit all Members. It is of particular importance for Members in view of increasingly intense international trade. Efforts put into the reputation of a geographical indication and its intrinsic qualities deserve to be effectively protected. This can offer Members and their products new opportunities in a competitive global market, other than just the benefit of economies of scale. The more free trade is, the more important the protection of geographical indications becomes.

III. Conclusion

So it can be said that though extension of Article 23 will not lead to any adverse effects but in the light of uncertainties surrounding the issue it may not give the desired result, and infact may lead to more issues. So it is better to first resolve all the uncertainties surrounding the issue and then come to the conclusion with consensus of all the members. But the most important things that appears from the various submissions made by the member countries is that the issue which is required at the WTO with greater propensity is not the justification of extension but achieving the same in a balanced manner. This could be achieved only by the extension of Article 23. Also the dual level of protection for the items belonging to the same subject matter is unacceptable. Keeping in mind the very fact that the objects which account for maximum GIs registration, are provided less protection as compared to wines and spirits.

FREEDOM OF SPEECH IN ADVERTISEMENTS: EMPHASIS ON NEWSPAPERS

*Anchal Mittal**

I. Introduction

Use of advertisement is a marketing concept that intents at drawing the attention of the public or at inducing customers in buying certain goods or services which promotes sales and increases goodwill and awareness of the product or services. It contains information about the product such as its use, quantity, features, USP[1] (unique selling proposition).[2] Usually advertisements are for products and services and propose to disseminate information amongst the prospective customers rather than just display the company name.[3] The definition for an advertisement embraces any visible representation by way of notice, circular, label, wrapper or other document and also includes any announcement made orally or by any means of producing or transmitting light, sound, smoke or gas.[4] Moreover, a notice designed to attract public attention or patronage is termed as advertisement by the New Webster's Dictionary of English.[5]

II. Judicial Approach Towards Advertisement

Advertisements are based on some common advertising techniques including puff up, which is the practice that uses exaggerations and superlatives for marketing a product. It is generally exercised in two forms, one that includes statements or phrases or adjectives describing the product, such as 'amazing', 'best', 'unbeatable'. Puffery of the extreme form happens when exaggeration is completely untrue and proves to be deceptive.The other form includes testimonials which are superiority claims and statements made usually by celebrities for a product/service. Examples of puffing statement for product X are:

i. Product X is the best in the world,
ii. Product X is the popular product in India,

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1 Caroline Taggart, Pushing The Envelope: Making Sense Out of Business Jargon (2011).
USP is a marketing mantra developed in the 1958 by advertising guru Rosser Reeves.

2 Gabriel Steinhardt, The Product Manager's Toolkit: Methodologies, Processes, and Tasks in High-Tech Product Management (2010).
USP is the key statement which describes the distinct value and features of a product, that sets the product apart from the competitors.

3 *ICICI* v. *Municipal Corpn.of Greater Bombay*, (2005) 6 SCC 404,414.

4 *Mahesh Bhatt* v. *Union of India* (2008) DLT 561,147.

5 Webster's II New College Dictionary (3rd ed. 2005).

iii. Product X delivers highest result

These statements used to puff up are not actionable offence. Indian courts have given considerable elbow room to advertisers that use puffing statements. This showcases that they usually do not try to restrain freedom of speech in ads when puffery technique is incorporated. In *Reckitt & Coleman of India Ltd* v. *Kiwi TTK Ltd*,[6] the Delhi High Court listed some important principles which are watershed in case of puffery, the principles are:

i. First, advertised goods are allowed to state in the advertisement that the product is best in the world, even if such declaration is not true,

ii. The goods advertised can be compared with that of its competitor, further the ad can state that the advertised goods are better than those of competitors, even though the statement is not true,

iii. Puffery is lax but not in cases when the goods advertised declare competitor's products are bad, because this defames the competitor's products.

The courts have therefore held that puffing is acceptable and can be practiced in advertisements. But it should not give rise to cause of action in the hands of the competitor when puffing statements turnout to be defaming its goods. By comparing goods with that of its competitor, the tradesman cannot slander or defame competitor's goods. Further it cannot call competitors product bad or inferior than his own product. At the same time, mere puffing is not actionable.[7] In cases when the puffing extents to defaming the competitor, its goods, the courts are competent to grant injunction order to restrain repetition of defamation or action for recovery of damages for defamation may lie. Repeated use of words such as 'cheap' and 'compromise' used by Heinz's in its advertisement for Complan were observed to harm the reputation of Horlicks a product of Glaxo Smith Kline (GSK). The permissible limit of puffery should not disparage the competitor's claims.[8]

The Constitution of India and the Consumer Protection Act,1986 both contain reasonable restrictions, against misleading advertisements in the interests of consumers. Under the Consumer Protection Act, puffery can lead to unfair

6 16 PTC 393 (1996).

7 It has been so held in *Hindustan Lever* v. *Colgate Palmolive (I) Ltd*., AIR 1998 SC 526, *Reckitt & Colman of India Ltd*. v. *M.P. Ramchandran and Anr*, (1999) 1 PTC 741 and *Reckitt & Colman of India* v. *Kiwi TTK Ltd*., (1996) 16 PTC 393.

8 *Glaxosmithkline Consumer Healthcare Ltd* v. *Heinz India (P) Ltd., (2009)* 39 PTC 498 Del.

trade practice when competitors are allowed to puff their products, to the extent which is not in public interest. According to a different view than that of other courts, the Chennai High Court in *Colgate Palmolive (India) Ltd* v. *Anchor Health and Beauty Care Pvt Ltd*,[9] observed that puffery leading to unfair trade practice, false and misleading should be limited so that it's not harmful to consumers. The advertiser thus enjoys freedom of speech while puffing up in advertising but reasonable restrictions have to be brought in when the puffing leads to disparages or slander or defame competitor's good. Statements that amount to disparaging or defamation are also debateable as what constitutes and defines puffery statements which defame or slander or disparage goods is determined on case to case basis. Other than puffery, comparative advertising, surrogate advertising, covert advertising and advertisements offering free gifts, prizes, offers or discounts are few examples of advertising techniques, that have been a subject of controversy, every now and then. On scrutinizing a published advertisement many legal violations can be observed, which range from misuse or suspected violation of right to freedom of speech and expression, misleading, deceptive or fraudulent information or abuse relating to copyright or trademark.

This paper is confined to the imbroglio regarding freedom of speech and expression in advertisements with focus on newspapers.The author has selected Singapore being a south East Asian country for comparative study and due to the fact that Singapore lays more weightage on preserving its cultural, ethnic and moral values by way of restrictions than freedom of speech. Further, the article broach upon freedom of speech and expression provided under the Constitution of Singapore, pivot being advertising. It is considered ideal market for advertising, thanks to its pro- businesses and tech savvy environment along with good infrastructure. Interestingly, Singapore has multi-cultural work environment due to its diversity as compared to the West. The advertising market in Singapore is built on data analysis and are heavely reliant on new technologies that enables collection of large data from consumers, their likes and dislikes, buying pattern, etc. Being a small market, clients are ready to take risks with their advertising and indulge in individual targeting but marketing strategies have to be clever and well contextualized to connect with the consumer. However, none of these characteristics influence the conventional approach that Singapore carries, towards freedom of speech and expression and restrictions.

[9] (2009) 40 PTC 653 Mad.

III. Gamut of Freedom of Speech and Expression in Advertisements or Commercial Speech

The freedom of speech and expression protected under clause (a) of Article 19 (1) of the Constitution of India enlarges to apply to advertising or commercial speech. Although, till the time *Tata Press Ltd.* v. *MTNL*[10] commonly known as the *Tata Press* case, commercial speech was not fended by freedom of speech and expression. In its previous view, the Supreme Court in 1960's brushed and was unfavourable to the concept of freedom of speech and expression in commercial advertising. The Apex court contemplated this aspect in *Hamdard Dawakhana* v. *Union of India.*[11] and opined that although an advertisement is a form of speech it fails to fall in the category of free speech when, such advertisement exercised as commercial advertisement aims to seek promotion of trade and commerce. The constitutional validity of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 was raised in *Hamdard Dawakhana* case. Parliament passed this Act with the objective of prohibiting self-medication and control drug advertisements in certain cases. The Act was challenged on the rationale that restriction on advertisements would encumber freedom of expression. The Supreme Court rejected the plea that clause (a)-of Article 19 (1) embraces advertisements in its scope and observed that:[12]

> Freedom of Speech goes to the heart of the natural right of an organised freedom loving society to 'impart and acquire information about that common interest'. If any limitation is placed which results in the society being deprived of such right, then no doubt it would fall within the guaranteed freedom under Article 19 (1) (a). But if all it does is that it deprives a trader from commending his wares, it would not fall within that term.

The court opined that although an advertisement is a form of speech but its main ingredient is the object it seeks to promote. It may fall under clause (a) of Article 19 (1) due to the fact that it amounts to expression of an idea. But then commercial advertisement constitutes trade, commerce and business as the baseline which does not propagate social, political or economic idea, hence it does not fall within the concept of freedom of speech. An advertisement falls within the category of trade or commerce with the objective of furtherance of business interest. An individual advertising his business by commercial advertisement is not regarded to be protected by freedom of speech.

[10] (1995) 5 SCC 139.
[11] (1960) 2 SCR 671.
[12] *Id.,* para 18.

Correspondingly, advertisements that promote sale of drugs and commodities which are not in public interest are not deemed as propagating idea, therefore protection under clause (a) of Article 19 (1) cannot be maintained.The extrapolated reason for not considering clause (a) of Article 19 (1) to apply to commercial advertising is that commercial advertising predominantly envisions for commercial gain. However, the Supreme Court reserved a different view in succeeding cases than that of *Hamdard Dawakhana*. The economic significance of revenue generated from advertisements was emphasized in *Sakal Papers (P) Limited* v. *Union of India*[13] and *Bennett Coleman* v. *Union of India*.[14]

The constitutional validity of Newspaper (Price and Page) Act, 1956 was raised in *Sakal Papers,* due to the powers granted to the government by the Act for regulating prices vis a vis the size, pages and space allocation of advertisements. It was considered that such regulations will curtail advertisements, which would directly impact the newspaper circulation and hit clause (a) of Article 19 (1). When there is curtailment of advertisements, the price will inevitably shoot up and have a direct bearing on the truncated newspaper circulation. Similarly, in the *Bennett Coleman* case, it was stated that the newspaper circulation is essentially impacted by advertisements and any form of restrain on them will impugn freedom of publication and propagation under clause (a) of Article 19 (1). Further, in 1981 the Apex court held in *Indian Express Newspapers (Bombay) Private Ltd* v. *Union of India*[15] that protection of clause (a) of Article 19 (1) of the Constitution of India, cannot simply be denied because they are issued by businessmen.The Supreme Court while concluding the *Tata Press* case read *Hamdard Dawakhana* and *Indian Express Newspapers* together and viewed that commercial speech is part of freedom of speech protected under clause (a) of Article 19 (1) and public has a right to receive commercial speech. The instrumental role played by advertising in the economy was acknowledged in the *Tata Press Case*. Some pertinent comments of the court are:[16]

> Advertising is considered to be the cornerstone of our economic system. Low prices for consumers are dependent upon mass production, mass production is dependent upon volume sales, and volume sales are dependent upon advertising. Apart from the lifeline of the free economy in a democratic country, advertising can be viewed as the life blood of free media, paying most of the costs and thus making the media widely available. The newspaper industry obtains 60/80% of its revenue from advertising. Advertising pays a large portion of the costs of supplying the public with newspaper. For a democratic press the advertising "subsidy" is crucial. Without advertising, the resources available for expenditure on the "news" would decline, which may lead to an erosion of quality and quantity. The cost of the "news" to the public would increase, thereby restricting its "democratic" availability.

[13] AIR (1960) SC 554.
[14] (1972) 2 SCC 788.
[15] (1981) 1 SC 641.
[16] *Tata Press Limited* v. *Mahanagar Telephone-Nigam Limited*, AIR (1995) 2438.

The court added that more than the trade considerations of an advertiser, the information dissemination aspect of an advertisement is vital for the general public, thus freedom of speech and expression guaranteed under clause (a) of Article 19 (1) not only protects the rights of individuals to read and listen but also to receive the said speech. *Tata Press* case was an outcome of a dispute between Tata Yellow Pages and Mahanagar Telephone Nigam Limited-MTNL (a government undertaking) in which printing of telephone directories under the Indian Telegraph Act 1885 was challenged which was the monopoly of MTNL. MTNL claimed to have exclusive right to print and publish list of its telephone subscriber and Tata Press had no right to print, publish or compile the telephone directory. According to MTNL, the provisions of Indian Telegraph Act, 1885 were violated by Tata Press. From 1987 Nigam handed over the publication of its telephone-directory to outside contractors, before such time it exclusively published and distributed telephone-directory consisting of white papers only. Nigam permitted contractors to procure advertisements and publish the same as Yellow Pages to meet their cost and raise revenue.

The court expatiated that Tata Press cannot be restrained from publishing Tata Press yellow pages. Although Tata Press required permission of the telegraph authority to publish any list of telephone subscribers, and comply with the mandatory Rule 458.[17] Further, a very imperative observation was made by the court, it viewed that there are two facets to commercial speech,

> (i) More than being a commercial transaction, an advertisement is a form of disseminating information about the product or subject advertised. Without free flow of commercial information, there will be potential impediment to the economic structure of a democracy. It is empirical that without being educated the public at large cannot make an intelligent economical choice. Thus, the publication, circulation and propagation aspect of clause (a) of Article 19 (1)will be affected by curtailment of advertisements.

[17] Indian Telegraph Act, 1885, *publishing of telephone directory*- Except with the permission of the Telegraph Authority no person shall publish any list of telephone subscribers.

(ii) The other facet, considered pertinent is the right of the public to receive commercial information. Sub-clause (a) of Article 19 (1) also aims to protect rights of a person to read, receive and listen to the speech, therefore clause (a) of Article 19 (1) is not only available to the speaker but also to the recipient of the speech.

The role of the receiver of the information so disseminated through advertisements is hence more important than that of a businessman who is at the back of the publication. More than the trade considerations associated to an advertisement, the information related to life saving drug is of more importance to the public.The courts have made it clear that advertisement or commercial speech is protected under clause (a) of Article 19 (1) but the advertiser is not eligible for blanket protection. Like any other form of speech, it has to be read with Article 19(2) under which the government is empowered to impose restrictions on the advertisements or commercial speech. However, the restrictions shall be reasonable in nature and not favouring or preferential to the government.

India has enormous market capacity and such a democratic system has to be saved rather than be in hot water. So, rather than throwing the buck and pilling the judiciary for considering the nature of advertisement and rationalizing reasonable restriction on a case to case basis, the system needs a check and scrutiny of advertisements from a body having statutory powers. It will enhance consumerism, reduce misleading activities and malpractices incorporated by businessmen and deliver information which would be freedom of speech, manifesting constitutionalism in correct sense.Since commercial speech was not favoured by right to freedom of speech in the 1960's, the scenario changed after the 1990's through *Tata Press*. Essentially, freedom of speech does not imply that any and everything should be advertised. It does call for certain controls, self-regulation of the content by the advertiser while advertising certain product or services. For example: Today, numerous companies promote and advertise multi-vitamin and health supplements. Such advertisements promote and induce the consumer to take vitamin supplements to fight stress and cope up with the fast pace life. Though these vitamins are OTC[18] but only a medical practitioner can analyse which drug is required by the body, for how much duration, in what quantity the dosage is adequate, can the deficiency be bridged by natural food items, etc. Similarly, it is important for lifesaving information relating to drug and medicines to reach the public, it is equally critical thatcorrect and authenticated information is publicised. The advertiser cannot be permitted

[18] Medicines which are sold directly to a consumer without a prescription are known to be Over-the-counter (OTC) drugs.

to publish unauthenticated information and claims in the garb of freedom of speech and expression.

IV. Singapore Constitution and Freedom of Speech

Similar to the Indian Constitution, the Singapore Constitution is a written Constitution. Part VI of the Constitution comprises the fundamental liberties, having freedom of speech, assembly and association under Article 14. According to clause (a) of Article 14 (1) freedom of speech and expression is extended to all citizens of Singapore. Along with it, clause (a) of Article 14 (2) empowers Parliament to impose necessary restrictions in interest of Singapore's security or for friendly relations with other countries or to maintain public order or morality. Restrictions under the Article also include imposition of restrictions guarding the privileges of Parliament or protecting contempt of court, defamation or incitement to any offence.[19] 'Special powers' operate to further limit free expression in case of emergencies (Art 149,150).

Singapore being a developed nation with high literacy rates, allows media to be profitable by supporting commercial advertising. However, the local media is restricted by various control measures to develop a free environment for expressing views. There is close regulation even on the foreign media activities by controlling flow of free expression and information. As compared to the West, Singapore has repressive speech limitations with emphasis on maintaining and preserving its cultural, social and moral fabric and ethnicity. A three-part test is laid on restrictions imposed on right to freedom of expression, i.e.,

i. The restriction must be provided by law,

ii. Such restriction shall be for the purpose of safeguarding a legitimate public interest, and

iii. The limitation or restriction should be necessary to secure that interest.

The test is approved by the UN Human Rights Committee and the European Court of Human Right.[20] The government's regulatory body for content produced by local media in Singapore is governed by the Ministry of Information, Communications and the Arts (MICA) which has a statutory board, the Media Development Authority (MDA). Besides regulating print media, broadcast, other forms of media this statutory board also enforce regulation. Moreover, availability of published media from abroad is also under its domain. The Media Development Authority (MDA), administers Media content related policies to strike a balance

[19] The Constitution of the Republic of Singapore,Article XIV (2) cl. (a).

[20] James Gomez, Freedom of Expression and The Media in Singapore (2005) 19–20.

between social needs and information by the Ministry of Information, Communications and the Arts (MICA). The MDA and MICA practice censorship and build environment developed by both which reflects its tradition and government hold, are in the following areas:

i. Since Asian values (such as respect for parents and elders, importance of family, etc.) are core area to preserve, it is main attribute for censorship.
ii. To secure social unity and maintain social fabric.
iii. Sustain religious tolerance and conserve racial harmony.
iv. Children and young persons to be protect from corruption.

In July 2016, the Ministry of Communications and Information (MCI) prohibited newspaper Al Fatihin published Furat Media, which is an alliance of Islamic State of Iraq and Syria (ISIS). As ISIS being a terrorist group makes Singapore susceptible to severe terrorist attacks, the newspaper was construed, to be a step taken by ISIS to spread its propaganda and recruit Southeast Asian. The stringent act was due to zero tolerance of Singapore Government towards terrorist propaganda.[21] Further, a mall in Singapore by the name Cathay Cineleisure had to change an advertisement promoted by Pink Dot. The advertisement promoted gay rights which are reviewed to affect public sensitivities, especially the tag line '*Support freedom to love*'. Both the print and electronic media are under strong governmental influence. The government has its hold even in case of private player operating in media, commonly manifested through shareholdings in media entities. All domestic broadcast television channels and majority of radio stations except BBC World Service, which is independent of the government, are operated through government liked organizations or companies.

V. Self-Regulatory Body of the Advertising Industry in India

Currently there exists a self-regulatory body, the Advertising Standards Council of India (ASCI) which is not a Government body established in 1985. The ASCI, has a Board of Governors and the Consumer Complaints Council (CCC). The former consists of 12 members, four each representing the sectors such as advertisers, media, advertising agencies and allied professions such as market research, consulting, business education etc. The Consumer Complaints Council (CCC) comprises of about 21 members out which 9 are from within the industry and the remaining 12 are from the civil society. The decision of the

[21] *See* IS-linked newspaper Al Fatihin to be prohibited in Singapore *available at*http://www.channelnewsasia.com/news/singapore/is-linked-newspaper-al-fatihin-to-be-prohibited-in-singapore-7942708,(2016) (last visited June 24, 2017).

Consumer Complaints Council against any ad is final. The ASCI has its own code and aims to promote and protect honest advertising, non-offensive ads, ads which are not related to harmful products and fair competition in the market-place, protect legitimate interests of consumers and all concerned with advertising. ASCI has global presence, it is part of the global committee the Executive Committee of International Council on Ad Self-Regulation (ICAS). It has received six Global Best Practice Awards awards at the European Advertising Standards Alliance (EASA).

The Consumer Complaints Council (CCC) had upheld 200 complaints out of 319 in October 2017. Out of the 200 complaints 82 were from healthcare, 11 to personal care, 75 to education, eight to the food & beverages category and 24 from other categories. ASCI's Consumer Complaints Council had taken suo moto action in 148 advertisements out of the 319 complaints.[22] The power of ASCI has been questioned in the court numerous times. The body doesn't have any teeth or legislative backing still various Government agencies acclaim its role and have collaborated to prevent misleading advertisements. Although the government notified in the Cable Television Networks Rules, 1994 which stated that no advertisement for public exhibition in India carried by the cable service shall violate the Code for Self-Regulation in Advertising, as adopted by the Advertising Standards Council of India (ASCI), many advertisers have viewed that ASCI is not an enforcement body rather its role is at best advisory.[23]

ASCI or similar body having representatives from the different regulatory bodies of the government along with member from National Commission for Women (NWC), a legal expert, member from advertising agencies association, a corporate representative should be constituted. The ASCI can be converted into a statutory body after making structural changes in its composition. This will be of great use as ASCI has already built the necessary infrastructure and process to tackle violation in advertisements. However along with structural changes its scope will be required to extend to all or major sectors that advertise. Along with a strong regulator the public has to be sensitized to file complaint with ASCI, raise objections and report false and misleading advertisements which are running on the premise of freedom of speech and expression and violation of ASCI Code. The consumer and general public must not carry a casual approach towards advertisements as they are the ones who are directly influenced and impacted by false, misleading, unethical and

[22] *See* https://www.ascionline.org/images/pdf/asci-oct-ccc.pdf(last visited January12, 2017).
[23] Havells Pvt. Ltd had filed a case challenging ASCI order and powers in the Delhi High Court. *See* http://www.livemint.com/Consumer/7iI0uOUWDj8FKcyZMTcRqN/Havells-case-against-ASCI-brings-regulators-role-back-in-sp.html(last visited June 26, 2017).

objectionable advertisements. Campaigns like 'Jago Grahak Jago' are need of the hour. In support of this a web portal (http://gama.gov.in) has been launched by Department of Consumer Affairs for registering online complaints for grievances against misleading advertisements (GAMA). It extends to advertisements published in newspapers also other medium being Television, Radio, or any other electronic media, Banners, Posters, Handbills, wall-writing etc. The complaint can be registered through the portal in two steps or by registering a complaint at the nearest Grahak Suvidha Kendra or designated Voluntary Consumer Organizations (VCOs) which will lodge the complaint through the web portal.The list of key regulators for sectors of the government listed below:

i. Directorate of Marketing and Inspection (DMI)
ii. The Food Safety and Standards Authority of India (FSSAI)
iii. Bureau of Indian Standards (BIS)
iv. Central Drugs Standard Control Organization.
v. The Ministry of Urban Development, Real Estate, Financial Services, Education and Transport.

VI. Self-Regulatory body of the Advertising Industry in Singapore

Similar to the Advertising Standards Council of India (ASCI), Singapore also has self-regulatory body that fosters ethical advertising by the advertising industry. The Advertising Standards Authority of Singapore (ASAS) was set up in 1976 and it is the advisory council of Consumers Association of Singapore (CASE). Besides safeguarding and ensuring truthful advertising it works in the interest of both the advertiser and consumer. The Advertising Standards Authority of Singapore (ASAS) council comprises of around 27 members who are appointed for tenure of two years. The members of the council comprise of representatives from varied sectors associated to advertising, such as from advertising agencies, advertisers, government agencies, media owners and other related organizations.

The scope of the Advertising Standards Authority of Singapore (ASAS) Code extends to newspaper, which includes classified and other forms of print publication.[24] Guideline No. 4 of the ASAS Code states that there shall be free expression of opinion, without any restrain provided:

[24] Sub-clause (a) of clause 2.2 of the Code of Advertising Practice under the Advertising Standards Authority of Singapore (ASAS) code.

i. the expression is just an opinion,
ii. the expression does not mislead the consumer in ascertainable facts,
iii. the advertiser must be ready to clarify (promptly) as to why the expression according to his belief, abides by the code.

Besides, restricting misleading advertising and promoting healthy and corrective advertising the code lays specific emphasis on social values and family values which are incorporated in the General Principles of the Code. However, the Advertising Standards Authority of Singapore (ASAS) has no real power or has punitive capacity. Its power chiefly limit to:

i. get the advertisement amended or withdraw by the advertiser or an advertising agency if the advertisement is not in line with the Code.
ii. get the advertisement withhold by the advertiser or advertising agency,
iii. provide advice on advertisement to publishers besides the four associations (Singapore Advertisers Association, the Association of Accredited Advertising Agents, Association of Media Owners (Singapore) and Association of Broadcasters (Singapore).

VII. Suggestions

Singapore: The Singapore advertising market has immense growth potential and progressing into centre for creative advertising. It has attracted acclaimed international advertising agencies like Ogilvy and Mathur, moreover regional advertising agencies are partnering international advertising for the purpose of expansion. Apparently, Singapore does possess number of legislature relevant to advertising but advertising is ancillary for most of them. Developments in the advertising industry and increase influence of global dynamics is affecting the existing legal structure. Some suggestions for better regulation are:

i. The involvement and control of government in the ownership and running of Media Corporation should be restricted.
ii. Freedom of speech and expression should not be suppressed or limited to the Speakers' Corner. However, individuals shall respect and protect the social and family values of Singaporeans.
iii. All advertisements before publication should be scrutinized by Advertising Standards Authority of Singapore (ASAS). This will keep a check on the legal and ethical practice of advertising.

iv. National and international publications, editorials and advertising agencies shall be allowed for publication in Singapore in respective areas. This will develop and build expression within the country and amongst the citizens. Advertising will be much lucrative business for advertising agencies than what it exists, this will boost the economy.

India: Though the court has struck regulation of page and size of advertisement in a newspaper, today guidelines need to be framed for newspapers. Few suggested guidelines are:

i. Each page of the main newspaper should devote only 25% of the page space to advertisements. For informational and public announcements, the ad space can constitute maximum of 40% space of a page but the entire newspaper shall limit space provided to advertisements of 25% (avg.).

ii. Commercial advertisements can occupy as much space as required out of the 25% limit in the main newspaper. Further, the newspaper should be given a free hand to prioritize and use the 25% space for advertising without any intervention (until it violates any law). In the supplementary newspapers and magazine editions which essentially focus on entertainment, health, education, city, etc. can allocate as much space required by commercial advertisements.

iii. Like Singapore, India shall also incorporate reasonable restrictions that concentrate on preserving and promoting our rich history, culture, tradition and value system but such restrictions should be reasonable and not obstruct trade or upsets any religion or race.

iv. A statutory body to address the complaints rather than having a voluntary body is required, such statutory body must be competent of taking action and penalise advertisers who do not adhere to the standards. This body shall be empowered to scrutinize the ads and its content and suggest changes (if any) to advertisers before the ad is published. The body has to keep a proper balance between public interest and business interest so that neither public interest is compromised nor the profits, cost and business of the advertiser are impacted. Some issues relating to the content of ads that deal with women and children shall be scrutinise and refrain by this body, are listed below:

   a. Objectionable display of women and their body.

   b. Projection of women as object in ads, use and display of their sexuality for promoting the product in ads.

   c. Passive or subordinate representation of women than men or presenting men as dominant gender than to women.

   d. Ads should not include technical stunts that are dangerous and life-threatening because children get influence and imitate the stunts at home which turnout to be fatal.

   e. Children should not be represented or used to project in such a way that the ad has negative impact on the tender minds of children.

   f. Women and children shall not be projected as vulnerable category.

   g. Ads shall not promote acts and habits which are immoral or influence the innocent mind or create unrealistic environment and expectation or are unhealthy for the society.

The suggestion is to compose two bodies, one for scanning and recommending the advertisers on advertisements and its content before they are published and second which has statutory power and functions on similar lines that of ASCI. The second body may be linked to the district, state and national consumer courts but have a wider reach and coverage of issues existing in advertisements. This is required to hail freedom of speech and expression and its purpose rather than the business generated from advertisements. But at the same time business interest also needs to be considered with rational eye, as they drive the economy and generate employment for the people.

CONSTITUTION, STATUTORY LAWS AND PERSONAL LAW: THE DIVIDED CONSTITUTIONAL BENCH IN *SHAYARA BANO* V. *UNION OF INDIA*

Rajni Kheria & Neha Kheria***

I. Introduction

Muslim personal law doesn't require Muslim couples to recite vows in their marriage but that doesn't make it any less sacred than it is considered in Hindu Law. The true nature of marriage is highly debatable. Some says it to be a pure civil contract because it requires proposal from one and acceptance from other, the consent must be free and the marriage can be breached. Other opines that it is an *ibadat*, a religious sacrament in nature.Whatever may be the nature of the marriage but one fact, which can never be denied is that Muslim law has also been stung by the vicious divorce.Prophet has discouraged divorce yet it has been allowed by the holy Quran and Hadith in certain situations.

Divorce may be effected at the instance of the husband. It may be effected at the request of wife or the marriage may be dissolved by mutual consent, called *Mubarat*. Divorce at the instance of husband can further be divided into five categories: *talaq-e-ahsan*, *talaq-e-hasan*, *talaq-e-biddat*, *ila*, and *zihar*. In Muslim personal law, divorce asked by wife is known as *khula*. Apart from that women can file for divorce under Dissolution of Muslim Marriages Act, 1939.

While *talaq-e-ahsan*is considered to be most approved mode of *talaq* approved by both Quran and Hadith, *talaq-e-hasan*, is considered only reasonable and proper mode of *talaq*. *Talaq-e-biddat* on the other hand is regarded as sinful irregular mode of *talaq*. Three pronouncement made in one sentence during a *tuhr* is enough to break the sacred knot of marriage in this form of *talaq* and the divorce becomes effective and irrevocable forthwith the pronouncement of *talaq*. In *talaq-e-ahsan* the husband makes single pronouncement of *talaq* during *tuhr*. It is followed by a period of abstinence called *iddat* which generally is for three menstrual cycles or three lunar month[1]

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[1] *Tuhr* is a period when a woman is free from her menstrual course; it's a state of purity. In an unconsummated marriage, *talaq* may even be pronounced when the wife is in her menstrual course. If the spouses are away from each other for a long period or where the wife is beyond the age of mensuration, the condition of *tuhr* (purity) is not applicable. *See*, Prof. I.A. Khan (ed.), Aqil Ahmad Mohammedan Law (Central Law Agency, 2007) p. 170.

This mode of *talaq* is revocable hence if the spouses resume cohabitation or the husband expresses that 'he has retained her' during the period of *iddat*, the pronouncement is treated revoked. Though absence of resumption of cohabitation within *iddat* period makes the pronouncement irrevocable and final. In *talaq-e-Hasan*, the husband makes three successive pronouncements of *talaq*. The pronouncement is made during the *tuhr*, the second during the next *tuhr* and the third during the succeeding *tuhr*; if the wife is non- menstruating, the pronouncement should be made during the successive intervals of 30 days[2]. Third pronouncement makes the divorce irrevocable. While cooling off period during *iddat* in these two forms of *talaq* assure chance of reconciliation, the unavailability of the same in *talaq-e-biddat* subject it to the criticism by feminists, scholars, jurists and other sections of the society.

The legality and constitutionality of triple *talaq* was challenged by five Muslim women before the Supreme Court[3] and it was urged todeclare this practice illegal and impermissible as it violates women right to equality, life and dignity.The issue is finally dispose of by the Supreme Court, on 22nd August 2017. Majority judgment of Justices R.F Nariman, U.U Lalit and J. Kurian Joseph running down 123 pages declared triple *talaq* invalid. While Justice R.F Nariman, Justice U.U. Lalit held the practice to be arbitrary, unreasonable, unfair violating Muslim women right to equality encroaching upon their right to life and dignity, Justice Kurian Joseph adjudged the practice not integral part of right to religion. Chief Justice J.S. Khehar and Justice S.A. Nazeer in 272 pages expressed their dissenting view on the issue and recognized triple *talaq* as part and parcel of Muslim personal law and thus enjoy the status of fundamental right under Article 25 of the Constitution. Exercising its power under Article 142, Chief Justice then directed the Union of India to bring appropriate legislation particularly with reference to *talaq-e-biddat*. The judge then granted injunction against Muslim husbands from pronouncing triple *talaq*. This injunction would remain operative for a span of six months. If the legislature initiates the process before the expiry of six months, the injunction would continue till the legislature comes up with the legislature. Failing which the injunction shall cease to operate. This paper endeavors to critically appraise the verdict delivered by the divided Constitutional bench and also highlights the gaps and lacuna in the judgment and pandora box it has opened for the Judiciary.

[2] *Ibid.*
[3] *Shayara Bano* v. *Union of India*, AIR 2017 SC 4609.

II. Shayara Bano v. Union of India

A. Against the validity and legality of triple talaq

To challenge the validity of triple *talaq* the petitioners rested their case on constitutional morality claiming that commitment to the Constitution is the fulcrum of constitutional morality, which further demands tradition and conventions to grow under the light of such ethos[4]. The second bullet was shot on Article 25 of the Constitution, which declares Freedom of religion subject to other fundamental rights provided under part III of the Constitution.[5] It was claimed that plethora of judgments substantiate the fact that under the right to religion only core belief, essential to spiritual well-being could be protected. *Talaq-e-biddat* unanimously considered to be sinful and therefore could never been regarded as essential part of Muslim religion and therefore prayed to be declared invalid by the Court.

It was further contended by Ms Indira Jaising arguing on behalf of the Muslim Women who have been divorced by their husbands by pronouncement of triple *talaq* that with the commencement of Muslim Personal Law (Shariat) Application Act, 1937 (hereafter Act, 1937) personal law has reached the status of statutory law and thus must be tested on the touchstone of other fundamental rights provided under part III of the Constitution. The court's attention was further drawn towards the various International covenants, commissions and declarations.[6] All of these conventions and commissions are rigorously working to ensure equal status to women in the society and to eliminate all forms of discrimination, biases and impediments to development demands enforcement from the ratifying and participatory states. India being one of them is obliged to maintain the sanctity of the same.

It was urged by the Attorney General Mukul Rohatgi that almost all the Muslim Countries including Islamic theocratic States have undergone significant reforms and in such a scenario, India being a secular country there is no reason

[4] *Manoj Narula* v. *Union of India*, (2014) 9 SCC 1.

[5] *Sri Venkataraman Devaru* v. *State of Mysore*, 1958 SCR 895. It was held in this case that other provision of part III would prevail over Art 25 of the Constitution.

[6] Like Universal Declaration on Human Rights (UDHR), 1948; Convention on the Political Rights of Women, 1952; Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women, 1955; International Convention on Civil and Political Rights, International Convention on Economic (ICCPR), 1966, Social and Cultural Rights (ICESCR), 1966; Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 1974; Vienna Declaration and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), 1979;Universal Declaration on Democracy 1997; and Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999.*See, supra* n. 3, paras 47 and 74.

to delay and deny women their equitable rights already been acknowledged and secured by the rest of the world. He also highlighted the requirement of differencing religion per se and religious practices, and argued that Constitution protects the former not the latter.[7]

Further it was submitted by Ms Indira Jaising that cardinal principle of interpretation demands all the conflicting provisions of the Constitution must be construed harmoniously and right to religion must give way to women right to equality.

It was then contended by Mr. Salman Khurshid that to settle the conflict *Quran* must be referred first and only in absence of clear guidance, hadith[8] could be referred. When the answer is available neither in *Quran* nor in *sunna*, general consensus called *ijma* could be taken into consideration though it must be kept in mind that the *sunna* and *ijma* must not be read in a manner which runs counter to the message given by Quran. As triple *talaq* leaves no door open for reconciliation and goes against the spirit of Quran hence should be held invalid.

B. Proponents of validity and legality of triple talaq

To rebut the contentions raised by the opponents of triple *talaq* it was argued before the court that personal law and custom and usage are not identical terms. The definition of 'custom and usage' does not include in itself personal law followed by religious denomination and hence they are not subservient to Article 13 of the Constitution. Also the fact that the Act, 1937 ensures applicability of Muslim personal law over customary law but that itself doesn't gives the Act, 1937 flavour of statutory law.

It was contended that in India majority of the Muslims are Sunni's and 90% of them belongs to Hanafi school and petitioners relied on interpretation suggested by scholars who didn't even belong to the Sunni faith hence there elucidation is irrelevant to decide the present dispute.To unveil the ambit and scope of freedom of religion, Kapil Sibal learned Senior Advocate drew court's attention to Constituent Assembly debates in which Mahboob Ali Beg, Pocker Sahib, Mohamed Ismail Sahib, Sahib Bahadur, Naziruddin Ahmad proposed amendments to draft Article 35, Uniform Civil Code,[9] so that personal laws could be guarded against any dent targeted in the name of fundamental rights. He also claimed that the personal laws of some of the communities are very

[7] *A.S. Narayana Deekshitulu* v. *State of A. P.*, (1996) 9 SCC 548, paras 86 and 87 were placed before the court.

[8] *Supra* n.3, p. 87. Tradition of the Prophet Muhammad is recorded in the *hadiths*.

[9] *Supra*, n. 3, pp. 140-145.

near and dear to them and a march into their personal law will bring disharmony, discontent and dissatisfaction in the people and society of India. It was further submitted by Mr. V. Giri, that question of violation of Fundamental rights could be invoked against State action, personal law, not being statutory law does not find its origin from state and therefore could not be challenged on the ground of transgressing provisions contained in part III of the Constitution.

C. Decision of the Court

The very first issue taken up by Chief Justice J.S Khehar was whether *Rashid Ahmad* v. *Anisa Khatun*[10] in which Privy Council upheld the validity of *talaq-e-biddat* holding it to be final and irrevocable the very moment it is pronounced, require a relook? After weighing rival contentions against each other, Hon'ble Chief Justice of the Supreme Courtrelied on the judgment of Yusuf *Rawther* v. *Sowramma,*[11] *Jiauddin Ahmed* v. *Anwara Begum,*[12] *Mst. Rukia Khatun* v. *Abdul Khalique Laskar,*[13]*Masroor Ahmed* v. *State (NCT of Delhi),*[14] *Nazeer* v. *Shemeema*.[15] In Yusuf case the validity of triple *talaq* was again questioned before the Court. It was held by Justice V.R Krishna Iyer that the views expressed by Privy Council on Muslim personal law are based on incorrect understanding of 'Shariat'. In *Jiauddin Ahmed,* Gauhati High Court negated the validity of triple *talaq* and decided contrary to what was held in *Rashid Ahmad* case. The court in this case said:

A perusal of the Quranic verses quoted above and the commentaries thereon by well-recognized Scholars of great eminence like Mahammad Ali and Yusuf Ali and the pronouncements of great jurists like Ameer Ali and Fyzee completely rule out the observation of Macnaghten that "there is no occasion for any particular cause for divorce, and mere whim is sufficient", and the observation of Batchelor, J (ILR 30 BOM. 537) that "the whimsical and capricious divorce by the husband is good in law, though bad in theology". These observations have been based on the concept that women were chattel belonging to men, which the holy Quran does not brook. Costello, J. in 59 Calcutta 833 has not, with respect, laid down the correct law of *talaq*. In my view the correct law of *talaq* as ordained by the Holy Quran is that *talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters-one from the wife's family the other from the husband's. If the attempts fail, *talaq* may be effected.

[10] AIR 1932 PC 25.
[11] AIR 1971 Ker 261.
[12] (1981) 1 Gau LR 358.
[13] (1981) 1 Gau LR 375.
[14] (2007) ILR 2 Delhi 1329.
[15] 2017 (1) KLT 300.

Delhi High court was also moved to decide the fate of triple *talaq* in the *Masroor Ahmed* case. Justice Badar Durrez Ahmed relying on relevant '*hadith'* deduced that Privy Council decision was not in consonance with Muslim personal law. In the words of the court:[16]

> it is accepted by all schools of law that *talaq-e-biddat* is sinful. Yet some schools regard is as valid. Courts in India have also held it to be valid. The expression-bad in theology but valid in law-is often used in this context. The fact remains that it is considered to be sinful. It was deprecated by Prophet Muhammad. It is definitely not recommended or even approved by any school. It is not even considered to be a valid divorce by *shia* schools. There are views even amongst the *sunni* schools that the triple *talaq* pronounced in one go would not be regarded as three *talaqs* but only as one. Judicial notice can be taken of the fact that the harsh abruptness of triple *talaq* has brought about extreme misery to the divorced women and even to the men who are left with no chance to undo the wrong or any scope to bring about a reconciliation. It is an innovation which may have served a purpose at a particular point of time in history but, if it is rooted out such a move would not be contrary to any basic tenet of Islam or the Quran or any ruling of the Prophet Muhammad.
>
> In this background, I would hold that a triple *talaq (talaq-e-biddat),* even for *sunnimuslims* be regarded as one revocable *talaq*. This would enable the husband to have time to think and to have ample opportunity to revoke the same during the *iddat* period. All this while, family members of the spouses could make sincere efforts at bringing about a reconciliation. Moreover, even if the *iddat* period expires and the *talaq* can no longer be revoked as a consequence of it, the estranged couple still has an opportunity to re-enter matrimony by contracting a fresh *nikah* on fresh terms of *mahr etc*.

Then the High court of Kerala in *Nazeer* case emboldened the miserable condition of Muslim wives[17] in consequence of continuing the practice of pronouncing triple *talaq,* which severe the matrimonial ties in one sentence.

After careful perusal of the afore mentioned judgments it was held by the court that Rashid Ahmad case yearn for a fresh look. It was further held by the hon'ble Judge that although *talaq-e-biddat* does not find its origin in Quran but so is the case withother forms of divorces like *talaq-e-ahsan* and *talaq-e-hasan*. The petitioners have not challenged the validity and legality of these

[16] *Ibid.*, para 26 and 27.
[17] *Supra* n. 15.

two and they in fact have been acknowledged by the petitioner to be most proper and reasonable mode of *talaq*. Therefore challenge to triple *talaq* cannot be allowed on this score.

Chief Justice then explained that *sati*, *devadasi* and polygamy were sinful practices but they were discontinued and invalidated by the legislatures. In the present scenario also it is the parliament, which has the authority to bring reform Judiciary being bound by the rule of separation of power, is incapable to do so. Expressing his disagreement with the Chief Justice on the aforesaid issue J. Kurian Joseph said that this Court in *Shamim Ara* v. *State of UP*[18] already held that triple *talaq* lacks legal sanctity. Since then *Shamim Ara* is understood as the law of the land by various High Courts.

It was further held by the hon'ble Chief justice that there is unanimity about two issues. First that *talaq-e-biddat* has been followed for more than 1400 years. Secondly triple *talaq* in consensus acknowledged bad in theology but good in law. Hence the court can't held the practice to be invalid. Also it considers *talaq-e-biddat*as an integral part of Sunni's personal law. Expressing his disagreement with Chief Justice J.S Khehar, and Justice Kurian Joseph explained that the whole purpose of the Act, 1937 was to discontinue anti Shariat practices. To decipher the meaning of Shariat, the Judge referred to Asaf A.A Fyzee, which runs thus:[19]

> What is morally beautiful that must be done; and what is morally ugly must not be done. That is law or *Shariat* and nothing else can be law. But what is absolutely and indubitably beautiful, and what is absolutely and indubitably ugly? These are the important legal questions' and who can answer them? Certainly not man, say the Muslim legists. We have the Quran which is the very word of god. Supplementary to it we have hadith which are the Traditions of the Prophet-the records of his actions and his sayings-from which we must derive help and inspiration in arriving at legal decisions. If there is nothing either in the Quran or in the Hadiths to answer the particular question which is before us, we have to follow the dictates of secular reason in accordance with certain definite principles.

The hon'ble judge thus concluded that *hadiths, ijma* or *qiyas* could not go against what is precisely stated in *Quran. talaq-e-biddat* as doesn't confer opportunity of reconciliation between the spouses is against the tenets of *Quran*, cannot be afforded Constitutional protection. Further to elucidate the meaning

[18] (2002) 7 SCC 518.

[19] Tahir Mahmood (ed.), Outlines of Muhammadan Law (Oxford University Press, 2008).

of essential practice Justice R.F Nariman quoted two pivotal judgments[20] of this court. In *Javed* it was held that

> what is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted

In *Commisioner of Police* v. *Acharya Jagdishwaranda Avadhuta*[21] apex court while explaining the essential part of a religion, states:[22]

> what is meant by "an essential part or practices of a religion" is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts which are protected by the Constitution. Nobody can say that an essential part or practice of one;s religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the "core" of religion whereupon the belief is based and religion is founded upon. They could only be treated as mere embellishments to the non-essential (sic essential) part or practices.

Triple *talaq* fails the aforementioned test, as the Islamic religion would survive even in the absence of this practice. Triple *talaq* is neither commanded nor recommended at the most it is considered permissible though reprobated as unworthy.[23] Hence *talaq-e-biddat* could not be adjudged essential practice having protection under Article 25 (1) of the Constitution. The contention of the Muslim Personal Board that the reform could be brought by legislature is not

[20] *Javed* v. *State of Haryana*, 2003 (8) SCC 369.

[21] 2004 (12) SCC 770.

[22] *Ibid*.

[23] Also *see* M. Hidayatullah & A. Hidayatullah (eds.), Introduction to Mulla's Principles of Mahomedan Law (N.M. Tripathi Ltd., 1990). Degree of obedience- Islam divides all human action into five kinds. (i) First degree:*Fard*, (ii)Second degree: *Masnun, Mandub* and *Mustahab*, (iii) Third degree:*Jaizor Mubah*, (iv) Fourth degree: *Makruh*, (v) Fifth degree: *Haram*.

sustainable, as Article 25(2) (b) will come into picture only if the practice is essential integral part of religion under Article 25(1) of the Constitution.

The next question entertained by Chief Justice Khehar was that whether *talaq-e-biddat* violates the parameters expressed in Article 25 of the Constitution as it infringes the other provisions of part III of the constitution? Has Muslim personal law gained statutory law status with the enactment and enforcement of Act, 1937? In answer to this question the Chief Justice pronounced that after a careful perusal of the various provision of the constitution, we conclude that the expression 'law in force' under Article 13 does not include personal law. Also that fundamental right provided under part III of the Constitution can be invoked against the state. Since personal law 'Shariat' is not based on any State legislative action hence cannot be tested on the touch stone of being a State action[24]. Having closely examined Section 2 of the concerned Act, it could hardly be doubted that the Act was enacted with the sole purpose to ensure over riding effect of Muslim personal law 'Shariat' over usages and customs. The Act, 1937 does not lays down or declare Muslim personal law. Justice Kurian Joseph endorsed the same view.

Contrary to the aforementioned was the opinion of Justices R.F Nariman and U.U. Lalit. These two judges declared the Act, 1937 as a pre constitutional legislative measure and therefore subject to Article 13(1) of the Constitution of India. Section 2 of the 1937 Act mandates that "notwithstanding any custom or usage, in the matter provided under section 2, the rule of decision shall be Muslim personal law.[25] It was further held that 1937 Act recognizes and enforces all forms of *talaq* recognized and enforced by Muslim personal law and that mean it would include triple *talaq* too. As this court has already concluded 1937 Act is a law made by legislature, it squarely would find place in expression "law in force" in Article 13 (3) (b). Triple *talaq* being inconsistent with fundamental right would hit Article 13 (1) of the Constitution and hence unconstitutional.

On the question of Constitutional morality and *talaq-e-biddat,* and the impact of international conventions and declarations on *talaq-e-biddat,* Chief Justice Khehar said that Constitutional Assembly debates leads us to a clear

[24] *Supra* n.3.

[25] Section 2, Muslim Personal Law (Shariat) Application Act, 1937 provides that:
Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq, ila, zihar, lian, khula* and *mubaraat,* maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

direction, that Constitution requires state to provide for a uniform civil code.[26] In reference to international conventions and declaration court maintained that while Constitution respects and supports all conventions and declaration it preserves 'personal law' as an exception.

III. Some Observations

The apex case caution that court cannot transgress the field of legislature is laudable and true yet at the same time it is relevant to highlight here that court being court of justice, equity and good conscience can never foster practices which puts the women in dark alley of injustice. Where such act of husband should have got slap on his face that act is strangely finding support and legitimacy in the words of Chief Justice Khehar. The doctrine of separation envisage legislature should legislate, executive to execute and judiciary to dispense justice in accordance with existing laws. In reality such watertight division is impracticable and impossible. Court could have worried about the possibility of adequate enforcement but in the present situation where central government speaking through Attorney General, Mukul Rohatgi has already supported the cause, such fear loses its grips.

Also it is noteworthy that on one hand Chief Justice Khehar expressed his inability to usurp the function of legislature and refused to declare triple *talaq* invalid and illegal. Strangely he didn't hesitate issuing direction to the Union of India to come with the appropriate legislation blatantly disregarding principle of judicial restraint. On this Justice Kurian Joseph said that court couldn't grant injunction under Article 142, which restrict the enforcement of fundamental right.

With respect to Holy *Quran* in reference to *talaq-e-biddat,* it is unfortunate to say that the Chief Justice failed to gauge the fact that *Quran* though have not provided the modes of divorce but in a precise manner has crystalized the procedure, which the husband must adhere to. Divorce as ordained by Quran must not be pronounced in arbitrary fashion rather the *talaq* must be for a reasonable cause preceded by attempts of reconciliation by two arbitrators one from the husband's side and other from the wife's family.[27] Further, with respect to the Chief Justice Khehar declaring triple *talaq* integral and essential part of Muslim personal law enjoying stature of fundamental right, then why in fact the judge held that *Rashid Ahmad* require relook at triple *talaq*. If the court doesn't want to transgress its limit, specifically in the light of the above finding what is the need of examining ita fresh? A practice does not become

[26] *Supra* n. 3.

[27] *Sura* LXV of the Quran.

integral part of a religion even if it is in vogue since time-immemorial. The test to find out essential practices of the religion has already been clarified through *Javed* and *Acharya Jagdishwaranda Avadhuta* cases.

Reflecting on the findings of the Chief Justice about the Act, 1937 doesn't codify Muslim personal law. It becomes pertinent to mention that 1937 Act may not lay down or declare Muslim personal law but Muslim personal law is given overriding effect over customs and usage and it is enforceable because of the mandate of Section 2 of the 1937 Act. It is one thing to say that inadvertently the legislature made the whole Muslim personal law applicable on Muslims without even ascertaining its righteousness and it is totally different thing to deny the fact of the personal law reaching the status of statutory law. The legislature could be criticized for introducing the law without foreseeing its consequences but this fact cannot be denied that the Muslim personal law is binding and enforceable in court of law because of the existence of Section 2 of the Act, 1937. Therefore the validity of the Act can always be challenged in the light of Article 13 of the Constitution. The personal law must be in consonance with fundamental right otherwise the fate of the same is not hard to predict.

Also with respect to the declaration by the Chief Justice of the Supreme Court that fundamental right provided under part III of the Constitution could be invoked against state only and Shariat not having reached to the status of statutory law cannot be tested on the touchstone of state action. Well if that is the case then why writ of Habeas Corpus could be enforced even against private individual. In *Indian Council for Enviro-Legal Action* v. *Union of India*,[28] the apex Court held:[29]

If by the action of private corporate bodies a person's fundamental right is violated the court would not accept the argument that it is not 'State' within the meaning of Article 12 and therefore, action cannot be taken against it.

IV. Conclusion

Undoubtedly the verdict on triple *talaq* has brought back smile of Muslim Women and has earned praise from every corner of the society. But even in the mood of festivity we cannot afford to overlook the fact that by declaring a practice as integral to religion having stature of fundamental right is immune to be struck down by Article 13 of the Constitution and could be reformed by the parliament in India, the court has itself chopped its hand and made itself handicap. This observation of the Chief Justice Khehar might put the judiciary in awkward,

[28] (1996) 3 SCC 212.

[29] *Ibid*. Also there are plethoras of cases, which rebut this finding.

inconvenient position where the Court would be made a mere spectator witnessing injustice winning over equity. The Court being court of justice should always adopt harmonious interpretation of law. Choosing one fundamental right over all the other fundamental rights has dis balanced the conflicting rights and goes against the rules of interpretation. Judiciary of any country is eyes of that society; the protector and guardian of rule of law and the hope of the population with the sword of courage must dispense justice in the society.

CONTEMPORARY DEVELOPMENTS IN INTERNATIONAL LAW: SOME RANDOM REFLECTIONS, Editor Ashish Kumar, Satyam Law International, New Delhi. 2017, Pp. xvi + 222, Rs 795/-.

*Prashant Kumar**

The book[1] is a collective work by young scholars of international law, who envisaged it during the Fourth Biennial Conference of Asian Society of International Law hosted by Indian Society of International Law, New Delhi in November 2013.[2] It covers diverse contemporary themes of International Law.

The contemporary world geo politics is reined by right-wing regimes, and witnessing a transition from liberal to conservative politics. As the nations are choosing to use excessive force, adopting expansionist policies, tightening immigration laws, and conservative economic policies, there seems to be an upheaval, and uncertainty of outcomes. The Brexit, Yemen crisis, failure of climate change accords, recent aggression by Israel on Palestine, Crimean annexation by Russia, emergence of ISIL (Islamic State of Iraq and the Levant) in the Middle East, use of chemical weapons by Syrian regime on civilians, threats of digital colonialism, Chinese territorial expansionist muscle flexing and Nuke threats from North Korea, and a huge refugee crisis from African nations, Myanmar, Syria, and Iraq has shook the very roots of international peace and laws per se.

The book attempts to discuss some of these issues explicitly. It has been divided into four parts, viz. Critical Insights, Continental Reception, Municipal Reception, and Emerging Domain, with a total of twelve chapters on various themes.

The first chapter titled *Changing Methods of Use of Force and Challenges to Traditional Concept of Self Defense- A Contemporary Reflection*[3] provides a critical and holistic reflection on the contemporary trends in international politics, marred by a number of disputes, and global security challenges. It begins by discussing the evolution of international laws prohibiting war and use of force through adoption of Covenant of League of Nations followed by Peace Treaty. While discussing nuances of the laws, it describes

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1 Ashish Kumar (ed.), CONTEMPORARY DEVELOPMENTS IN INTERNATIONAL LAW: SOME RANDOM REFLECTIONS (Satyam Law International, New Delhi, 2017).

2 *Id*. at ix.

3 *Id*. at 1.

the lacunae they carry, and the repercussions they have on international politics. It discusses how the change in world politics has made it difficult to comply with the principles of *jus cogen*, when nations face multifaceted threats to their security, from not only nation states but also "non-state actors"[4]. It discusses how the International Court of Justice interprets Article 51 of the UN Charter[5], that force cannot be used for self-defense unless "there is actual armed attack". While for nations facing proxy wars and covert operations carried out by nations and non-state actors (also sometimes sponsored by one state against another), it becomes very difficult to not use force for exercising their right of self-defense.

Citing interesting cases of Surgical Strike conducted by India in Myanmar and Pakistan, and the US surgical operation in Abottabad against Osama Bin Laden, it argues how anticipatory use of force is justified, and pre-emptive actions have to be taken to ensure self-defense.[6] The United Nations and its Security Council has although been successful in averting wars on several occasions, by using its resolutions to reinforce collective self-defense by intervening, for instance during Gulf War-I (1990) after Iraq invaded Kuwait, but on many occasions it has failed, like recently in Crimea, Yemen, ISIS in Iraq, and Syria. The failures urge for underlining clear guidelines for use of force (whether proportionate?) for self-defense (not only during war but also to tackle proxy wars and acts of terror).

The second chapter titled *Third World Approach to International Law and the International Criminal Court: A Perspective from Global South*[7], produces an analysis of international law, and the international criminal court from the lens of binary of power relationship between the Global South and the North. Several cases of North bias of the above two bodies have been pointed out[8] while the argument has been substantiated. Tokyo tribunal and Nuremberg Tribunal has till today, failed to dispense justice, and, on the other hand, many sovereign nations that are weaker have been prosecuted, that too on the recommendation of Northern nations, violating equal status of sovereignty granted to all the nations of world.

The chapter, firstly, discusses the historical background, followed by the evolution of international laws, along with the Eurocentric tenets it is based upon, which lead to divide and bias. It discusses how the International Criminal Court, post the Cold War Era came into being after a long evolution of

4 *Id.* at 4.

5 *Id.* at 9.

6 *Id.* at 16.

7 *Id.* at 21.

international laws, trial system, and growth of tribunals. A meticulous analysis highlights the gaps and issues with the functioning of ICC from the Third World perspective.

The third chapter titled *International Crimes Tribunal, Bangladesh: Case Study on the Chief Prosecutor* v. *Delowar Hossain Sayeedi*[9] presents a case study of a recent famous judgment, *Chief Prosecutor* v. *Delowar Hossain Sayeedi* made by the International Crimes Tribunal established by Bangladesh in 2009. By carefully analyzing the case, it presents a vivid picture of serious anomalies with this tribunal. The jurisdiction of tribunal, unfair trial procedure (disregard to basic principles of the Evidence Act, taking away fundamental right to not answer to questions), retrospective application of the cases (may award punishment to minors also), no option for appeal to the order passed, and passing capital punishment to the accused. It makes a point by discussing how there is a mushrooming of International Crimes Tribunal, and its hybrid like Yugoslavia, Rwanda, Nuremberg, Tokyo, etc., and the way they function with serious ambiguities and anomalies.[10]

The fourth chapter titled *Jurisdiction Issues in Admiralty Matters: A Critical Analysis of Emerging Indian Law*[11] presents a holistic view of admiralty laws. It begins by introducing the conceptual framework of the admiralty laws, and goes on to discuss its evolution in India. After discussing the merits, demerits, and other concerns of existing admiralty statutes of the Victorian times, which still regulate Indian admiralty matters, it ends with an analysis of the upcoming Admiralty Bill 2016,[12] pending in the Parliament, which is based upon the honorable Supreme Court's judgment in the *M.V. Elizabeth Case* (1993).

The fifth chapter titled *International Legal Framework for Nuclear Energy and Nuclear Non-Proliferation: An Overview*[13] discusses the international legal framework, which governs the use of nuclear energy and non-proliferation for military purpose. By discussing various important bodies like International Atomic Energy Agency (IAEA),[14] Nuclear Supplier Group (NSG),[15] and Nuclear Energy Agency (NEA)[16] along with various legal

[8] *Id.* at 33.
[9] *Id.* at 41.
[10] *Ibid.*
[11] *Id.* at 57.
[12] *Id.* at 62.
[13] *Id.* at 71.
[14] *Id.* at 73.

instruments guiding them, it discusses the nuclear safety, and security conventions. CTBT and issues related to it have been explained during the discussion of the Non-Proliferation Treaty.[17] The chapter seems to be immensely helpful for the young students willing to gain a comprehensive insight with conceptual clarity on the topic.

The sixth chapter titled *A Common European Law for Data Protection: An analysis of the New Data Protection Reform*[18] presents the case of data protection laws of the European Union (EU), and discusses the hiccups due to multiplicity of data protection laws of individual member states, and how the EU is yet to realize a robust and effective data protection law for the Union, which meets the needs of each member state. The author has pain stakingly analyzed various reform measures[19] that can be undertaken, which have also been recommended in the reports of the European Commission. The above reform measures can ensure the right of self-determination of the citizens of the Union, by strengthening the data protection regime. In sum, it presents a detailed analysis of the EU data protection regime that can be a model to be followed elsewhere in the digital era.

The seventh chapter titled *EU Directive on Mediation: Assessing the Development and Challenges*[20] discusses the Alternative Dispute Resolution (ADR) movement to secure to its citizens and member states access to justice. Mediation Directive issued in 2008 by the European Parliament and the Council has banked upon it as a strong framework for an easy and convenient way to access justice. It explains in great detail the scope, nature, key provisions,[21] along with the doubts like "question of mandatory mediation,"[22] and ambiguities existing within the present framework like that of mediation practitioners and their qualification, credentialing process, and other standards. It argues how this step can promote mediation as an effective ADR mechanism for the world to follow. Following the directive within the EU, many member states, like Italy, Slovenia, and Germany have used the directive for the domestic disputes resolution purposes, apart from its use for cross border disputes of varying nature among the member states.

[15] *Id.* at 77.
[16] *Id.* at 79.
[17] *Id.* at 89.
[18] *Id.* at 93.
[19] *Id.* at 96.
[20] *Id.* at 112.
[21] *Id.* at 117.
[22] *Id.* at 122.

The eighth chapter titled *Implementation of Copyright Law of the TRIPS Agreement: A Case Study of Sri Lanka*[23] begins by tracing the evolution of international copyright law with signing of instruments like the Bern and Paris Conventions, which led to bringing copyrights into the global consciousness. But due to its shortcoming of domestic nature application, the need for an international and robust mechanism led to an agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The chapter is an analysis of the domestic copyright laws of Sri Lanka (Sri Lanka's Intellectual Property Act, 2003), its performance within the domestic locus, and relationship with the TRIPS agreement. A detailed analysis of opportunities, conflicts, challenges, and issues faced by Sri Lanka in order to foster a robust IPR (Intellectual Property Regime) has been elucidated in the chapter.

The ninth chapter titled *Reading International Law for Addressing Labour Rights Concerns in Bangladesh: A Critical Review*[24] provides an insight into prestigious Bangladeshi ready-made garment industry, which accounts for 81% of its total export, contributing to the average 6% GDP growth of the country. But controversies related to accidents and non-compliance with the international and national standard of the labour laws have also surfaced in the news at the global platform. It illustrates violation of the labour rights under national and international statutes, mentioning examples of incidents with detailed explanation of working conditions, and condition of work at workplaces from various angles. Interestingly, it also mentions constitutional ambiguity over application of international laws in the domestic courts.[25]

The tenth chapter titled *Changing Contours of Anti-Trust Laws in Developing Asian Economics: A Case Study of Pakistan and Sri Lanka*[26] argues that trade and competition are complementary to each other, and no economy can thrive without a proper free market regime, which checks monopolistic, restrictive, unfair trade practices, and cartelization. There is no multilateral international law as such to govern the competition at global level, among various countries, which are usually governed by their domestic anti-trust or competition laws.[27] The chapter presents current status of global competition governance through bodies like UNCTAD (United Nations Conference on Trade and Development), and its model law on competition 2010,

[23] *Id*. at 127.
[24] *Id*. at 141.
[25] *Id*. at 153.
[26] *Id*. at 159.
[27] *Id*. at 160.

OECD (Organization of Economic Cooperation and Development), ICN (International Competition Network), WTO (World Trade Organization) code & GATT (General Agreements on Tariffs and Trade), and rules set by the UN in 1980 on competition.[28] The analysis of anti-trust laws of Pakistan and Sri Lanka has been conducted in detail.

The next chapter titled *Access to Traditional Medicines and Public Health in India, Pakistan and Sri Lanka*[29] builds upon the arguments on the premise that before growth of modern medicines[30], the traditional medicines were the only way of effective medications, and according to the WHO(World Health Organization), 25% of all modern medicines use traditional knowledge, and, still, a major portion of population depends on traditional medicines for addressing health-related concerns. The subcontinent India, Pakistan, and Bangladesh, where a large population still depends upon the traditional medicines, and has been great repository of rich traditional knowledge of medicines historically, faces real issues in securing its citizens, medicines and basic healthcare facilities. The chapter discusses international instruments like SDG (Sustainable Development Goals), Doha declaration on Public Health, Trade Related Aspects of Intellectual Property Rights (TRIPS), and challenges faced by developing and under-developed nations to ensure access to medicines. It takes case of above three nations and proposes how important it is to secure the rights of indigenous communities over the traditional knowledge and traditional medicines.[31] In all the three cases, it has been proposed that traditional medicines needs to be protected, patented, and their misappropriation has to be checked by the states, by proper enforcement of patents. The above steps will ensure protection and promotion of indigenous knowledge, and also help countries to meet needs of access to medicines.

The last chapter titled *International Disaster Relief Laws: An Emerging Branch of Law*[32] brings out often marginalized but most significant issue of the contemporary world, i.e., disaster relief and paradigm of international law. The world is witnessing impact of climate change translating into extremely fast occurrence of natural hazards, and increased magnitude of it is something to be worried about. Although no country is insulated from the disaster, but its impact varies according to capacity of country to country. Hazards are certainly not bound by the boundary, but disaster risk can be mitigated, reduced, and

[28] *Ibid.*
[29] *Id.* at 183.
[30] *Id.* at 184.
[31] *Id.* at 187.
[32] *Id.* at 198.

relief, rescue and rehabilitation ability depends on the preparedness of the country. The chapter argues for a pressing need for international disaster relief law, uniform in nature, in place of multiple domestic laws, and bilateral treaties among various nations, also collectively known as International Disaster Relief Laws (IDRL).

As the *corpus juris* of International Disaster Relief Laws (IDRL) is still developing, International Law Commission (ILC) in order to draft an International Convention for the Protection of Persons in the Event of Disasters appointed special rapporteur on the recommendations of ILC's working group. All the eight reports submitted by special rapporteur have been discussed in detail in the chapter.[33]

The book provides a holistic approach through each chapter, beginning with an introduction of the themes for a beginner to quench the needs of both professionals and practitioners alike, by taking the discussion to the required level. The book has been written in a convenient language, and its comprehensive compilation makes it readable. The reviewer believe, the book will be a great resource, specially, for the new entrants into the field of law, and will meet the needs of practitioners, academicians, judges, and everyone who is interested in knowing international law and politics.

[33] *Id*. at 201.